

FEDERAL RESERVE SYSTEM

12 CFR Part 225

Regulation Y; Docket No. R-1078

Bank Holding Companies and Change in Bank Control

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule with request for public comments.

SUMMARY: The Board of Governors of the Federal Reserve System, after consultation with the Secretary of the Treasury, proposes to determine by rule that acting as a finder is an activity that is financial in nature or incidental to a financial activity and therefore permissible for financial holding companies. The proposed rule would authorize financial holding companies to act as a “finder,” which is an activity defined as bringing together buyers and sellers of products or services for transactions that the buyers and sellers themselves negotiate and consummate. The proposal would amend Subpart I of Regulation Y to add finder activities to the list of activities permissible for financial holding companies. The proposed rule provides examples of services that financial holding companies may perform as a finder, and examples of actions that are outside the scope of permissible finder activities. In addition, the proposed rule would require financial holding companies that act as a finder to distinguish the products and services offered by third parties through the company’s finder service from any products or services offered by the financial holding company or its subsidiaries.

The Board solicits comments on all aspects of the proposed rule and will amend the rule as appropriate in response to comments received.

DATES: Comments must be received by September 5, 2000.

ADDRESSES: Comments should refer to docket number R-1078 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), Kieran J. Fallon, Senior Counsel (202/452-5270), or Adrienne G. Threatt, 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

The Gramm-Leach-Bliley Act (Pub. L. No. 106-102, 113 Stat. 1338 (1999)) ("GLB Act") amended the Bank Holding Company Act ("BHC Act") (12 U.S.C. § 1841 et seq.) to allow a bank holding company or foreign bank that qualifies as a financial holding company to engage in a broad range of activities that are defined by the GLB Act to be financial in nature or incidental to a financial activity. The GLB Act also permits financial holding companies to engage in other activities that the Board determines, by regulation or order and in consultation with the Secretary of the Treasury ("Secretary"), to be financial in nature or incidental to a financial activity.

In considering whether an activity is financial in nature or incidental to a financial activity, the GLB Act requires the Board to consider: (1) the purposes of the GLB Act and BHC Act; (2) the changes or reasonably expected changes in the marketplace in which financial holding companies compete; (3) the changes or reasonably expected changes in technology for delivering financial services; and (4) whether the proposed activity is necessary or appropriate to allow a financial holding company to compete effectively with companies seeking to provide financial services in the United States, efficiently deliver financial information and services through technological means, and offer customers any available or

emerging technological means for using financial services or for the document imaging of data. The Board also may consider other factors and information that it considers relevant to its determination.

After considering the factors listed above and other relevant information, the Board, after consultation with the Secretary of the Treasury, proposes to determine by rule that acting as a finder is an activity that is incidental to a financial activity. The proposed rule would amend § 225.86 of the Board's Regulation Y to add a new activity, which, as explained below is denominated "acting as a finder," to the list of activities permissible for financial holding companies.¹ Bank holding companies and foreign banks that qualify as financial holding companies would be permitted to engage in finder activities by using the post-commencement notice procedure described in § 225.87 of Regulation Y. Bank holding companies and foreign banks that do not qualify as financial holding companies may engage only in those nonbanking activities that were permissible for bank holding companies prior to the enactment of the GLB Act and, thus, could not act as a finder under the proposed rule.

The Board has consulted with the Secretary of the Treasury concerning the proposed rule, and the Secretary supports the Board's determination to seek public comment on the proposed rule. Under the GLB Act, the Board may not determine that an activity is financial in nature or incidental to a financial activity if the Secretary notifies the Board in writing that the Secretary believes the activity is not financial in nature, incidental to a financial activity, or otherwise permissible under section 4 of the BHC Act. The Secretary must notify the Board of the Secretary's determination within 30 days of receiving notice from the Board of a request, proposal or application for a determination that an activity is financial in nature or incidental to a financial activity, or within such longer period as the Board may allow under the circumstances.

¹ Subpart I of the Board's Regulation Y includes the criteria that a bank holding company or foreign bank must meet to become a financial holding company, a list of the activities permissible for financial holding companies, and the procedures for persons to request a determination that an activity is financial in nature or incidental or complementary to a financial activity. See 65 FR 3,785 (Jan. 25, 2000); 65 FR 14,433 (March 17, 2000); 65 FR 15,053 (March 21, 2000).

Proposed Rule

Definition of a Finder

The Board proposes to allow financial holding companies to act as an intermediary in bringing together buyers and sellers for transactions that the buyers and sellers themselves negotiate and consummate. This activity is referred to as “acting as a finder.” Although the exact services provided by a finder in a particular transaction may vary, a finder essentially performs two functions. First, a finder locates and matches third parties that are interested in engaging in a business transaction between themselves. For example, a finder may locate buyers for a company’s products or services, or locate sellers of a particular product or service for a consumer. Similarly, a finder may assist a company locate third parties interested in engaging in other types of business arrangements, such as a merger, acquisition, or joint venture. Once a finder locates a potential buyer, seller, or business partner, the finder may arrange a meeting between the parties or refer one party to the other so that they may negotiate and complete the transaction.

Second, a finder serves as a conduit of transaction-related information between third parties that are interested in conducting a business transaction. For example, a finder may provide potential buyers with information concerning a seller’s products and services, or convey information about a potential buyer’s preferences to a seller. In addition, a finder may receive bids, offers, expressions of interests or purchase orders from one party and convey them to the other party.

Although a finder may introduce a buyer and seller and act as a conduit for the exchange of transaction-related information between the parties, it is the parties themselves--and not the finder--that are responsible for negotiating, executing and consummating the transaction. A finder lacks the authority to negotiate on behalf of either party concerning the transaction or to bind a party to the terms of the transaction. Accordingly, the role of a finder is more limited than that of an agent or broker.² In addition, because a finder acts as an intermediary and not as a

²An agent generally has the power to enter into or alter business or legal relationships on behalf of another person (the principal). 3 Am. Jur. 2d Agency § 2 (1986). A broker is defined generally as an agent that carries on negotiations on

(continued...)

principal, a company acting as a finder also does not have an ownership interest in the products or services being offered and sold by third parties through the company's finder services.

Role of Financial Holding Companies as Finders

The activity of acting as a finder has taken on increased significance as technological developments in communications, computing, and the Internet have spurred innovations in the way buyers and sellers of products and services, including financial products and services, come together. These technological developments have encouraged the development of intermediaries who are able electronically to find and connect buyers and sellers in transactions that are negotiated and consummated by the buyers and sellers themselves.

While technological developments have made the intermediary function more common and important, the demands of buyers and sellers simultaneously have encouraged the combination of previously uncombined products and services as a means of attracting buyers through the added convenience of one-stop shopping tailored to the needs of specific consumers. Thus, finders increasingly are attempting to attract buyers by combining access to sellers of commercial or consumer products as well as providers of financial products, such as investment products and advice, loans, and various payment services.

Banking organizations, including banks and bank holding companies, have long facilitated the connection of buyers and sellers of nonfinancial products and services to a limited degree through the placement of commercial advertisements in customer mailings and through referrals that arise in connection with the banking organization's role as financial advisor or intermediary. More recently, the developments in electronic commerce over the Internet have allowed banking organizations to establish electronic sites that offer financial products and services in a manner comparable to the manner in which nonfinancial firms offer products

²(...continued)

behalf of its principal with the purpose of bringing the parties together on the terms established by the principal. 12 Am. Jur. 2d Brokers § 1 (1997). A finder, on the other hand, finds, interests, introduces and brings parties together for a transaction that they themselves negotiate, enter into, and consummate.

and services. The electronic sites often include connections to and advertisements by sellers of nonfinancial products and services that may be of interest to consumers of financial products and services. The expertise gained in conducting these activities is operationally identical to the expertise needed to act more broadly as a finder.

The Office of the Comptroller of the Currency (“OCC”) also has determined that acting as a finder is part of or incidental to the business of banking and therefore a permissible activity for national banks.³ The OCC has permitted national banks to act as a finder for nonfinancial products and services within parameters that closely parallel the limitations discussed below. Many state-chartered banks also are permitted to act as finders.⁴

Financial Holding Companies Permitted to Act as a Finder

The Board’s proposed rule would authorize financial holding companies to act as a finder, which is defined as acting as an intermediary in bringing together one or more buyers and sellers of financial or nonfinancial products or services for transactions that the parties themselves negotiate and consummate. Under the proposed rule, a financial holding company acting as a finder could provide any or all of the following services—

- (1) Identifying third parties that may be interested in engaging in a transaction between themselves;
- (2) Making inquiries of third parties as to their interest in engaging in a transaction with another party;

³ See 12 CFR § 7.1002; OCC Interpretive Ltr. No. 875 (Oct. 31, 1999); OCC Interpretive Ltr. No. 856 (March 5, 1999).

⁴ See Tex. Admin. Code § 11.83(d) (“A state bank, pursuant to request, may act as a finder in bringing together a buyer and seller, where the bank’s activity is limited to the introduction and it takes no further part in the negotiations.”). Several states also have “wild card” statutes that allow their state-chartered banks to engage in any activity that is permissible for national banks, which would include acting as a finder. See, e.g., 202 Ill. Comp. Stat. 5/5(11).

- (3) Introducing and referring potential parties to each other;
- (4) Arranging contacts and meetings between interested parties;
- (5) Conveying expressions of interests, bids, offers, orders, and confirmations relating to a transaction between third parties; and
- (6) Transmitting information concerning products and services to potential parties in connection with the activities described in paragraphs (1) through (5) above, such as transmitting to a buyer information concerning the products and services offered by a seller or transmitting to a seller the product preferences of a buyer.

The rule includes specific examples of services that a financial holding company could provide as a finder and the technological means through which such services could be provided. These examples are intended to illustrate some activities that constitute acting as a finder and do not attempt to define fully the ways in which a financial holding company may act as finder. These examples are included in the rule in order to remove ambiguity about the permissibility of certain activities specifically mentioned by various financial holding companies in their requests regarding finder activities. Accordingly, the rule illustrates that a financial holding company acting as a finder may—

- Host an “Internet marketplace” that consists of hypertext links to the web sites of third party buyers and sellers;
- Host on the company’s computer servers an Internet web site that allows various buyers and sellers to post information about the products and services they are willing to purchase and sell, locate potential counterparties for transactions, aggregate their orders for goods and services with those of other parties, and negotiate and enter into transactions between themselves;
- Host on its computer servers the Internet web site of a merchant that provides information about the merchant and its products and services and allows customers to place orders with the merchant; and
- Operate a telephone call center that provides consumers with information

about the services or benefits provided by a government or government agency and clerical assistance in completing applications to receive those services or benefits.

The Board invites comment on whether the rule should include additional examples of how a financial holding company could act as a finder.

The authority to act as finder does not restrict the manner in which a financial holding company may conduct activities that otherwise are permissible for a financial holding company to conduct. For example, financial holding companies have broad authority to act as a broker and advisor in the sale of securities. These activities, permissible under other provisions of Regulation Y, may be conducted without regard to the restrictions that apply to the financial holding company when it acts as a finder with regard to nonfinancial products or services.

Moreover, a financial holding company may conduct activities that otherwise are permissible for a financial holding company in conjunction with acting as a finder for other products and services so long as these other permissible activities are conducted within any limits applicable to those activities and the company's finder activities are conducted within the limitations applicable to finder activities under this proposed rule. For example, a financial holding company acting as a finder for a merchant under the proposed rule also could make, acquire, broker or service loans or other extensions of credit to the merchant or the merchant's customers; provide the merchant with check verification, check guaranty, collection agency and credit bureau services; provide financial or investment advice to the merchant or the merchant's customers; act as a certification authority for digital signatures and thereby authenticate the identity of persons conducting business with the merchant over electronic networks; and process and transmit financial, economic, and banking data on behalf of the merchant, such as by processing the merchant's accounts receivables and debit and credit card transactions, providing the merchant with bill payment and billing services, and processing order, distribution, accounting, settlement, collection and payment information for the merchant's transactions.⁵ Furthermore, under the proposal a financial holding

⁵ See 12 CFR 225.28(b)(1) (extending credit and servicing extensions of credit); (b)(2)(iii), (iv) and (v) (credit bureau, check guaranty, check verification,

(continued...)

company may market and provide its own financial products and services in conjunction with acting as a finder for buyers and sellers of nonfinancial products and services.

The Board expects that financial holding companies likely would engage in finder activities through electronic means, such as over the Internet or other electronic networks. The proposed rule, however, would allow a financial holding company to act as a finder through any technological means available.

Parameters Defining Finder Authority

As noted above, a finder's role is limited to acting as an intermediary in bringing third parties together for a transaction that the parties themselves negotiate and consummate. Paragraph (d)(1)(iii) of the proposed rule incorporates this restriction and includes several specific parameters designed to ensure that, when acting as a finder, a financial holding company does not exceed the limited role of a finder or otherwise become involved in any nonfinancial activity or transaction.

In particular, paragraph (d)(1)(iii) provides that a financial holding company acting as a finder may not bind any buyer or seller to a specific transaction or the terms of a specific transaction, or negotiate on behalf of a buyer or seller concerning a specific transaction. As noted above, these activities are outside the limited scope of a finder's role.

These restrictions, however, would not prohibit a financial holding company from conveying bids, offers, and orders between buyers and sellers, so long as the bids, offers and orders were negotiated and accepted by the buyers and sellers and not by the financial holding company. The proposed rule also would not prohibit a

⁵(...continued)

collection agency and credit bureau services); (b)(6) (financial and investment advice); 12 CFR 225.86(a)(2) (certification authority for digital signatures) and (b)(1) (management consulting services); and 12 CFR 225.28(b)(14), Banc One Corporation, Inc., 83 Federal Reserve Bulletin 602 (1997); Royal Bank of Canada, 83 Federal Reserve Bulletin 135 (1997); Compagnie Financiere de Paribas, 82 Federal Reserve Bulletin 348 (1996) (financial data processing and data transmission services).

financial holding company from arranging for a seller to offer its goods or services on preferred terms to buyers generally or broad categories of buyers, if the financial holding company did not negotiate the terms of the arrangement as part of any individual transaction and the preferred terms were made available by the seller (and not the financial holding company). One of the permissible functions of a finder is to make inquiries as to the interest of a seller in entering into transactions with buyers, which includes determining the terms the seller is willing to offer buyers. Where the finder arranges for a seller to offer preferred terms to broad categories of buyers, and such negotiations are conducted outside the context of any individual transaction, the finder would not become involved in the negotiations between the buyer and seller concerning a specific transaction.

Under the proposed rule, a financial holding company may not take title to, acquire, or hold an interest in any product or service. A finder may act only as an intermediary between a buyer and seller in the sale of products and services, and may not have an ownership or principal interest in the products or services being offered or sold. Similarly, a financial holding company may not, under the auspices of acting as a finder, own or operate any real property that is used for the purpose of manufacturing, storing, or assembling products offered or sold through the company's finder services or provide distribution services for physical products or services offered or sold through the company's finder services. The Board requests comment on whether the rule should specify other activities that are outside the scope of finder activities.

Finally, paragraph (d)(1)(iii) clarifies that the proposed rule does not authorize a financial holding company to engage in any activity that would require the company to register or obtain a license as a real estate agent or broker under applicable law. The Board has made no determination to date regarding whether real estate agency, brokerage, investment or development activities are financial activities permissible for financial holding companies, and nothing in the proposed rule is intended to authorize a financial holding company to engage in these activities by, for example, owning or operating real property that serves as a shopping mall, a retail store, a manufacturing plant, or a product distribution center. The Board expects to monitor the finder activities of financial holding companies to ensure that companies engaged in finder activities comply with the restrictions contained in the rule and do not become impermissibly involved in real estate activities or commercial transactions entered into by third parties through the company's

finder services.

The limitations in paragraph (d)(1)(iii) are restrictions on the activities that a financial holding company may conduct as a finder under the proposed rule. They do not apply to or restrict the authority of financial holding companies to engage in other activities that are permissible for financial holding companies under section 4 of the BHC Act and the Board's Regulation Y, even if the financial holding company engages in such activities in conjunction with its finder activities. For example, since insurance agency and insurance underwriting activities are permissible for financial holding companies, a financial holding company acting as a finder for an insurance company could also accept and negotiate insurance contracts on behalf of the insurance company and have a principal interest in the insurance products being sold, if the financial holding company had appropriately notified the Board of the company's intent to engage in insurance agency and underwriting activities under section 4(k)(4)(B) of the BHC Act.

Disclosure of Role

To reduce the likelihood that customers using a financial holding company's finder services may be confused about the company's role in the underlying transactions, paragraph (d)(1)(iv) of the proposed rule provides that a financial holding company acting as a finder must distinguish the products and services it offers from those offered by a third party through the financial holding company's finder service.

Request for Comments

The Board invites comment on all aspects of the proposed rule. In particular, the Board invites comments on whether the examples included in paragraph (d)(1)(ii) of the proposed rule are useful and whether additional examples of permissible finder activities should be included in the rule. The Board also requests comments on whether the restrictions contained in paragraph (d)(1)(iii) of the proposed rule should be modified, expanded, or restricted in any way.

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 and has included in the rule examples of activities that would be permissible under the proposed rule. The Board invites comments on whether there are additional steps the Board could take 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 would determine that acting as a finder, as defined in the proposed rule, is an activity that is incidental to a financial activity and, consequently, permissible for financial holding companies. A description of the reasons why action by the Board is being considered 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 allow bank holding companies and foreign banks that qualify as financial holding companies to engage in a new activity--acting as a finder. The proposed rule would apply to all financial holding companies, regardless of their size. The proposed rule should enhance the ability of financial holding companies, including small financial holding companies, 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 financial holding companies compete. The Board specifically seeks comment on the likely burden the proposed rule would have on financial holding companies.

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 the authority delegated to the Board by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in the proposed 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:

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 225.86 is amended by adding a new paragraph (d) to read as follows:

§ 225.86 What activities are permissible for financial holding companies?

* * * *

(d) Activities determined to be financial in nature or incidental to financial activities by the Board.

(1) Acting as a finder--(i) What is a finder? A financial holding company may act as a finder in bringing together one or more buyers and sellers of products or services for transactions that the parties themselves negotiate and consummate. Acting as a finder includes providing any or all of the following services—

(A) Identifying potential parties, making inquiries as to interest, introducing and referring potential parties to each other, and arranging contacts between and meetings of interested parties;

(B) Conveying between interested parties expressions of interest, bids, offers, orders and confirmations relating to a transaction; and

(C) Transmitting information concerning products and services to potential parties in connection with the activities described in paragraphs (d)(1)(i)(B) and (C) of this section.

(ii) What are examples of finder services? The following are examples of services that a financial holding company may provide as a finder when done in accordance with paragraph (d)(1)(iii) of this section—

(A) Hosting an Internet marketplace on the financial holding company's Internet web site by providing hypertext links to the web sites of third party buyers or sellers;

(B) Hosting on the financial holding company's servers the Internet web site of a seller that provides information concerning the seller and its products or services and allows buyers to submit orders for such products or services;

(C) Operating an Internet web site that allows multiple buyers and sellers to post information concerning the products or services that they are willing to purchase or sell, locate potential counterparties for transactions, aggregate their orders for goods or services with those made by other parties, and enter into transactions between themselves;

(D) Operating a telephone call center that provides consumers with information concerning the services or benefits provided by a government or government agency and clerical assistance in completing applications to receive services or benefits from the government or agency.

(iii) What limitations are applicable to a financial holding company acting as a finder? In acting as a finder, a financial holding company may act only as an intermediary between a buyer and a seller and may not—

(A) Bind any buyer or seller to a specific transaction or the terms of a specific transaction;

(B) Negotiate on behalf of a buyer or seller concerning a specific transaction, except that a financial holding company may arrange for buyers to receive preferred terms from sellers so long as the terms are not negotiated as part of any individual transaction, are provided generally to customers or broad categories of customers, and are made available by the seller (and not by the company);

(C) Engage in any activity that would require the financial holding company to register or obtain a license as a real estate agent or broker under applicable law;

(D) Take title to or acquire or hold an ownership interest in any product or service offered or sold through the financial holding company's finder services or provide distribution services for physical products or services offered or sold through the company's finder services; or

(E) Own or operate any real property that—

(I) Is used for the purpose of manufacturing, storing or assembling products

offered or sold by third parties; or

(2) Serves as a physical location for the physical purchase, sale or distribution of products or services offered or sold by third parties.

(iv) What disclosures are required? A financial holding company acting as a finder must distinguish the products and services offered by the financial holding company from those offered by a third party through the company's finder service.

By order of the Board of Governors of the Federal Reserve System, July 31, 2000.

(Signed) Jennifer J. Johnson

Jennifer J. Johnson,
Secretary of the Board.