

POTENTIAL APPLICATION OF GRAMM-LEACH-BLILEY ACT TO WISCONSIN REAL ESTATE LICENSEES

OVERVIEW

The Gramm-Leach-Bliley Act (GLB) establishes extensive new consumer privacy obligations for financial institutions beginning on July 1, 2001. GLB may impact members of the real estate industry because of the broad definition of “financial institution” found in the law.ⁱ Entities which engage in “financial activities” are “financial institutions,” regardless of whether or not the entity would commonly be considered to be a financial institution.ⁱⁱ GLB directed the Federal Reserve Board to define financial activities and activities which are financial in nature or incidental to a financial activity.ⁱⁱⁱ Brokers should understand that GLB does not consider brokerage services or property management activities to be financial activities. However, if a real estate broker engages in any of the “financial activities” or “activities incidental to a financial activity” (in addition to the broker’s brokerage services or property management), the broker would be considered to be a “financial institution” and would be required to comply with the privacy provisions of GLB.

CONSUMERS & CUSTOMERS

Despite the broad definition of financial institution, the obligations of GLB only apply when the financial institution creates a “consumer” or “customer” relationship. A “consumer” is defined as “an individual who obtains a financial product or service that is to be used primarily for personal, family, or household purposes.” A “customer” is defined as “a consumer who has a continuing relationship” with a financial institution. For example, if a broker originates a loan, the borrower is a consumer, but if the broker services the loan, the consumer becomes a customer.

Thus, brokers that only provide financial services to businesses or to individuals for business purposes are not subject to GLB because these business parties are not “consumers” or “customers.” However, should a broker provide individuals with “financial activities” or “activities incidental to a financial activity” related to or used for personal, family, or household purposes, compliance with the GLB privacy requirements may be required because these individuals are “consumers” and “customers.”

COVERED FINANCIAL ACTIVITIES

Although the list of financial activities is extensive and should be reviewed carefully by every company (see footnote iii), the obvious group of real estate licensees who may be subject to GLB as financial institutions are real estate licensees who provide mortgage brokering services to consumers. Also included under the umbrella of entities which engage in “financial activities” under Federal Reserve Board rules are entities which provide the following financial services to consumers:

? real estate appraisal

? real estate settlement services (Real estate settlement services do not include real estate brokerage or providing title insurance as principal, agent, or broker.)

If these services are offered exclusively for business purposes rather than personal, family, or household purposes, the activity would not be subject to the GLB regulations. For example, an appraiser providing services to a lender is not covered, although an appraiser providing services to a buyer/consumer having a home appraised as part of a real estate transaction may be covered. Closing services offered to banks or other brokers would not be covered, but the same services

offered to a FSBO home seller or buyer (assuming broker is not providing these services as part of the broker's real estate brokerage practice) would be covered.

The rules state that the fact that a broker acts as a financial institution by providing one financial service does not cause every service offered by that broker to be a financial product or service. For example, a broker that provides closing services to FSBO home sellers is not subject to GLB with regard to any other non-financial service provided by that broker.

WHEN PRIVACY NOTICE TO CONSUMERS IS REQUIRED.

Consumers .

A privacy notice must be provided to a consumer before you disclose any nonpublic personal information^{iv} about the consumer to any nonaffiliated third party.^v

Customers .

A privacy notice must be provided to a customer no later than when you establish a customer relationship.

WHAT DISCLOSURES MUST BE GIVEN.

If the disclosure obligation arises, the disclosing financial institution must inform its consumers and customers about how their "nonpublic personally identifiable information" will be used. Nonpublic personally identifiable information is any information collected, either directly or indirectly, from the consumer in connection with the providing of a financial product or service. While information available from a public source is not included in this definition, it is the responsibility of the business to assure that any information it classifies as publicly available is in fact publicly available. When the disclosure obligation arises, it is recommended that those parties consult closely with their attorney about the type and timing of the disclosures that need to be made.

Consumers

The regulations state that a consumer must receive an initial disclosure notice (described below) if the broker intends to share any nonpublic personally identifiable information with unaffiliated third parties. The consumer must also be given the ability to opt out of the information disclosure. No notice is required for a consumer when the broker does not share the nonpublic personally identifiable information.^{vi}

Customers

However, once a consumer establishes a "customer relationship" with the broker, the customer must be provided with a copy of the privacy policy notice of the business and annually thereafter until the customer relationship terminates, regardless of whether the information is being shared with unaffiliated third parties or not.

Type of Disclosure Form

The requirements for the privacy disclosures required by the rules are complicated enough to require the assistance of legal counsel. Because each entity's forms must reflect the specific business practices of the entity, no standard form can be made available. While the regulations contain some example clauses, they also make it clear that compliance requires the covered entity to review its own policies and practices concerning nonpublic personal information and tailor its disclosure form to reflect those practices.

Nine points must be covered in the disclosure form, when applicable. These nine items are:

(1) the categories of nonpublic personal information that are collected;

- (2) the categories of nonpublic personal information that are disclosed;
- (3) the categories of affiliated and nonaffiliated third parties to whom nonpublic personal information is disclosed;
- (4) the categories of nonpublic personal information disclosed about former customers, and the categories of affiliated and nonaffiliated third parties to whom it is disclosed;
- (5) if nonpublic personal information is disclosed to a nonaffiliated third party who provides services or function on behalf of the business, the categories of information used must be disclosed as well as the categories of nonaffiliated third parties with whom the business has contracted;
- (6) an explanation of the consumer's right to opt out of the disclosure of nonpublic personal information to nonaffiliated parties and how the consumer may exercise that right;
- (7) any disclosure required under the Fair Credit Reporting Act relating to the ability of a consumer to opt out of the disclosure of personal information to affiliated third parties;
- (8) the policies and practices followed to protect the confidentiality and security of the nonpublic personal information collected; and
- (9) notice of any disclosure of nonpublic personal information permitted under the exceptions contained in the regulations.

CONCLUSIONS CONSUMERS

If a broker offers closing, appraisal, mortgage, or other covered services to a consumer, no privacy notice will be required unless the consumer's nonpublic personally identifiable information will be disclosed to any nonaffiliated third party. If such a disclosure will be made, contact legal counsel for development of the required privacy disclosure documents.

CUSTOMERS

Brokers who provide financial services to customers (consumers with continuing relationships) should immediately consult with legal counsel for advice on the development and distribution of the required privacy disclosure documents.

ⁱ 12 CFR Chapter V § 573.3 (k)(1) *Financial institution* means any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) *Financial institution* does not include:

- (i) Any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*);
- (ii) The Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or
- (iii) Institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights), or similar transactions related to a transaction of a consumer, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.

ⁱⁱ 12 CFR Chapter V § 573.3 (l)(1) *Financial product or service* means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) *Financial service* includes your evaluation or brokerage of information that you collect in connection with a request or an application from a consumer for a financial product or service derived in whole or in part using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.

Section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

ENGAGING IN ACTIVITIES THAT ARE FINANCIAL IN NATURE.--

(1) IN GENERAL.--Notwithstanding subsection (a), a financial holding company may engage in any activity, and may acquire and retain the shares of any company engaged in any activity, that the Board, in accordance with paragraph (2), determines (by regulation or order)--

(A) to be financial in nature or incidental to such financial activity; or

(B) is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.

(2) Coordination between the board and the secretary of the treasury.--

(A) PROPOSALS RAISED BEFORE THE BOARD.--

(i) CONSULTATION.--The Board shall notify the Secretary of the Treasury of, and consult with the Secretary of the Treasury concerning, any request, proposal, or application under this subsection for a determination of whether an activity is financial in nature or incidental to a financial activity.

(ii) TREASURY VIEW.--The Board shall not determine that any activity is financial in nature or incidental to a financial activity under this subsection if the Secretary of the Treasury notifies the Board in writing, not later than 30 days after the date of receipt of the notice described in clause (i) (or such longer period as the Board determines to be appropriate under the circumstances) that the Secretary of the Treasury believes that the activity is not financial in nature or incidental to a financial activity or is not otherwise permissible under this section.

[{{12-30-99 p.6046.01}}](#)

(B) PROPOSALS RAISED BY THE TREASURY.--

(i) TREASURY RECOMMENDATION.--The Secretary of the Treasury may, at any time, recommend in writing that the Board find an activity to be financial in nature or incidental to a financial activity.

(ii) TIME PERIOD FOR BOARD ACTION.--Not later than 30 days after the date of receipt of a written recommendation from the Secretary of the Treasury under clause (i) (or such longer period as the Secretary of the Treasury and the Board determine to be appropriate under the circumstances), the Board shall determine whether to initiate a public rulemaking proposing that the recommended activity be found to be financial in nature or incidental to a financial activity under this subsection, and shall notify the Secretary of the Treasury in writing of the determination of the Board and, if the Board determines not to seek public comment on the proposal, the reasons for that determination.

(3) FACTORS TO BE CONSIDERED.--In determining whether an activity is financial in nature or incidental to a financial activity, the Board shall take into account--

(A) the purposes of this Act and the Gramm-Leach-Bliley Act;

(B) changes or reasonably expected changes in the marketplace in which financial holding companies compete;

(C) changes or reasonably expected changes in the technology for delivering financial services; and

(D) whether such activity is necessary or appropriate to allow a financial holding company and the affiliates of a financial holding company to--

(i) compete effectively with any company seeking to provide financial services in the United States;

(ii) efficiently deliver 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

(iii) offer customers any available or emerging technological means for using financial services or for the document imaging of data.

(4) ACTIVITIES THAT ARE FINANCIAL IN NATURE.--For purposes of this subsection, the following activities shall be considered to be financial in nature:

(A) Lending, exchanging, transferring, investing for others, or safeguarding money or securities.

(B) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State.

(C) Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940).

(D) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.

(E) Underwriting, dealing in, or making a market in securities.

(F) Engaging in any activity that the Board has determined, by order or regulation that is in effect on the date of the enactment of the Gramm-Leach-Bliley Act, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in such order or regulation, unless modified by the Board).

(G) Engaging, in the United States, in any activity that--

(i) a bank holding company may engage in outside of the United States; and

(ii) the Board has determined, under regulations prescribed or interpretations issued pursuant to subsection (c)(13) (as in effect on the day before the date of the enactment of the Gramm-Leach-Bliley Act) to be usual in connection with the transaction of banking or other financial operations abroad.

(H) Directly, or indirectly acquiring or controlling, whether as principal, on behalf of 1 or more entities (including entities, other than a depository institution or subsidiary of a depository institution, that the bank holding company controls), or otherwise, shares,

[{{12-30-99 p.6046.02}}](#) assets, or ownership interests (include debt or equity securities, partnership interests, trust certificates, or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity, engaged in any activity not authorized pursuant to this section if--

(i) the shares, assets, or ownership interests are not acquired or held by a depository institution or subsidiary of a depository institution;

(ii) such shares, assets, or ownership interests are acquired and held by--

(I) a securities affiliate or an affiliate thereof; or

(II) an affiliate of an insurance company described in subparagraph (I)(ii) that provides investment advice to an insurance company and is registered pursuant to the Investment Advisers Act of 1940, or an affiliate of such investment adviser;

as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment;

(iii) such shares, assets, or ownership interests are held for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the activities described in clause (ii); and

(iv) during the period such shares, assets, or ownership interests are held, the bank holding company does not routinely manage or operate such company or entity except as may be necessary or required to obtain a reasonable return on investment upon resale or disposition.

(I) Directly or indirectly acquiring or controlling, whether as principal, on behalf of 1 or more entities (including entities, other than a depository institution or subsidiary of a depository institution, that the bank holding company controls) or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity, engaged in any activity not authorized pursuant to this section if--

(i) the shares, assets, or ownership interests are not acquired or held by a depository institution or a subsidiary of a depository institution;

(ii) such shares, assets, or ownership interests are acquired and held by an insurance company that is predominantly engaged in underwriting life, accident and health, or property and casualty insurance (other than credit-related insurance) or providing and issuing annuities;

(iii) such shares, assets, or ownership interests represent an investment made in the ordinary course of business of such insurance company in accordance with relevant State law governing such investments; and

(iv) during the period such shares, assets, or ownership interests are held, the bank holding company does not routinely manage or operate such company except as may be necessary or required to obtain a reasonable return on investment.

(5) ACTIONS REQUIRED.--

(A) IN GENERAL.--The Board shall, by regulation or order, define, consistent with the purposes of this Act, the activities described in subparagraph (B) as financial in nature, and the extent to which such activities are financial in nature or incidental to a financial activity.

(B) ACTIVITIES.--The activities described in this subparagraph are as follows:

(i) Lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities.

(ii) Providing any device or other instrumentality for transferring money or other financial assets.

(iii) Arranging, effecting, or facilitating financial transactions for the account of third parties.

(6) REQUIRED NOTIFICATION.--

(A) IN GENERAL.--A financial holding company that acquires any company or commences any activity pursuant to this subsection shall provide written notice to the [{{12-30-99 p.6046.03}}](#) Board describing the activity commenced or conducted by the company acquired not later than 30 calendar days after commencing the activity or consummating the acquisition, as the case may be.

(B) Approval not required for certain financial activities.--Except as provided in subsection (j) with regard to the acquisition of a savings association, a financial holding company may commence any activity, or acquire any company, pursuant to paragraph (4) or any regulation prescribed or order issued under paragraph (5), without prior approval of the Board.

(7) MERCHANT BANKING ACTIVITIES.--

(A) JOINT REGULATIONS.--The Board and the Secretary of the Treasury may issue such regulations implementing paragraph (4)(H), including limitations on transactions between depository institutions and companies controlled pursuant to such paragraph, as the Board and the Secretary jointly deem appropriate to assure compliance with the purposes and prevent evasions of this Act and the Gramm-Leach-Bliley Act and to protect depository institutions.

(B) Sunset of restrictions on merchant banking activities of financial subsidiaries.--The restrictions contained in paragraph (4)(H) on the ownership and control of shares, assets, or ownership interests by or on behalf of a subsidiary of a depository institution shall not apply to a financial subsidiary (as defined in section 5136A of the Revised Statutes of the United States) of a bank, if the Board and the Secretary of the Treasury jointly authorize financial subsidiaries of banks to engage in merchant banking activities pursuant to section 122 of the Gramm-Leach-Bliley Act.

iii TITLE 12--BANKS AND BANKING

PART 225--BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION

Sec. 225.28 List of permissible nonbanking activities.

(a) Closely related nonbanking activities. The activities listed in paragraph (b) of this section are so closely related to banking or managing or controlling banks as to be a proper incident thereto, and may be engaged in by a bank holding company or its subsidiary in accordance with the requirements of this regulation.

(b) Activities determined by regulation to be permissible -- (1) Extending credit and servicing loans. Making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others.

(2) Activities related to extending credit. Any activity usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit, as determined by the Board. The Board has determined that the following activities are usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit:

(i) Real estate and personal property appraising. Performing appraisals of real estate and tangible and intangible personal property, including securities.

(ii) Arranging commercial real estate equity financing. Acting as intermediary for the financing of commercial or industrial income-producing real estate by arranging for the transfer of the title, control, and risk of such a real estate project to one or more investors, if the bank holding company and its affiliates do not have an interest in, or participate in managing or developing, a real estate project for which it arranges equity financing, and do not promote or sponsor the development of the property.

(iii) Check-guaranty services. Authorizing a subscribing merchant to accept personal checks tendered by the merchant's customers in payment for goods and services, and purchasing from the merchant validly authorized checks that are subsequently dishonored.

(iv) Collection agency services. Collecting overdue accounts receivable, either retail or commercial.

(v) Credit bureau services. Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower's application for credit or who has extended credit to the borrower.

(vi) Asset management, servicing, and collection activities. Engaging under contract with a third party in asset management, servicing, and collection of assets of a type that an insured depository institution may

originate and own, if the company does not engage in real property management or real estate brokerage services as part of these services. Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

(vii) Acquiring debt in default. Acquiring debt that is in default at the time of acquisition, if the company:

(A) Divests shares or assets securing debt in default that are not permissible investments for bank holding companies, within the time period required for divestiture of property acquired in satisfaction of a debt previously contracted under Sec. 225.12(b); For this purpose, the divestiture period for property begins on the date that the debt is acquired, regardless of when legal title to the property is acquired.

(B) Stands only in the position of a creditor and does not purchase equity of obligors of debt in default (other than equity that may be collateral for such debt); and

(C) Does not acquire debt in default secured by shares of a bank or bank holding company.

(viii) Real estate settlement servicing. Providing real estate settlement services. For purposes of this section, real estate settlement services do not include providing title insurance as principal, agent, or broker.

(3) Leasing personal or real property. Leasing personal or real property or acting as agent, broker, or adviser in leasing such property if:

(i) The lease is on a nonoperating basis; The requirement that the lease be on a nonoperating basis means that the bank holding company may not, directly or indirectly, engage in operating, servicing, maintaining, or repairing leased property during the lease term. For purposes of the leasing of automobiles, the requirement that the lease be on a nonoperating basis means that the bank holding company may not, directly or indirectly: (1) Provide servicing, repair, or maintenance of the leased vehicle during the lease term; (2) purchase parts and accessories in bulk or for an individual vehicle after the lessee has taken delivery of the vehicle; (3) provide the loan of an automobile during servicing of the leased vehicle; (4) purchase insurance for the lessee; or (5) provide for the renewal of the vehicle's license merely as a service to the lessee where the lessee could renew the license without authorization from the lessor. The bank holding company may arrange for a third party to provide these services or products.

(ii) The initial term of the lease is at least 90 days;

(iii) In the case of leases involving real property:

(A) At the inception of the initial lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated total cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property at the expiration of the initial lease; and

(B) The estimated residual value of property for purposes of paragraph (b)(3)(iii)(A) of this section shall not exceed 25 percent of the acquisition cost of the property to the lessor.

(4) Operating nonbank depository institutions--(i) Industrial banking. Owning, controlling, or operating an industrial bank, Morris Plan bank, or industrial loan company, so long as the institution is not a bank.

(ii) Operating savings association. Owning, controlling, or operating a savings association, if the savings association engages only in deposit-taking activities, lending, and other activities that are permissible for bank holding companies under this subpart C.

(5) Trust company functions. Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law, so long as the company is not a bank for purposes of section 2(c) of the Bank Holding Company Act.

(6) Financial and investment advisory activities. Acting as investment or financial advisor to any person, including (without, in any way, limiting the foregoing):

(i) Serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(20)), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(ii) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(iii) Providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions,

and conducting financial feasibility studies. Feasibility studies do not include assisting management with the planning or marketing for a given project or providing general operational or management advice.

(iv) Providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments;

(v) Providing educational courses, and instructional materials to consumers on individual financial management matters; and

(vi) Providing tax-planning and tax-preparation services to any person.

(7) Agency transactional services for customer investments--(i) Securities brokerage. Providing securities brokerage services (including securities clearing and/or securities execution services on an exchange), whether alone or in combination with investment advisory services, and incidental activities (including related securities credit activities and custodial services), if the securities brokerage services are restricted to buying and selling securities solely as agent for the account of customers and do not include securities underwriting or dealing.

(ii) Riskless principal transactions. Buying and selling in the secondary market all types of securities on the order of customers as a "riskless principal" to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer. This does not include:

(A) Selling bank-ineligible securities at the order of a customer that is the issuer of the securities, or selling bank-ineligible securities in any transaction where the company has a contractual agreement to place the securities as agent of the issuer; or A bank-ineligible security is any security that a State member bank is not permitted to underwrite or deal in under 12 U.S.C. 24 and 335.

(B) Acting as a riskless principal in any transaction involving a bank-ineligible security for which the company or any of its affiliates acts as underwriter (during the period of the underwriting or for 30 days thereafter) or dealer. A company or its affiliates may not enter quotes for specific bank-ineligible securities in any dealer quotation system in connection with the company's riskless principal transactions; except that the company or its affiliates may enter "bid" or "ask" quotations, or publish "offering wanted" or "bid wanted" notices on trading systems other than NASDAQ or an exchange, if the company or its affiliate does not enter price quotations on different sides of the market for a particular security during any two-day period.

(iii) Private placement services. Acting as agent for the private placement of securities in accordance with the requirements of the Securities Act of 1933 (1933 Act) and the rules of the Securities and Exchange Commission, if the company engaged in the activity does not purchase or repurchase for its own account the securities being placed, or hold in inventory unsold portions of issues of these securities.

(iv) Futures commission merchant. Acting as a futures commission merchant (FCM) for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract traded on an exchange in the United States or abroad if:

(A) The activity is conducted through a separately incorporated subsidiary of the bank holding company, which may engage in activities other than FCM activities (including, but not limited to, permissible advisory and trading activities); and

(B) The parent bank holding company does not provide a guarantee or otherwise become liable to the exchange or clearing association other than for those trades conducted by the subsidiary for its own account or for the account of any affiliate.

(v) Other transactional services. Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(8) of this section, any transaction that is permissible for a state member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not) relating to a commodity that is traded on an exchange.

(8) Investment transactions as principal--(i) Underwriting and dealing in government obligations and money market instruments. Underwriting and dealing in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 U.S.C. 24 and 335, including banker's acceptances and certificates of deposit, under the same limitations as would be

applicable if the activity were performed by the bank holding company's subsidiary member banks or its subsidiary nonmember banks as if they were member banks.

(ii) Investing and trading activities. Engaging as principal in:

(A) Foreign exchange;

(B) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset (including gold, silver, platinum, palladium, copper, or any other metal approved by the Board), nonfinancial asset, or group of assets, other than a bank-ineligible security, if:

A bank-ineligible security is any security that a state member bank is not permitted to underwrite or deal in under 12 U.S.C. 24 and 335.

(1) A state member bank is authorized to invest in the asset underlying the contract;

(2) The contract requires cash settlement; or

(3) The contract allows for assignment, termination, or offset prior to delivery or expiration, and the company makes every reasonable effort to avoid taking or making delivery; and

(C) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on an index of a rate, a price, or the value of any financial asset, nonfinancial asset, or group of assets, if the contract requires cash settlement. This reference does not include acting as a dealer in options based on indices of bank-ineligible securities when the options are traded on securities exchanges. These options are securities for purposes of the federal securities laws and bank-ineligible securities for purposes of section 20 of the Glass-Steagall Act, 12 U.S.C. 337. Similarly, this reference does not include acting as a dealer in any other instrument that is a bank-ineligible security for purposes of section 20. A bank holding company may deal in these instruments in accordance with the Board's orders on dealing in bank-ineligible securities.

(iii) Buying and selling bullion, and related activities. Buying, selling and storing bars, rounds, bullion, and coins of gold, silver, platinum, palladium, copper, and any other metal approved by the Board, for the company's own account and the account of others, and providing incidental services such as arranging for storage, safe custody, assaying, and shipment.

(9) Management consulting and counseling activities--(i) Management consulting. (A) Providing management consulting advice: \1\

\1\ In performing this activity, bank holding companies are not authorized to perform tasks or operations or provide services to client institutions either on a daily or continuing basis, except as necessary to instruct the client institution on how to perform such services for itself. See also the Board's interpretation of bank management consulting advice (12 CFR 225.131).

(1) On any matter to unaffiliated depository institutions, including commercial banks, savings and loan associations, savings banks, credit unions, industrial banks, Morris Plan banks, cooperative banks, industrial loan companies, trust companies, and branches or agencies of foreign banks;

(2) On any financial, economic, accounting, or audit matter to any other company.

(B) A company conducting management consulting activities under this subparagraph and any affiliate of such company may not:

(1) Own or control, directly or indirectly, more than 5 percent of the voting securities of the client institution; and

(2) Allow a management official, as defined in 12 CFR 212.2(h), of the company or any of its affiliates to serve as a management official of the client institution, except where such interlocking relationship is permitted pursuant to an exemption granted under 12 CFR 212.4(b) or otherwise permitted by the Board.

(C) A company conducting management consulting activities may provide management consulting services to customers not described in paragraph (b)(9)(i)(A)(1) of this section or regarding matters not described in paragraph (b)(9)(i)(A)(2) of this section, if the total annual revenue derived from those management consulting services does not exceed 30 percent of the company's total annual revenue derived from management consulting activities.

(ii) Employee benefits consulting services. Providing consulting services to employee benefit, compensation and insurance plans, including designing plans, assisting in the implementation of plans, providing administrative services to plans, and developing employee communication programs for plans.

(iii) Career counseling services. Providing career counseling services to:

(A) A financial organization and individuals currently employed by, or recently displaced from, a financial organization; Financial organization refers to insured depository institution holding companies and their subsidiaries, other than nonbanking affiliates of diversified savings and loan holding companies that engage in activities not permissible under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1842(c)(8)).

(B) Individuals who are seeking employment at a financial organization; and

(C) Individuals who are currently employed in or who seek positions in the finance, accounting, and audit departments of any company.

(10) Support services--(i) Courier services. Providing courier services for:

(A) Checks, commercial papers, documents, and written instruments (excluding currency or bearer-type negotiable instruments) that are exchanged among banks and financial institutions; and (B) Audit and accounting media of a banking or financial nature and other business records and documents used in processing such media. See also the Board's interpretation on courier activities (12 CFR 225.129), which sets forth conditions for bank holding company entry into the activity.

(ii) Printing and selling MICR-encoded items. Printing and selling checks and related documents, including corporate image checks, cash tickets, voucher checks, deposit slips, savings withdrawal packages, and other forms that require Magnetic Ink Character Recognition (MICR) encoding.

(11) Insurance agency and underwriting--(i) Credit insurance. Acting as principal, agent, or broker for insurance (including home mortgage redemption insurance) that is:

(A) Directly related to an extension of credit by the bank holding company or any of its subsidiaries; and

(B) Limited to ensuring the repayment of the outstanding balance due on the extension of credit \14\ in the event of the death, disability, or involuntary unemployment of the debtor. Extension of credit includes direct loans to borrowers, loans purchased from other lenders, and leases of real or personal property so long as the leases are nonoperating and full-payout leases that meet the requirements of paragraph (b)(3) of this section.

(ii) Finance company subsidiary. Acting as agent or broker for insurance directly related to an extension of credit by a finance company that is a subsidiary of a bank holding company, if: Finance company includes all non-deposit-taking financial institutions that engage in a significant degree of consumer lending (excluding lending secured by first mortgages) and all financial institutions specifically defined by individual states as finance companies and that engage in a significant degree of consumer lending.

(A) The insurance is limited to ensuring repayment of the outstanding balance on such extension of credit in the event of loss or damage to any property used as collateral for the extension of credit; and

(B) The extension of credit is not more than \$10,000, or \$25,000 if it is to finance the purchase of a residential manufactured home and the credit is secured by the home; and These limitations increase at the end of each calendar year, beginning with 1982, by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics.

(C) The applicant commits to notify borrowers in writing that:

(1) They are not required to purchase such insurance from the applicant;

(2) Such insurance does not insure any interest of the borrower in the collateral; and

(3) The applicant will accept more comprehensive property insurance in place of such single-interest insurance.

(iii) Insurance in small towns. Engaging in any insurance agency activity in a place where the bank holding company or a subsidiary of the bank holding company has a lending office and that:

(A) Has a population not exceeding 5,000 (as shown in the preceding decennial census); or

(B) Has inadequate insurance agency facilities, as determined by the Board, after notice and opportunity for hearing.

(iv) Insurance-agency activities conducted on May 1, 1982. Engaging in any specific insurance-agency activity \17\ if the bank holding company, or subsidiary conducting the specific activity, conducted such activity on May 1, 1982, or received Board approval to conduct such activity on or before May 1, 1982.\18\ A bank holding company or subsidiary engaging in a specific insurance agency activity under this clause may:

Nothing contained in this provision shall preclude a bank holding company subsidiary that is authorized to engage in a specific insurance-agency activity under this clause from continuing to engage in the particular activity after merger with an affiliate, if the merger is for legitimate business purposes and prior notice has been provided to the Board.

For the purposes of this paragraph, activities engaged in on May 1, 1982, include activities carried on subsequently as the result of an application to engage in such activities pending before the Board on May 1, 1982, and approved subsequently by the Board or as the result of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition.

(A) Engage in such specific insurance agency activity only at locations:

(1) In the state in which the bank holding company has its principal place of business (as defined in 12 U.S.C. 1842(d));

(2) In any state or states immediately adjacent to such state; and

(3) In any state in which the specific insurance-agency activity was conducted (or was approved to be conducted) by such bank holding company or subsidiary thereof or by any other subsidiary of such bank holding company on May 1, 1982; and

(B) Provide other insurance coverages that may become available after May 1, 1982, so long as those coverages insure against the types of risks as (or are otherwise functionally equivalent to) coverages sold or approved to be sold on May 1, 1982, by the bank holding company or subsidiary.

(v) Supervision of retail insurance agents. Supervising on behalf of insurance underwriters the activities of retail insurance agents who sell:

(A) Fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the bank holding company or its subsidiaries; and

(B) Group insurance that protects the employees of the bank holding company or its subsidiaries.

(vi) Small bank holding companies. Engaging in any insurance-agency activity if the bank holding company has total consolidated assets of \$50 million or less. A bank holding company performing insurance-agency activities under this paragraph may not engage in the sale of life insurance or annuities except as provided in paragraphs (b)(11) (i) and (iii) of this section, and it may not continue to engage in insurance-agency activities pursuant to this provision more than 90 days after the end of the quarterly reporting period in which total assets of the holding company and its subsidiaries exceed \$50 million.

(vii) Insurance-agency activities conducted before 1971. Engaging in any insurance-agency activity performed at any location in the United States directly or indirectly by a bank holding company that was engaged in insurance-agency activities prior to January 1, 1971, as a consequence of approval by the Board prior to January 1, 1971.

(12) Community development activities--(i) Financing and investment activities. Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas by providing housing, services, or jobs for residents.

(ii) Advisory activities. Providing advisory and related services for programs designed primarily to promote community welfare.

(13) Money orders, savings bonds, and traveler's checks. The issuance and sale at retail of money orders and similar consumer-type payment instruments; the sale of U.S. savings bonds; and the issuance and sale of traveler's checks.

(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 30 percent of the company's total annual revenues derived from data processing and data transmission activities.

^{iv} *Nonpublic personal information* means:

- (i) Personally identifiable financial information; and
 - (ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.
- (2) *Nonpublic personal information* does not include:
- (i) Publicly available information, except as included on a list described in paragraph (n)(1)(ii) of this section; or
 - (ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available.

^v *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

Nonaffiliated third party includes any company that is an affiliate solely by virtue of your or your affiliate's direct or indirect ownership or control of the company in conducting merchant banking or investment banking activities of the type described in section 4(k)(4)(H) or insurance company investment activities of the type described in section 4(k)(4)(I) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)(4)(H) and (I)).

^{vi} **Subpart B—Limits on Disclosures**

§ 573.10 Limits on disclosure of non-public personal information to nonaffiliated third parties.

(a)(1) *Conditions for disclosure.*

Except as otherwise authorized in this part, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless:

- (i) You have provided to the consumer an initial notice as required under § 573.4;
- (ii) You have provided to the consumer an opt out notice as required in § 573.7;
- (iii) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and
- (iv) The consumer does not opt out.

(2) *Opt out definition.* Opt out means a direction by the consumer that you not disclose nonpublic personal information about that consumer to a nonaffiliated third party, other than as permitted by §§ 573.13, 573.14, and 573.15.

(3) *Examples of reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

- (i) *By mail.* You mail the notices required in paragraph (a)(1) of this section to the consumer and allow the consumer to opt out by mailing a form, calling a toll-free telephone number, or any other reasonable means within 30 days from the date you mailed the notices.
- (ii) *By electronic means.* A customer opens an on-line account with you and agrees to receive the notices required in paragraph (a)(1) of this section electronically, and you allow the customer to opt out by any reasonable means within 30 days after the date that the customer acknowledges receipt of the notices in conjunction with opening the account.
- (iii) *Isolated transaction with consumer.* For an isolated transaction, such as the purchase of a cashier's check by a consumer, you provide the consumer with a reasonable opportunity to opt out if you provide the notices required in paragraph (a)(1) of this section at the time of the transaction and request that the consumer decide, as a necessary part of the transaction, whether to opt out before completing the transaction.

(b) *Application of opt out to all consumers and all nonpublic personal information*—(1) You must comply with this section, regardless of whether you and the consumer have established a customer relationship.

(2) Unless you comply with this section, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer that you have collected, regardless of whether you collected it before or after receiving the direction to opt out from the consumer.

(c) *Partial opt out.* You may allow a consumer to select certain nonpublic personal information or certain nonaffiliated third parties with respect to which the consumer wishes to opt out.