The Gramm-Leach-Bliley Act: An Overview

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A. IMPETUS FOR GLBA

The impetus for the passage of the Gramm-Leach-Bliley Act (GLBA) was the merger between Citicorp and the Travelers Group. Citigroup took advantage of a provision of the Bank Holding Company Act that grants a company that becomes a bank holding company by virtue of its acquisition of a bank a two-year period (subject to three additional one-year extensions) in which to divest itself of operations that are not permissible for a bank holding company. 12 U.S.C.A. § 1842(a). Operation of an insurance underwriter (Travelers) was not then permissible for a bank holding company. Travelers owned Salomon Smith Barney and its bank-ineligible activities were potentially in excess of the existing twenty-five percent revenue limitation authorized by the Federal Reserve Board (Fed) for Section 20 subsidiaries. The formation of Citigroup represented a big gamble that financial modernization legislation would be passed. The Citigroup combination was announced on April 6, 1998, and GLBA was enacted on November 12, 1999. GLBA permits financial holding companies, like Citigroup, to own banks, insurance companies, and securities firms. Some observers have characterized GLBA as the "Citigroup Relief Act."

B. FINANCIAL HOLDING COMPANIES

A financial holding company (FHC) is a new type of bank holding company (BHC) created by GLBA that meets certain additional requirements. 12 U.S.C.A. §§ 1841(p), 1843(l)(1). All of a FHC's depository subsidiaries must be well-capitalized, well-managed, and have Community Reinvestment Act (CRA) ratings of satisfactory or above. Id. § 1843(l). A BHC must file an application to be certified as an FHC. As of May 25, 2001, the Fed reported that 537 companies have been certified as FHC's, including 25 foreign institutions.

An FHC may offer a broader range of services than a traditional BHC. An FHC may engage in, or own a company that engages in, any activity that is "financial in nature or incidental to such financial activity; or complimentary to a financial activity." 12 U.S.C.A. § 1843(k)(1). A specific list of financial activities is set forth in § 1843(k)(4) and includes all activities previously permitted for a BHC, activities permitted for a BHC in foreign countries, securities, insurance (underwriting and agency), annuity issuance, mutual funds, insurance company portfolio investments, and merchant banking. Additional activities may be considered "financial in nature" upon the joint determination of the Treasury Department and the Fed.

If the FHC fails to maintain a well-capitalized or well-managed rating, then corrective action by the Fed will be imposed on the institution. 12 C.F.R. § 225.83. If the FHC is unable to correct its deficiencies, the Fed may order the FHC to divest itself of any subsidiary institutions that are out of compliance. If the FHC fails to meet the CRA-rating requirement, then the FHC is prohibited from commencing any activiites that are "financial in nature." 12 C.F.R. § 225.84.

The Fed and the Treasury Department have had few opportunities since the passage of GLBA to consider what additional activities might be considered "financial in nature." The Fed has determined, however, that acting as a "finder" is "incidental to a financial activity," and is thus a permitted activity for a FHC. 65 Fed. Reg. 80,375 (Dec. 22, 2000) (codified at 12 C.F.R. § 225.86(d)).

A joint proposal by the Fed and the Treasury Department to permit FHC's and financial subsidiaries to engage in real estate brokerage and management services met with widespread opposition. 66 Fed. Reg. 307 (Jan. 3, 2001) (to be codified at 12 C.F.R. pts. 225 & 1501). A record number of comment letters were received opposing the proposal.

C. FINANCIAL SUBSIDIARIES

GLBA authorized a broad range of new activities for holding companies that qualify as financial holding companies (FHC). These new activities are to be performed in subsidiaries of the FHC and are subject to FRB oversight. In a compromise with the Office of the Comptroller of the Currency (OCC), some, but not all, of the activities are permitted for newly minted "financial subsidiaries" of national banks, 12 U.S.C.A. § 24a, or state banks, 12 U.S.C.A. § 1831w.

A financial subsidiary may engage in activities that are "financial in nature," or "incidental" to a financial activity,12 U.S.C.A. § 24a, but not those that are "complimentary to a financial activity." Authorized activities include those activities permissible for the subsidiaries of bank holding companies, activities permissible for a bank holding company to conduct abroad (other than real estate development or real estate investment), securities activities, and insurance agency activities (without the place of 5,000 limitation of 12 U.S.C.A. § 92), and any additional activities subsequently determined by the Treasury Department and the Fed to be financial in nature. Unlike the subsidiaries of FHC's, financial subsidiaries may not engage in insurance underwriting, annuity issuance, or merchant banking. The merchant banking prohibition will be renewed or abandoned five years following GLBA's enactment.

To establish a financial subsidiary, a bank and each depository institution affiliate must be well-capitalized and well-managed. 12 U.S.C.A. § 24a(a)(2)(D). The equity investment of the bank in the financial subsidiary is not counted for purposes of computing the bank's capital requirements. The theory is that insured deposits of the bank (gathered at below-market interest rates because of FDIC insurance coverage) should not be used to fund financial subsidiary activities. There are additional requirements for a financial subsidiary relating to the maximum relative size of the financial subsidiary in relation to the parent bank, 12 U.S.C.A. § 24a(a)(2)(D), and requirements that the 100 largest banks must meet certain credit standards before being allowed to establish a financial subsidiary, 12 U.S.C.A. § 24a(a)(3). See Final Rule for Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905 (Mar. 10, 2000) (OCC); 66 Fed. Reg. 42,929 (Aug. 16, 2001) (to be codified at 12 C.F.R. pt. 208) (Fed).

D. SECURITIES ACTIVITIES

Section 20 of the Glass-Steagall Act, 12 U.S.C.A. § 377, was repealed by GLBA. Now a financial holding company may own a company engaged in securities underwriting firm without regard to the prior twenty-five percent limitation on revenue from bank-ineligible activities. 12 U.S.C.A. § 1843(k)(4)(A). A financial subsidiary of a bank may also act as an underwriter without being subject to the bank-ineligible revenue limit. 12 U.S.C.A. § 24a(a) (national banks) & § 1831a(a) (insured state banks).

GLBA added a provision to section 24 (Seventh) of the National Bank Act that permits national banks to deal in, hold, and underwrite municipal revenue bonds. 12 U.S.C. § 24

(Seventh). Prior to GLBA, operating subsidiaries of national banks had been authorized to underwrite municipal revenue bonds, but that authority did not extend to the bank itself.

GLBA also repealed Section 32 of the Glass-Steagall Act, which prohibited interlocking directors or management between a bank and a firm "principally engaged" in investment banking activities.

Endorsing the concept of functional regulation, GLBA removed the exemption from broker-dealer registration for banks contained in the Securities Exchange Act of 1934. Bank securities activities are now functionally regulated by the SEC.

The statute carved out some fifteen securities activities that a bank could engage in without being required to register as a broker-dealer with the SEC. These include securities activities that relate to functions traditionally performed by banks and transactions that relate to traditional bank products, such as trust activities (unless the bank customer has discretionary trading authority), dealings in exempted securities (principally U.S. government and municipal securities), stock purchase plans, commercial paper, stock custody arrangements, certain asset-backed debt, dividend reinvestment plans, sweep accounts, private securities placements, and municipal securities. 15 U.S.C.A. § 78c(4) & (5). A rather heated row broke out between the SEC and bank regulators after the SEC adopted interim rules and interpretative guidance that narrowly defined these exemptions. 17 C.F.R. §§ 240.3a4-2 et seq. For the bank regulators' objections to these rules see Banking Regulatory Agencies Comments on SEC Broker-Dealer Exemption Interim Rules, Fed. Banking L. Rep. (CCH) ¶ 92-833 (June 29, 2001).

E. MERCHANT BANKING

Merchant banking is the practice of taking an equity position in a non-public company as an investment. Banks were able to engage in this activity prior to GLBA only through small business investment corporations, Edge Act corporations (which engaged in foreign investments), or through authority that allowed bank holding companies to make investments in up to five percent of the voting shares of any company. GLBA permits FHC's to engage in merchant banking activities directly. 12 U.S.C.A. § 1843 (k)(4)(H) (defining merchant banking investments).

Although it allowed expanded merchant banking investments, GLBA sought to prevent banks from becoming controlled by an industrial firm. Thus, GLBA imposed conditions on the length of time that merchant banking investments could be held and restricted the financial holding company from becoming routinely involved in managing the company in which the investment is made, except to the extent necessary to obtain a reasonable return on the investment. Financial holding companies are allowed to conduct merchant banking investments directly or through any subsidiary other than a depository institution or the subsidiary of a depository institution. Financial subsidiaries of depository institutions are barred from making merchant banking investments at least until November, 2004, at which time the statutory moratorium will be reconsidered. 12 U.S.C.A. § 24a(2)(B). Merchant banking under GLBA may be conducted only by a registered broker-dealer in the financial holding company structure or an investment advisory affiliate of an insurance company in that structure.

The Fed and the Secretary of the Treasury adopted regulations to govern merchant banking investments under GLBA. The rules allow a financial holding company to make merchant

banking investments directly or through a private equity fund (sometimes referred to as a hedge fund) or other investment fund that makes investments in nonfinancial companies. The regulations define the management role that banks may play in managing their investment and set forth maximum holding periods for merchant banking investments (those periods generally ranged from 10 to 15 years unless the Fed approves a longer period). These rules are set forth in 12 C.F.R. pt. 225.

The banking regulators were concerned with the safety and soundness of complex financial institutions. They feared that investment losses from merchant banking could endanger an insured institution in a financial holding company. The regulations adopted by the Fed and the Secretary of the Treasury require FHCs engaging in merchant banking investments to adopt appropriate risk management policies. 12 C.F.R. § 225.175. As an interim measure, the rules also placed restrictions on the amounts of merchant banking activity that could be conducted by a financial holding company. Fed approval was required for any such investments in excess of thirty percent of tier 1 capital of the financial holding company or, after excluding interests in private equity funds, 20 percent of tier 1 capital. 12 C.F.R. § 225.174. These restrictions may be dropped once capital rules are in place for such activities.

The adoption of capital rules, however, has been slowed by controversy. The Fed's initial proposal would have imposed a capital requirement of fifty cents for every dollar invested. That proposal was so heavily criticized that it was withdrawn. A revised rule will impose a sliding scale based on aggregate equity investments and tier 1 capital. 66 Fed. Reg. 10,212 (Feb. 14, 2001). If the institution's merchant capital investment is equal to 15% or less of the institution's Tier 1 capital, then the investment is subject to the normal 8% capital charge. If the amount of the investment ranges between 15% and 25% of Tier 1 capital, then the capital charge for the investment will be 12% for the portion of the investment above 15% of Tier 1 capital. For any portion of a total merchant capital investment exceeding 25% of the institution's Tier 1 capital, a 25% capital charge will be applied.

F. INSURANCE ACTIVITIES

To many, the Gramm-Leach-Bliley Act (GLBA) is most notable for its repeal of the Glass-Steagall Act restrictions on commercial bank affiliates' investment banking activities. Of at least equal interest, however, are provisions that widen the entrance for banks into the insurance industry. Those provisions were not easily added. Initially, the trade association for independent insurance agents ferociously opposed bank intrusion into the insurance industry. Clearly, banks were a threat to the agents' existence. Independent agencies already faced competition from direct line purchasers that allowed consumers to buy insurance from the insurance underwriting company without having to pay an intervening agency. As one writer noted, "[W]e are witnessing the virtual disappearance, nominally, of the 'life insurance agent' as this person is now being named 'financial planner.'" Howard J. Sachs, Merging of Life Insurance and Securities Industry Accelerates, 25 Est. Plan. 326 (1998).

This transformation occurred because many insurance agents and securities brokers were cross-licensed, and many securities brokers selling insurance were working for a bank affiliate. The insurance lobby effectively capitulated to bank competition in 1997 when the Independent Insurance Agents of America announced that it would support legislation allowing the affiliation of banks and insurance firms if functional regulation of insurance activities by the traditional state regulator was retained, and if appropriate consumer protection measures were enacted.

Perhaps the insurance underwriters decided that banks would function well as retail delivery vehicles for insurance products and that empowering more bank-affiliated insurance agents could improve insurance company sales.

GLBA significantly expanded the ability of banks to engage in insurance activities. A bank holding company that is designated as an FHC may engage in activities that are "financial in nature." 12 U.S.C.A. § 1843(k)(1). Specifically listed as activities that are financial in nature are "[i]nsuring, 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." 12 U.S.C.A. § 1843(k)(4)(B). Moreover, it is permissible for a subsidiary of an FHC to own shares, assets, or ownership interests in a company or other entity if such ownership represents an investment made in the normal course of business by an insurance company in accordance with state law regulating such investments, and the FHC does not routinely manage or operate the company in which it holds the investment, except as necessary to ensure a reasonable return on the investment. 12 U.S.C.A § 1843(k)(4)(H) & (I).

Bank holding companies that wish to expand into insurance underwriting need to qualify as an FHC and conduct underwriting activities in a subsidiary of the FHC. Numerous institutions have already filed as FHCs, enabling them to expand their financial activities when they desire.

Under GLBA, neither a national bank nor its subsidiary may underwrite insurance unless underwriting was permitted by enforceable OCC rulings as of January 1, 1999. 15 U.S.C.A. § 6712(a), (b). The OCC permits underwriting of credit-related insurance products. GLBA, however, specifically prohibits the underwriting of title insurance or an annuity contract even if it has already been approved by the OCC. 12 U.S.C.A. § 6712(b)(3).

Although the financial subsidiaries of national banks, like the subsidiaries of an FHC, are authorized to engage generally in activities that are "financial in nature or incidental to a financial activity" under GLBA, insurance underwriting, annuity issuance, real estate investment and development, and merchant banking are specifically excluded for a financial subsidiary even though all are permitted for an FHC subsidiary. 12 U.S.C.A. § 24a(a)(2). This curious distinction is apparently the result of a compromise in the turf war between the Fed (regulator of FHCs, bank holding companies, and their respective nonbank subsidiaries) and the OCC (primary regulator of national banks and national bank subsidiaries). The compromise was apparently premised on an assumption that certain financial activities were too risky to be placed in a financial subsidiary of a bank.

Section 92 of the NBA, permitting national banks to act as an insurance agent in a place of less than five thousand, was not repealed by GLBA, so presumably national banks may still conduct insurance agency activities in offices of the national bank located in a place of less than five thousand people. A financial subsidiary of a national bank is not subject to the place of five thousand limitation, however, and for this reason it is likely that many national banks will transfer their insurance agency activities to a financial subsidiary.

In another curious restriction, GLBA forbids the sale of title insurance by a national bank unless authorized under state law for a state-chartered bank. 12 U.S.C.A. § 6713(a), (b)(1). In such a state, a national bank may sell title insurance, subject to the same restrictions applicable to the state-chartered bank. The title insurance sale restriction applies only to the national bank, so presumably, a financial subsidiary should be able to sell title insurance, which would provide

an additional incentive to transfer insurance agency activities to a financial subsidiary of a national bank. A grandfather provision permits a national bank or its subsidiary to continue any title insurance activities (underwriting or sale) that were “actively and lawfully” conducted before the enactment of GLBA. 12 U.S.C.A. § 6713(c). However, a national bank with no affiliate other than a subsidiary that underwrites insurance may not directly engage in underwriting title insurance. In addition, if a national bank has an affiliate that underwrites insurance but is not a subsidiary of the bank, neither the bank nor its subsidiary may underwrite title insurance pursuant to the grandfather provision. Although a national bank's title insurance activities may continue pursuant to this grandfather provision, the grandfather provision in effect pushes the title insurance activities out of the bank into a separate existing subsidiary or affiliate engaged in insurance.

State banks and their subsidiaries, as a general matter, are prohibited by the FDICIA from engaging in insurance underwriting even if permitted under state law, except to the extent that activity is permissible for national banks. 12 U.S.C.A. § 1831a. The new insurance underwriting restrictions for national banks in GLBA also restrict the underwriting ability of state banks. Thus, state banks cannot underwrite title insurance unless they fall within one of the limited exceptions provided in the FDICIA.

GLBA does not answer definitively whether state banks may issue annuities if so authorized under state law. GLBA clearly prevents national banks from issuing annuities. But if annuities are not insurance, then they are not subject to the underwriting prohibitions. Moreover, a state bank or its subsidiary could apply for the FDIC's permission to issue annuities as a principal.

Insurance agency activities, if permitted under state law, are not linked to national bank powers since the FDICIA only limits a state bank's activities as principal. In a state that authorizes title insurance sales for its state banks, those sales may continue under GLBA. Although national banks under GLBA generally may not engage in the underwriting or sale of title insurance, a national bank may sell title insurance in a particular state to the same extent as a state bank.

A state bank, to the extent permitted by state law, may own a subsidiary that engages in activities comparable to those permitted by GLBA for a national bank's financial subsidiary. 12 U.S.C.A. § 1831w. The conditions for establishing a financial subsidiary of a state bank mirror those for establishing a financial subsidiary of a national bank. In addition, a state bank may retain existing subsidiaries (that may not qualify as financial subsidiaries) and continue to engage in activities lawfully conducted by such subsidiaries as of the date of GLBA's enactment. Moreover, a state bank subsidiary may still apply to engage in new activities pursuant to section 24 of the Federal Deposit Insurance Act, bypassing the requirements necessary for establishing a financial subsidiary.

GLBA continues the McCarran-Ferguson Act's requirement that insurance be regulated at the state level. 15 U.S.C.A. § 6701(a), (b). The statute specifically addresses the interaction between state insurance regulators and federal banking regulators, anticipating the likely regulatory struggle. See 15 U.S.C.A. § 6714. GLBA mandated the creation of the National Association of Registered Agents and Brokers (NARAB), a private, nonprofit entity to be managed by the National Association of Insurance Commissioners (NAIC), in the event that twenty-nine jurisdictions were unable to establish uniform licensing requirements for agents or enact reciprocity laws permitting the licensure of nonresidents to sell insurance within the state. The requisite number of states have enacted reciprocity statutes, but the goal of greater uniformity in state regulation of insurance has yet to be achieved.

G. COMMERCIAL ACTIVITIES

GLBA expanded the scope of holding company activities from those that are "closely related to banking" to those that are "financial in nature." Nonfinancial activities (i.e., commercial activities), however, are generally not permitted for FHC's. Senator Gramm – one of the sponsors of the GLBA – predicts that GLBA's separation of financial and nonfinancial activities will prove as anachronistic as Glass-Steagall's separation of commercial banking and investment banking.

It is possible for a commercial firm that becomes a FHC to retain its commercial activities for a minimum of ten years, with a potential five-year extension for a total of fifteen years of commingling of banking and nonfinancial activities. 12 U.S.C.A. § 1843(n)(7). To qualify for this grandfather provision, however, the FHC must be "predominantly engaged" in financial activities. 12 U.S.C.A. § 1843(n)(1). An FHC meets this test if at least 85% of its annual gross revenues (excluding the revenues of its depository subsidiaries) are received from financial activities. 12 U.S.C.A. § 1843(n)(2). This revenue requirement must be met on a continuing basis.

A further opportunity for entry into nonfinancial activities is by an expansive interpretation of "financial in nature." Moreover, FHC's may engage in activities that are "complementary to a financial activity." Arguing that a nonfinancial activity is nevertheless complementary to a financial activity is possibly the first argument that will be made by FHC's seeking to expand into general business activities. An additional, and potentially large, breach in the wall separating financial from nonfinancial activities is GLBA's authorization of merchant banking investments for FHC's.

Historically commercial firms enjoyed banking privileges through the unitary thrift holding company loophole and through nonbank banks. Even though both "loopholes" have since been legislatively closed, 200 or so unitary thrift holding companies have been grandfathered by GLBA and nonbank banks were grandfathered by the Competitive Equality Banking Act of 1987 (CEBA). These entities continue to provide opportunities to examine whether the combination of financial and nonfinancial activities is dangerous or harmful. Grandfathered unitary thrift holding companies include Nordstrom's department store, which owns Nordstrom FSB of Scottsdale, Arizona, and State Farm Insurance Company, which owns State Farm Bank. Grandfathered unitary thrift holding companies are afforded all the FHC powers without oversight by the Fed.

Numerous entities chartered as banks remain excepted from the definition of "bank" under the BHCA. 12 U.S.C.A. § 1841(c)(2). Therefore, it is still possible for a commercial firm to own

one of these “nonbank banks,” escape characterization as an FHC, and escape GLBA’s limitation of FHC’s to activities that are “financial in nature.” Even after GLBA freed securities firms to buy banks, many firms eschewed the opportunity in favor of limited purpose trust banks or industrial loan companies that would permit bank-like operations without FHC designation and FRB supervision and oversight. Goldman Sachs chartered Goldman Sachs Trust Company, N.A., a national trust bank with a charter from the OCC. This entity may engage in trust operations but may not accept deposits or make loans. This limited purpose trust company does, however, offer Goldman the ability to provide its customers with wealth management services via the trust vehicle and to gain the benefits of a national charter, such as the ability to offer services nationwide. Another example is the BMW auto group, which has established an industrial loan company in Utah that will accept deposit accounts, issue credit cards, and sell insurance products. Since an industrial loan company is not considered a bank, BMW is not a FHC, and is not subject to the additional layers of regulation.

H. PRIVACY

One reason for forming an FHC is to enjoy the benefits of cross-marketing the products of the commonly owned affiliates. Concerns about customer privacy of financial information potentially endangered the cross-marketing advantages for FHC’s. After long debate, Congress adopted Title V of GLBA, which sets forth various requirements designed to protect the privacy of customers of financial institutions. 15 U.S.C.A. § 6801. Financial institutions are defined as institutions, “the business of which is engaging in financial activities as described in section 1843(k) of Title 12,” 15 U.S.C.A. § 6809(3)(A). GLBA preserves the ability of an FHC to share customer information among its affiliates. 15 U.S.C.A. § 6802(a). Customers may, however, opt out of having their financial information shared with non-affiliates. 15 U.S.C.A. § 6802(b)(1)(B). The opt out right must be given to a customer along with the institution’s privacy policy when a new customer relationship is established and annually thereafter. States may adopt more stringent privacy regulations than those set forth in GLBA, and a more stringent state scheme will control. 15 U.S.C.A. § 6807.

I. FUNCTIONAL REGULATION

GLBA endorses the concept of “functional” regulation, as opposed to “entity” regulation. Thus, if the function that is being performed involves the sale of securities, the SEC regulates that function even if it is being performed by an entity, such as a bank or an insurance company, that is not a securities firm. The obvious advantages to this approach are fairness and regulatory expertise. It is only fair that the same functions are regulated the same way, no matter what type of financial entity is performing the function. Indeed, this helps to reduce one form of regulatory arbitrage by artificially placing an activity in a particular entity to avoid a disfavored regulator. Moreover, regulation of the function will presumably be performed by the regulator with the greatest expertise in that function. A “functionally regulated subsidiary” under GLBA is a company that is not a bank or a bank holding company, but that is either a broker or dealer, investment advisor, investment company, insurance company, or an entity subject to regulation by the Commodity Futures Trading Commission (CFTC). 12 U.S.C.A. § 1844(c)(5).

Functional regulation of securities dealing is provided by the repeal of the bank exception from the definitions of “broker” and “dealer” in the Securities Exchange Act of 1934, 15 U.S.C.A. § 78c(a)(4)-(5). The SEC is also granted jurisdiction over any “new hybrid product,” that the SEC determines to be a security but which the SEC has not previously treated as a security, which is not an “identified banking product” and is not an equity swap. 12 U.S.C.A. § 78o(i).

Insurance activities, including those being conducted by a national bank, are regulated by the state insurance regulator. 15 U.S.C.A. § 6711. Discrimination by the state insurance regulator against FHC's or depository institutions is prohibited. 15 U.S.C.A. § 6701(c) & (d). In anticipation of the inevitable turf conflict between a federal bank regulator and the state insurance regulator, GLBA provides for an expedited review of such a conflict in a U.S. Court of Appeals, and provides that the standard for review shall be "without unequal deference." This review standard negates the usual "controlling weight" standard of review given to a federal agency's interpretation of an ambiguous statute under *Chevron*. 15 U.S.C.A. § 6714. Federal regulators are not totally excluded from the regulation of insurance, however, as GLBA mandates the adoption by the federal bank regulators of consumer protection regulations relating to the sale of insurance. 12 U.S.C.A. § 1831x(a). See Joint Rule on Consumer Protections for Depository Institutions Sales of Insurance, 65 Fed. Reg. 75,822 (Dec. 4, 2000) (codified at 12 C.F.R. pts. 14, 208, 343 & 536).

GLBA also recognizes that comprehensive regulation is still necessary. Even though an entity may be subject to regulation by many different functional regulators, and an FHC by even more functional regulators, it is important for one regulator to have the big picture. The Fed has retained this role as the "umbrella supervisor" over the entire FHC. 12 U.S.C.A. § 1844(c). FRB Supervisory Letter, Framework for Financial Holding Company Supervision, SR 00-13 (Aug. 15, 2000). In this role, the Fed may request reports, conduct examinations, and intervene to take action to redress unsound practices under certain circumstances. 12 U.S.C.A. §§ 1844(c), 1831v(a), 1848a.

There are, however, potential problems with functional regulation. Innovative products do not always fit neatly into a single functional category. See Lissa L. Broome & Jerry W. Markham, Banking and Insurance: Before and After the Gramm-Leach-Bliley Act, 25 J. Corp. L. 724, 777 (2000) (describing the changing characterization of variable annuity products as (1) securities, (2) mutual funds subject to the Investment Company Act, and (3) part of the business of banking); Heidi Mandanis Schooner, Regulating Risk Not Function, 66 U. Cin. L. Rev. 441 (1998). Moreover, entity regulation has not disappeared as a result of GLBA. Thus, a bank is still chartered and examined by one or more bank regulators, and may have its securities and insurance activities subject to additional functional regulators. Add to this mix the as yet unknown role of the Fed as "umbrella supervisor," and the potential for regulatory conflict is great. A single entity may discover that being subject to multiple functional regulators is unduly burdensome, and this may result in a competitive disadvantage for FHC's vis-a-vis those foreign counterparts who are supervised by a unified regulator. Fear of the Fed's intrusion as the umbrella supervisor for FHC's may have led some financial firms to avoid purchasing a bank in favor of entering banking via acquisition or chartering of a bank-like institution that is not defined as a "bank" under the BHCA.