FEDERAL RESERVE SYSTEM

12 CFR Part 225

Regulation Y; Docket No. R-1092

Bank Holding Companies and Change in Bank Control

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Board invites public comment on a proposal to amend its Regulation Y (1) to change the conditions that govern the conduct of financial data processing activities previously found to be closely related to banking in order to permit all bank holding companies to conduct a greater amount of nonfinancial data processing in connection with processing financial data, and
(2) to allow financial holding companies, as an activity that is complementary to financial activities, to own companies engaged in certain types of data storage, Internet and portal hosting activities, and broad advisory activities involving data processing activities, so long as the companies also provide financial data processing or other financial products and services. In addition, the Board seeks comment on whether it should permit financial holding companies to make investments in companies that engage in developing new technologies that might support the sale and availability of financial products and services, companies that provide communication links for the delivery of financial products and services and/or companies that engage in the electronic sale and delivery of products and services that include, but are not limited to, financial products and services.

DATES: Comments must be received by February 16, 2001.

ADDRESSES: Comments should refer to docket number R-1092 and should be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C., 20551, or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson also may be delivered to the Board's mailroom between 8:45 a.m. and 5:15 p.m. and, outside those hours, to the Board's security control room. Both the mailroom and the security control room are accessible from the Eccles Building courtyard entrance, located on 20th Street between Constitution Avenue and C Street, N.W. Members of the public may inspect comments in

room MP-500 of the Martin Building between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Scott G. Alvarez, Associate General Counsel (202/452-3583), or Adrianne G. Threatt, Senior Attorney (202/452-3554), Legal Division; Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C., 20551. For users of Telecommunications Device for the Deaf ("TDD") only, contact Janice Simms at 202/872-4984.

SUPPLEMENTARY INFORMATION:

Background

A number of financial holding companies, represented by the New York Clearing House, the American Bankers Association and the Financial Services Roundtable, have requested that the Board permit financial holding companies (FHCs) to engage in and make investments in companies engaged in broad data processing and e-commerce activities. The requested activities involve:

1. Acting as a finder;

2. Operating an electronic marketplace;

3. Purchasing aggregation and marketing access arrangements;

4. Conducting nonfinancial data processing activities in connection with financial data processing activities;

5. Data collection, processing, imaging, storage and retrieval for financial and nonfinancial data;

6. Providing web and portal hosting services, electronic links to Internet and Intranet sites (including serving as an Internet Service Provider), data transmission security and authentication, software and ongoing support and maintenance for third party web sites and portals;

7. Advisory and consulting services related to the development, implementation and operation of Internet and Intranet sites and web portals;

8. Owning communication linkages;

9. Owning companies engaged in developing new technologies that might in the future support the sale and provision of financial products and services; and

10. Owning companies engaged in the electronic marketing and sale of nonfinancial products and services for the purpose of allowing the FHC to market and provide financial products and services.[1]

The FHCs argue that recent dramatic changes in technology and in the manner in which products and services are sold over the Internet make these types of activities and investments either financial in nature, incidental to financial activities or complementary to financial activities. They argue in particular that there is no practical distinction between processing financial data (a permissible activity for bank holding companies) and processing nonfinancial data (an activity permitted for bank holding companies only in limited amounts). FHCs also contend that the experience that they have gained over the years conducting data processing activities for financial, banking and economic data is readily transferable to other types of data processing. For example, FHCs contend that activities such as the storage, imaging and retrieval of nonfinancial data are a natural extension of permissible activities already conducted by bank holding companies and banks.

FHCs also argue that, while in the past a banking organization could make contractual arrangements with a nonfinancial firm to market financial products and services of the banking organization along with products and services of the nonfinancial firm, today companies that market products and services over the Internet or intranets typically seek equity partners rather than contractual partners in order to share the equity risk of these ventures and to raise equity capital. Consequently, banking organizations contend that they must be in a position to make equity investments in companies that have found innovative methods of

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[1] Several companies also requested that the Board permit FHCs to provide identity certification services, including digital certification services. The Board has already permitted these activities for all bank holding companies, including financial holding companies. See Bayerische Hypo- und Vereinsbank AG, 86 Federal Reserve Bulletin 56 (January 2000).

reaching the same customers that the banking organizations seek to reach for their own financial products and services.

In addition, FHCs argue that they must be able to participate in the development of new technologies that in the future may be useful in delivering financial products and services. They contend that FHCs must be able to participate in the development of the standards and industry protocols for new technology and in the development of delivery systems and equipment to be sure that these standards and equipment will be capable of delivering banking products and services.

Again, FHCs contend that the paradigm of the past--where financial products and services were largely delivered over uniquely designed systems developed by or under contract to banking organizations--has changed. Today, technology is designed to accommodate a series of partners that bind together to develop a number of simultaneous uses for the new technology. FHCs argue that, unless they are permitted to be partners in the development of new technologies and standards, FHCs risk being required to comply with standards and limitations imposed by other industries that will tailor new delivery systems to their own products and services. Similarly, FHCs contend that they must be permitted to own delivery systems, such as communication lines and systems, in order to assure that these broad technologies for the delivery of products and services remain available to them.

Legal Framework

The Gramm-Leach-Bliley Act broadened in two ways the authority of the Board to determine the scope of activities permissible for FHCs. First, FHCs may conduct any activity that the Board, in consultation with the Secretary of the Treasury, determines to be "financial in nature or incidental to a financial activity."[2] This new authority was specifically designed to create a test that is broader than the "closely related to banking" test that applied previously. The closely related test has been construed over the years by the Board and the courts to allow bank holding companies to conduct activities that are permissible for banks to conduct, are operationally similar to activities conducted by banks, or are activities that bank holding companies are particularly well equipped to conduct because of their other

[2] 12 U.S.C. 1843(k)(1)(A).

activities. The new “financial in nature” test was intended to allow activities to be authorized in response to technological and other developments that more broadly affect the market for financial products and services.[3]

In addition, the Board may allow an FHC to engage in any nonfinancial activity that the Board determines to be "complementary to a financial activity."[4] The activity must be complementary to a financial activity. That is, the activity must in some way complement or enhance a financial activity or there must be a relationship or connection between the complementary activity and a financial activity. In considering whether an activity is complementary, the Board must also consider whether the activity poses a substantial risk to the safety and soundness of depository institutions or the financial system generally.[5]

The authority to engage in complementary activities was included as a mechanism for allowing some amount of commercial or nonfinancial activities so long as there is a connection between the complementary activity and a financial activity conducted by the FHC and the activity does not pose unacceptable risks to the safety and soundness of the FHC, its banks or the banking system. At the same time, Congress rejected the invitation to allow depository institutions to affiliate in an unrestricted manner with commercial companies and determined not to permit FHCs to engage in a basket of purely commercial activities that have no connection to financial activities.

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[3] In considering whether an activity is financial in nature or incidental to a financial activity, the Board is directed to consider (1) the purposes of the Bank Holding Company Act and the Gramm-Leach-Bliley Act; (2) changes and reasonably expected changes in the marketplace in which financial holding companies compete and in the technology for delivering financial services; and
(3) whether the activity is necessary or appropriate to allow a FHC to compete effectively with other companies providing financial services, to deliver efficiently information and services that are financial in nature through the use of technological means, including any application necessary to protect the security or efficacy of systems for the transmission of data or financial transactions, and to offer customers any available or emerging technological means for using financial services or for the document imaging of data. 12 U.S.C. 1843(k)(3).

[4] 12 U.S.C. 1843(k)(1)(B).

[5] Id.

The requesting FHCs have indicated that some of the investments they have requested authority to make are similar to investments that could be made under the merchant banking authority granted to FHCs under the Gramm-Leach-Bliley Act. However, that authority does not permit cross-marketing between the depository institutions owned by the FHC and the portfolio company, and it is precisely this cross-marketing opportunity that motivates many of the requested investments.

Proposal

In response to the requests described above, the Board proposes several steps. As an initial matter, items 1, 2 and 3 in the list above involve various aspects of a finder proposal that the Board, in consultation with the Secretary of the Treasury, has already published for public comment and recently adopted as a final rule.[6]

The Board proposes several additional amendments to Regulation Y to address other aspects of the requests. First, the Board, under the closely related to banking test, has already allowed bank holding companies to engage in processing financial, economic and banking data (and providing limited amounts of general purpose data processing hardware). In connection with those activities, the Board authorized bank holding companies to own a company engaged in processing any type of data so long as the revenues generated by the company from processing nonfinancial data do not exceed 30 percent of the company's total data processing revenues.

The Board proposes to expand from 30 to 49 percent the amount of revenues that may be derived from nonfinancial data processing. This would allow bank holding companies, including FHCs, to make more efficient use of their data processing expertise and equipment and recognizes that processing nonfinancial data is in many cases operationally and functionally indistinguishable from processing financial, economic and banking data. At the same time, the revenue test assures that a majority of the business of each data processing subsidiary would be financial data processing. This would address item 4 in the above list.

The Board proposes this change as a change in the conditions that govern the conduct of financial data processing activities under section 4(c)(8) of the Bank Holding Company Act (BHC Act) and the Board's Regulation Y. Accordingly,

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[6] See 65 FR _____ (December xx, 2000)

this change, if adopted, would allow all bank holding companies and financial holding companies to engage in broader data processing activities. The Board has authority to modify the conditions that govern activities that were previously found to be closely related to banking.[7]

Second, to address items 5, 6 and 7 listed above, the Board proposes to amend Regulation Y to authorize FHCs, as an activity that is complementary to related financial activities, to invest up to an aggregate of 5 percent of the FHC's Tier 1 capital in the following types of companies:

(1) Data storage. Companies that act as custodian of files that involve any type of data, including financial and nonfinancial data, so long as the custodian provides these services for financial data. This activity would include data imaging, data storage and data retrieval for data in any form, including in electronic, paper, micro-fiche or other form.

(2) General data processing. Companies that provide general data processing and data transmission services, including data processing and data transmission hardware, software, documentation and operating personnel, data bases, advice and facilities, without limit as to the type of data processed or transmitted, so long as at least 20 percent of the total revenues of the company conducting these activities are derived from providing data processing services to depository institutions and their affiliates and/or processing financial data and/or the sale of other financial products and services. This authority would be in addition to investments permitted above in companies that engage primarily in financial data processing, and would be available only to FHCs.

(3) Electronic information portal services. Companies that provide or facilitate information search, exchange, consolidation, screening, filtering or aggregation services over electronic networks. This activity would include providing on-line search engines that display sites meeting criteria selected by the user, bulletin boards, newsgroup services on general or specific topics, "chat" rooms, Internet web sites or portals that contain links to other web sites, and aggregation services that accumulate and display any type of data selected by the user on a customized web page. This activity would also

[7] 12 U.S.C 1843(c)(8).

include acting as an Internet Service Provider. It would be expected that FHCs would market and provide financial products and services through these companies.

Each of these proposed investments involves investing in companies engaged in some degree of commercial activities. Consequently, the Board proposes to find that investments in these companies are complementary to a financial activity.

As explained above, in order to determine that an activity is permissible as a complementary activity, the Board must determine that the activity is related to or complements a financial activity. In each case, the proposal includes a connection with a previously approved financial activity or with the marketing and delivery of financial products and services.

The Board seeks comment on whether the connections to financial activities described above are appropriate and sufficient to indicate that each of the types of investments or activities described above is complementary to a financial activity within the meaning of the BHC Act. In addition, comment is invited on whether the Board should adopt other requirements to assure that the investment or activity is related to or complements a financial activity. For example, the Board requests comment on whether the Board should require that some amount of revenues of the target company be derived from financial data processing or from marketing financial products and services of the FHC in order to satisfy the complementary test.

The Board does not propose that any restrictions be placed on the FHC's ability to be involved in managing these companies or cross-marketing or delivering financial products and services through these companies. In fact, as noted above, in each case it is expected that financial products and services, such as storing and processing financial data or providing access to financial advice or home banking services, would be provided as an integral part of the activities of the company.

In order to limit the potential risk of these investments and activities to the safety and soundness of the FHC, its depository institutions and the financial system generally as required by section 4(k)(1)(B) of the BHC Act,[8] the proposal

[8] 12 U.S.C. 1843(k)(1)(B).

would limit the total carrying value of all investments permitted under the 3 categories listed above to an aggregate of 5 percent of the FHC's Tier 1 capital. The Board believes that this limitation will also help to ensure that the proposed investments and activities remain complementary to the FHC's overall financial activities.

The Board requests comment on whether an investment limit is an appropriate way to limit the potential risk to the safety and soundness of affiliated depository institutions and to the financial system generally and whether the limit proposed is the appropriate level given the potential risks of these activities and the nature of the activities. The Board also requests comment on whether a stronger connection between the activity and a related financial activity may justify a higher or different type of limit. In addition, the Board requests comment on whether, either as an alternative to the limit described above or as a supplement to that limit, the Board should require that additional capital be maintained by FHCs against investments made in the three types of companies listed above.

Section 4(j) of the BHC Act as amended by the Gramm-Leach-Bliley Act requires that a financial holding company provide notice to the Board at least 60 days prior to conducting any activity or acquiring any company that conducts any activity that is complementary to a financial activity.[9] At least initially, the Board proposes that each investment under any of the complementary authorities would be subject to review by the Board on a case-by-case basis pursuant to section 4(j) of the BHC Act. In this process, the FHC would be expected to explain the connection between its proposed complementary investment or activity and a related financial activity. The Board proposes that its review be focused on a review of the permissibility of the investment under the appropriate category and a brief review of the public benefits. This notice would satisfy the approval process in the Gramm-Leach-Bliley Act. After the System has gained more experience with these types of investment activities, the Board would revisit whether a more streamlined process (e.g., a one-time approval to make investments in companies engaged in the listed activities) is appropriate.

In addition to these activities, FHCs have requested authority to make investments in companies engaged in developing new technologies, in providing communication links or in e-commerce (Items 8, 9 and 10 above). The Board

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[9] 12 U.S.C. 1843(j)(1)(A) & (E).

requests comment on whether conducting or investing in companies that conduct any of these activities would be financial in nature, incidental to a financial activity or complementary to a financial activity. In particular, the Board requests comment on how these types of activities or investments should be defined or identified. Commenters favoring a finding regarding these activities or investments should provide detailed arguments and information supporting their recommended action. In particular, to the extent that an activity or investment would be financial in nature or incidental to a financial activity, commenters are requested to provide detailed arguments and data explaining and supporting how the activity or investment is financial or incidental. Similarly, to the extent that an activity or investment is considered to be complementary to a financial activity, detailed information is sought on what connection exists between these activities/investments and financial activities that are conducted by FHCs or how the proposed activity or investment would otherwise complement a financial activity.

In addition, comment is sought on how investing in companies engaged in developing new technologies, providing communication links or selling products electronically might be conducted in a manner consistent with the separation of banking and commerce. Comment is also sought on whether any supervisory limits, such as those discussed above for data processing activities, might be appropriate to address potential risks to affiliated depository institutions and the financial system generally.

The Board also seeks comment on whether it should permit FHCs to make noncontrolling investments in companies engaged in developing new technologies, providing communication links or selling products electronically. The Board already permits bank holding companies to acquire up to 25 percent of the equity, in the form of nonvoting shares, of any company so long as the bank holding company does not have the ability to exercise control over the portfolio company. Under this proposal, the Board would permit FHCs to invest in up to 25 percent of the voting stock of these companies and engage in cross-marketing activities through these companies so long as the FHC does not exercise control over the companies and there is another person or group of persons that owns more voting shares than the FHC. As an alternative, the Board could permit FHCs to make equity investments that represent in the aggregate more than 25 percent of the equity of the portfolio company, such as the levels permitted for portfolio investments overseas under Regulation K (that is, in up to 20 percent of the voting shares and up to another 20 percent of equity in the form of nonvoting

shares). In this event, it would be particularly important that another person or control group, such as the management of the company, control more shares of the portfolio company than the FHC and have responsibility for actively managing the company.

The Board invites comment on all aspects of the proposed rule, and particularly on the items specifically identified in the foregoing discussion.

Section 722 of the GLB Act requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. In light of this requirement, the Board has sought to present the proposed rule in a simple and straightforward manner. The Board invites comment on whether the Board could take additional steps to make the proposed rule easier to understand.

Regulatory Flexibility Act

In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the Board must publish an initial regulatory flexibility analysis with this proposed rulemaking. The proposed rule, if adopted, would (1) change the conditions that govern the conduct of data processing activities that already are permissible for a bank holding company and (2) allow a bank holding company or foreign bank that qualifies as an FHC, on a case by case basis, to own companies engaged in certain types of data processing and web hosting activities as an activity that is complementary to its financial activities. A description of the reasons for the Board's consideration of this action and a statement of the objectives of and legal basis for the proposed rule are contained in the supplementary material provided above.

The proposed rule would apply to bank holding companies and FHCs regardless of their size and should enhance the ability of all such companies, including small ones, to compete with other providers of financial services in the United States and to respond to technological and other changes in the marketplace in which banking organizations compete. The Board specifically seeks comment on the likely burden the proposed rule would have on bank holding companies, including FHCs.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board has reviewed the proposed rule under authority delegated to the Board by the Office of Management and Budget. If the proposal is adopted, bank holding companies and financial holding companies, including foreign banks, would be required by statute to file notice with the Board prior to making the investments or conducting the activities addressed in the proposal (12 U.S.C. 1843(j)). The applicable notice procedures, which already are in place, are described at sections 225.22 to 225.24 and section 225.89 of the Board's Regulation Y. In addition, the Board would be required to monitor the compliance of a bank holding company or financial holding company with the 49 percent revenue limitation on nonfinancial data processing and the 5 percent of Tier I capital limitation on the proposed complementary activity, which are described in more detail above. The Board intends to monitor compliance with these limitations through existing financial reports filed by bank holding companies

and financial holding companies. Because all paperwork collection procedures associated with this proposed rule already are in place, the Board anticipates that no additional burden will be imposed as a result of this proposal. The Board specifically requests comment on the likely burden that would result from implementation of this rule.

List of Subjects in 12 CFR Part 225

Administrative practice and procedures, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons set forth in the preamble, Title 12, Chapter II, of the Code of Federal Regulations is proposed to be amended as follows:

PART 225 – BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p-1, 1843(c)(8), 1843(k), 1844(b), 1972(*l*), 3106, 3108, 3310, 3331-3351, 3907, and 3909.

2. Section 225.28(b)(14) is revised to read as follows:

§ 225.28 List of Permissible Nonbanking Activities

* * * * *

(b) * * *

(14) Data processing. (i) Providing data processing and data transmission services, facilities (including data processing and data transmission hardware, software, documentation, or operating personnel), data bases, advice, and access to such services, facilities, or data bases by any technological means, if:

(A) The data to be processed or furnished are financial, banking, or economic; and

(B) The hardware provided in connection therewith is offered only in conjunction with software designed and marketed for the processing and transmission of financial, banking, or economic data, and where the general purpose hardware does not constitute more than 30 percent of the cost of any packaged offering.

(ii) A company conducting data processing and data transmission activities may conduct data processing and data transmission activities not described in paragraph (b)(14)(i) of this section if the total annual revenue derived from those activities does not exceed 49 percent of the company's total annual revenues derived from data processing and data transmission activities.

3. Section 225.89 is amended by adding a new paragraph (d) to read as follows:

§ 225.89 How to request approval to engage in an activity that is complementary to a financial activity?

* * * * *

(d) What activities have been determined to be complementary to a financial activity? The following activities are complementary to the described financial activity–

(1) Expanded data processing and related activities. (i) When conducted in accordance with the limitation in paragraph (ii)–

(A) Data storage. Acting as custodian of files that involve any type of data, including financial and nonfinancial data, so long as the custodian provides these services for financial data. This activity includes data imaging, data storage and data retrieval for data in any form, including in electronic, paper, micro-fiche or other form.

(B) General data processing. Providing general data processing and data transmission services, including data processing and data transmission hardware,

software, documentation and operating personnel, data bases, advice and facilities, without limit as to the type of data processed or transmitted, so long as at least 20 percent of the total revenues of the company conducting these activities are derived from providing data processing services to depository institutions and their affiliates and/or processing financial, banking and economic data and/or the sale of other financial products and services.

(C) Electronic information portal services. Providing or facilitating information search, exchange, consolidation, screening, filtering or aggregation services over electronic networks. This activity includes acting as an Internet Service Provider, providing on-line search engines that display sites meeting criteria selected by the user, bulletin boards, newsgroup services on general or specific topics, "chat" rooms, Internet web sites or portals that contain links to other web sites, and aggregation services that accumulate and display any type of data selected by the user on a customized web page. These activities must be provided in connection with the marketing and delivery of financial products and services.

(ii) The aggregate carrying value of all investments in companies engaged in activities described in paragraph (d)(1)(i) of this section may not exceed 5 percent of the Tier 1 capital of the financial holding company.

By order of the Board of Governors of the Federal Reserve System, December 13, 2000.

(Signed) Jennifer J. Johnson

Jennifer J. Johnson,
Secretary of the Board.