I. INTRODUCTION

In 1933, the Glass-Steagall Act created a "complete divorcement" between commercial and investment banking.¹ Under this legislation, commercial banks were prohibited from engaging in the underwriting of securities.² In addition, the Bank Holding Company Act of 1956 restricted the ability of bank holding companies to enter into various business arenas or to purchase other banks.³ However, over the years, banks have found loopholes to expand their business and to avoid such banking regulations.

As the Glass-Steagall Act was diluted by numerous Federal Reserve Board rulings and bank activities, it became apparent that there was a need for new legislation.⁴ Glass-Steagall was out of date, and it was restricting United States banking institutions here and abroad by limiting commercial banks and their affiliates from engaging in investment opportunities. The Gramm-Leach-Bliley Act of 1999⁵ ("GLB") repealed Glass-Steagall's Section 20, which banned affiliations between member banks of the Federal Reserve and firms that were "engaged principally in the issue, flotation, underwriting, public sale, or distribution...of stocks, bonds, bonds, and obligations."²

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¹ Jerry W. Markham, Banking Regulation: Its History and Future, 4 N.C. BANKING INST. 221, 223-85 (2000) (citing S. Rep. No. 73-1455, at 185 (1934)).
² Id.
³ Id.
⁴ Markham, supra note 1.
debentures, notes, or other securities," and Section 32, which provided that "[n]o officer, director, or employee" of a company engaged principally in underwriting securities could concurrently serve "as an officer, director, or employee" of a Federal Reserve member bank.

The Gramm-Leach-Bliley Act ratified what had already been accomplished through legal loopholes. GLB maintains the functional regulatory system as the basis for regulating the expanded activities of the banks and their holding company structures. This means that traditional commercial banking activities would continue to be regulated by the bank regulators and securities activities would be regulated by the SEC and state securities commissions. By eliminating prohibitions on affiliations between commercial banking, investment banking, and insurance companies, GLB is expected to initiate a new wave of mergers as securities underwriters, insurers, and banks combine to form more diversified financial services corporations.

Financial services have become increasingly globalized as of late. GLB has set the stage not only for a wide array of mergers and acquisitions domestically, but GLB also provides avenues for foreign banks to enter the United States financial services market and for United States financial companies to pursue interests in other countries. However, the initial enactment of GLB was discriminatory against foreign banks electing to become financial holding companies in that GLB provided different standards for foreign and domestic applicants.

Since the enactment of GLB, the Federal Reserve Board has issued an interim ruling and several amendments to the interim rule that clarify the process of becoming a financial holding company. This article will examine how these rulings affect German banks. The first section will describe the German banking system, which is a complex system of banking institutions and credit cooperatives. The second section will take a

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10. Id.

11. McCoy, supra note 8.

closer look at the Glass-Steagall and Gramm-Leach-Bliley Acts. The third section will analyze the new regulations established by the Federal Reserve’s interim ruling and amendments of Gramm-Leach Bliley, and how these rulings pertain to German banks wishing to become financial holding companies under GLB. This paper will show that the new regulations issued by the Federal Reserve Board will alleviate burdens the Act placed on German banks by equalizing the playing field between foreign and domestic entities.

II. STRUCTURE OF GERMAN BANKS

The German banking system varies significantly from that of the United States in form and permissible activities. It is, therefore, important to understand the structure of the German banking system before analyzing how United States laws affect foreign banks.

German banks offer a wide range of financial services, some of which are prohibited activities in the United States. There is no division between commercial and investment banking in Germany. Thus, the universal banking system allows banks to own equity in and/or control commercial, industrial, and insurance companies. As long as non-banking corporations are deemed “reliable” by the Bundesaufsichtsamt für das Kreditwesen (Federal Supervisory Authority), such corporations may own up to 100 percent of a banking corporation’s equity interest.

Banks in Germany have taken the role of initiators, advisers, and financiers of mergers and acquisitions. While all German banks have the power of universal banking, only a few actually underwrite securities. Instead, the German banking system is highly segregated. The banking industry is divided into three major sectors: public sector banks, cooperative banks, and private banks. The Genossenschaftsbanken, or credit cooperative sector, primarily deals with small business and

15. Id.
17. Id.
agricultural financing. The Geschäftsbanken are private commercial banks. Finally, the Sparkassen and Landesbanken, which are public savings banks, maintain a majority of deposits and dominate the local market.

The group of credit associations, or Genossenschaftsbanken, is composed of local associations (Volksbanken and Raiffeisenbanken), their regional institutions (Zentralbanken), and a central institution (Deutsche Genossenschaftsbank). The local credit associations are structured in the form of co-operatives. Banking services under the Genossenschaftsbanken were initially only accessible to members, who had set up the co-operatives as "self-made banks" to finance agricultural and industrial undertakings. Their business today encompasses all types of financial services and is no longer limited to members. In regards to branching, the Genossenschaftsbanken constitute the most widespread banking group in Germany today, with a market share of approximately twenty-one percent.

The Geschäftsbanken, or private commercial banks, developed as the country industrialized in the nineteenth century. The lack of an equity market capable of meeting the financial needs of emerging industrial enterprises forced Germans to turn to banks for capital. Thus, during the nineteenth century, banks and industry developed a close relationship. In the twentieth century, these relationships were strengthened in the inter-war years, when banks were obligated to take stock as protection from financially troubled companies. Following World War II, German capital markets were once again weakened. The reconstruction of the destroyed industry heavily depended upon the Marshall Plan, which poured a significant amount of United States' funds into Germany. After initial allied plans to divide the large commercial banks into smaller entities were

20. Id.
21. Id.
22. Id.
24. Id.
26. Id. at 1356.
27. Id.
28. Id.
29. Id. at 1356.
abandoned, the large commercial banks regained their prominent position within the German economy.\textsuperscript{30}

Currently, the private commercial banks are divided into four categories. These types consist of big branch banks (Gro\textsuperscript{S}Sbanken), regional banks (Regionalbanken), private bankers (Privatbankiers), and the branches of foreign banks. Regional banks are organized either as stock corporations (Aktiengesellschaft-AG) or as limited liability companies (Gesellschaft mit beschrankter Haftung-GmbH).\textsuperscript{31} These regional banks maintain a nationwide network of branches with a concentration on a specific region.\textsuperscript{32} In contrast, private bankers comprise all banks organized as partnerships. Nearly all of these private commercial banks function as universal banks.\textsuperscript{33} They, therefore, engage in all types of banking operations.\textsuperscript{34} The private commercial banks comprise thirty-five percent of the commercial bank market share.\textsuperscript{35}

Sparkassen, or savings banks, are established by cities and incorporated under state public law.\textsuperscript{36} Throughout German history, municipalities and counties considered the opportunity to earn interest on deposits (of any amount) to be part of their public welfare function.\textsuperscript{37} In order to provide their citizens with this service, counties and cities formed Sparkassen. Savings banks focus on traditional banking services.\textsuperscript{38} These services include the extension of commercial loans and the acceptance of deposits (that the depositor may withdraw upon demand).\textsuperscript{39} Savings banks' operations are limited to the locality of the establishing municipality or district, under what is referred to as Regionalprinzip (or the "territorial principle").\textsuperscript{40}

\textsuperscript{30} Nance & Singhof, \textit{supra} note 16.

\textsuperscript{31} The so-called "Big Three" (Deutsche Bank AG, Dresdner Bank AG, and Commerzbank AG) have become a party of four after the merger of Bayerische Hypotheken und Wechselbank and Bayerische Vereinsbank AG into Bayerische HypoVerinsbank. By the end of 2000, it was expected that there would be a party of three again as a result of a proposed merger between Dresdner Bank AG and Deutsche Bank. Even though this particular merger failed, other mergers of significance are likely to ensue. \textit{Id.}

\textsuperscript{32} Nance & Singhof, \textit{supra} note 16.

\textsuperscript{33} \textit{Id.} at 1357.

\textsuperscript{34} \textit{See generally} Garten, \textit{supra} note 13.

\textsuperscript{35} Nance & Singhof, \textit{supra} note 16, at 1357.

\textsuperscript{36} \textit{Id.} at 1352.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} Kim, \textit{supra} note 14.
Like the majority of German banks, Landesbanken are universal banks engaging in both investment banking and commercial banking functions. In addition, Landesbanken invest in commercial and industrial ventures. Landesbanken are not corporations; instead, they are established under public law, and their obligations are guaranteed by the German States.

Landesbanken play a vital role in the German banking business and in the sector of international financial institutions. One reason for this position is their close connection with their sponsoring state or political subdivision of a state. Unlike commercial banks organized as entities under the general corporate law, the internal structure of Landesbanken is congruous with the requirements of their regulatory supervision. Landesbanken are at a disadvantage to other German banking institutions in that it is more difficult for Landesbanken to create new capital. However, Landesbanken provide a unique protection for all customers, whether as depositors, fund transfer customers, purchasers of securities, or other types of customers. The Landesbanken's lengthy history of more than 100 years has demonstrated the fortitude of the public sector banking organization and has shown that the states and their subdivisions have benefited from the system of the Landesbanken.

The universal banks are valid throughout the European Union ("EU"). Each member state of the EU recognizes the banking license of the universal banks, subject to limitations. Since they are not hampered by restrictions on activities or by geographic limitations, some larger German banks are actively engaged in United States banking and capital markets.

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42. Id.
43. Id.
44. Id.
45. Gruson & Schneider, supra note 41, at 355.
46. Id.
47. See Gruson & Schneider, supra note 41.
48. Id.
49. Id.
Baden-Wurttemberg have all made public offerings of debt securities in the United States.\textsuperscript{52}

The EU has encouraged the proliferation of financial services abroad. As the world's third largest economic power, Germany has sought to expand its financial strength into other countries, primarily the United States.\textsuperscript{53} However, as German financial institutions expand into different countries, the banks must comply with the laws of the various countries.

III. REGULATIONS ON UNITED STATES BANKING

Following the United States stock market crash of 1929, the Glass-Steagall Act was enacted.\textsuperscript{54} Since it was thought that banks' involvement in the stock market was a contributing factor to the crash, the Act sought to divide commercial banking and investment banking in the United States.\textsuperscript{55} By prohibiting banks from underwriting securities, the federal government sought to protect investors.\textsuperscript{56} The law also prohibited affiliates of banks from being principally engaged in underwriting securities, and banned banks and securities firms from sharing board members and directors.\textsuperscript{57}

The United States entered into its worst depression after the stock market crash of "Black Thursday" on Wall Street, October 24, 1929. With more than 11,000 commercial bank failures from 1930 to 1933, the number of functioning commercial banks was reduced by more than forty percent from 25,000 to 14,000.\textsuperscript{58} A quarter of the working population became unemployed by 1933.\textsuperscript{59} Under the newly elected Roosevelt administration, Congress passed the Glass-Steagall Act in 1933, which prohibited commercial banks from engaging in securities transactions (the principal exception being that commercial banks were allowed to underwrite most government-issued bonds).\textsuperscript{60} It was the prevailing belief that the cause for these bank failures and the stock market crash was the involvement of banks in securities transactions.\textsuperscript{61}

\begin{itemize}
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Freis, supra note 19.
\item \textsuperscript{54} Markham, supra note 1.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{60} See 12 U.S.C. § 24 (1994).
\item \textsuperscript{61} Adam Nguyen & Matt Watkins, Financial Services Reform, 37 HARV. J. ON LEGIS. 579 (2000).
\end{itemize}
Populist sentiment, not careful inquiry, encouraged the passage of the Glass-Steagall Act. In light of disclosures of disreputable practices and dishonest dealings with such banks as National City Bank, public mistrust of speculative securities dealings carried over into commercial banking. This hastened the enactment of the Glass-Steagall regulatory measures. Some historians now attribute the bank failures to the Depression itself, which caused real estate and other values to fall, thus undermining bank loans. Furthermore, these historians note that securities abuses played a minor role in the collapse of banks. There were few failures among the New York banks, which had the largest Wall Street operations. Actually, the legislative history to the Glass-Steagall Act does not indicate that Congress blamed banks or their securities for the onset of the Great Depression, but instead, shows congressional concern with the relationship between commercial banks and their subsidiaries that underwrote securities, and the ability of the banks, through their subsidiaries, to dominate corporate underwriting.

Since the passage of the Glass-Steagall Act, banks and other financial service industries gradually chipped away at the restrictions between commercial and investment banking. The banking industry pressed for almost two decades for the repeal of the Glass-Steagall Act and for changes to the Bank Holding Company Act ("BHCA"). Regulatory interpretation, cross-industry relationships, court rulings, and marketplace practices had an impact on the practicality of these two statutes, but no legislative action was taken.

The business of traditional banking and investment banking had converged prior to enactment of GLB. In addition, banks were significantly involved in the insurance business through such sources of authority as "the place of 5000" exception to Section 92 of the National

62. Markham, supra note 1, at 237.
63. See Macey, supra note 59.
64. Id.
66. J. Robert Brown, Jr., The "Great Fall:" The Consequences of Repealing the Glass-Steagall Act, 2 STAN. J.L. BUS. & FIN. 129, 138 (1995) (citing 75 Cong. Rec. 9887 (1933) and 75 Cong. Rec. 9904 (1933)).
67. Id.
68. Id.
69. Id.
70. Nguyen & Watkins, supra note 61.
Banking Act ("NBA")," and Section 24 (Seventh) of the NBA, providing that national banks may engage in the business of banking and "all such incidental powers as shall be necessary to carry on the business of banking." Furthermore, the Supreme Court in Barnett Bank of Marion County v. Nelson held that state legislation could not restrict national banks from selling insurance.

Likewise, insurance companies started to sell securities—e.g., products such as variable annuities—and found ways to bypass restrictions of the BHCA, which prohibited mixing of banking and nonbanking activities. Some strategies to achieve this consisted of owning a thrift subsidiary, a "nonbank" bank, and operating a limited purpose trust.

United States Senator Gramm of Texas, in a November 3, 1999 floor statement, summarized this evolution:

This bill we bring to the floor of the Senate basically knocks down the barriers in American law that separate banking from insurance and banking from securities. These walls, over time, because of innovative regulators and because of the pressure of the market system, have come


74. The variable annuity was held to be a security by the Supreme Court. See SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65, 71-72 (1959). Annuity premiums were invested in securities, and therefore the performance of such investments determined the income of the variable annuity, a product sold to compete with mutual funds.

75. The Savings and Loan Holding Company Act (Codified as 12 U.S.C. § 1730A (1994)) provided that a company owning a single thrift institution, with sixty-five percent or more of its assets devoted to housing or consumer-related lending, was not restricted to any restrictions on other activities undertaken by the company. GLB closes this loophole.

76. A nonbank bank is an institution that failed to meet the BHCA's definition of a bank, which is an institution that both accepts demand deposits and makes commercial loans. The Competitive Equality Bank Act of 1987 closed this loophole, but grandfathered nonbank banks existing as of March 5, 1987. See 12 U.S.C. § 1841 (c)(A) (1994) (defining "bank" under the BHCA).

77. See 12 U.S.C. § 1841(c)(2)(D) (1994). A trust company is not considered a bank under the BHCA if functioning "solely in a trust or fiduciary capacity," accepting only trust funds deposits (as opposed to demand deposits) and does not offer FDIC insurance.
to look like very thin slices of Swiss cheese. As a result, we already have substantial competition occurring, but it is competition that is largely inefficient and costly, it is unstable, and it is not in the public interest for this situation to continue.\textsuperscript{78}

The convergence, which took place between banks, insurance companies, and securities firms, and the trend toward consolidation of these industries to create "one-stop-shop" financial centers, is best illustrated by the 1998 merger of two large United States banks, Citicorp and Travelers, into the conglomerate, Citigroup.\textsuperscript{79} The Federal Reserve Board ("FRB") approval of the merger was subject to the divestiture of the Travelers' insurance underwriting business.\textsuperscript{80} Under the BHCA, the divestiture period for non-conforming assets is two years by statute, with the FRB allowed to grant three additional one-year extensions.\textsuperscript{81} Obviously, Citigroup was counting on Congress to change the laws before the expiration of the divestiture deadline.\textsuperscript{82}

In passing GLB, Congress gave formal recognition of the many changes that had already occurred in the marketplace during the prior two decades.\textsuperscript{83} Senator Rod Grams of Minnesota acknowledged that the world envisioned by GLB already existed at the time of enactment, stating that "many times Congress shows up at the dance after the music is over."\textsuperscript{84}

However, attempts to repeal the Glass-Steagall Act began almost as soon it was passed.\textsuperscript{85} The most vocal proponent of its repeal was, ironically, one of the bill's authors, Senator Carter Glass. Only two years after the Glass-Steagall Act was adopted, Glass believed it was a "mistake and overreaction."\textsuperscript{86} However, the more frequent and serious reform attempts were made in the 1980s and 1990s. The last unsuccessful attempt

\begin{verbatim}
79. Cox, supra note 65, at 902.
80. Id.
82. See Cox, supra note 65.
83. Cocheo, supra note 78, at 6.
85. Id.
\end{verbatim}
was in 1998, with the proposed Financial Services Competitiveness Act of 1997. H.R. 10, introduced in the 105th Congress, would have repealed Sections 20 and 32 of the Glass-Steagall Act, thus allowing affiliations among banks, securities firms, and insurance firms through financial holding companies to be regulated by the FRB. The proposed Act would also have created a new entity, the Wholesale Financial Institution, which would not accept deposits of less than $100,000, and would not be federally insured. The White House opposed elements of H.R. 10, because it would have shifted some regulatory duties from the Department of the Treasury to the FRB. The bill was approved by the full House of Representatives on May 13, 1998 by one vote, but failed to reach a Senate vote, due to Senator Gramm's opposition to the CRA provisions in the bill.

Building on the activity that took place during 1997 and 1998, early legislation action followed in the 106th Congress. In the House of Representatives, Representative James Leach, Chairman of the House Committee on Banking and Financial Services, introduced on January 6, 1999, H.R. 10, the "Financial Services Act of 1999." On March 4, 1999, the Senate Banking Committee, under the Chairmanship of Senator Phil Gramm, revised a Committee Print that was then introduced as S.900, the "Financial Services Modernization Act of 1999." On March 23, the House Committee on Banking and Financial Services approved H.R. 10, which was then sequentially referred to the House Commerce Committee. In the meantime, on April 28, 1999, the Senate Banking Committee formally filed S.900, Financial Services Modernization Act of 1999, in the Senate. On May 6, 1999, the Senate passed an amended version of S.900, by a vote of 54-44. The House Committee on Commerce, under Chairman Thomas Bliley, reported its own version of H.R. 10 on June 15, 1999. Subsequently, the House Rules Committee resolved differences between the two versions of H.R. 10 and sent it to the House of Representatives, which passed the bill on
July 1, 1999 by a vote of 343-86. On H.R. 10 and S.900 then went to conference under bill number S.900.

On August 3, 1999, the Conference Committee held its first meeting, chaired by the Chairman of the House Banking Committee, Representative James Leach (Republican, Iowa). On October 12, 1999, Chairman Gramm, Leach, and Bliley released a “Chairmen’s Mark,” which became the document from which the conference committee would work. On October 14, 1999, the Department of Treasury and the FRB reached a compromise over their corresponding supervisory roles. On October 22, 1999, the conference committee held a final meeting. A compromise was reached on CRA, and the bill was named the Gramm-Leach-Bliley Act. The Conference Report together with the Statement of Managers Summary of Major Provisions dated November 1, 1999, was approved and signed by majority of conferees on November 2, 1999. On November 4, 1999, the Senate approved the Conference Report on S.900, by a vote of 90-8. The House of Representatives followed within hours by a vote of 362-57. On November 12, 1999, the President signed the bill into law.

GLB repeals Sections 20 and 32 of the Glass-Steagall Act. Section 20 prohibited member banks from affiliating with a company “engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.” The Act also repealed Section 32 of Glass-Steagall which provided that “no officer, director or employee” of a firm principally engaged in underwriting securities may serve “as an officer, director, or employee” of a member bank of the

95. Id.
97. Id.
98. Id.
99. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. GLB did not affect Sections 16 or 21 of Glass-Steagall.
Federal Reserve. This provision allows for the interlocking of various boards of banks and securities firms.

The Bank Holding Company Act prohibited bank holding companies from "providing insurance as a principal, agent, or broker." GLB's reversal of that restriction cleared the path for financial holding companies to own insurance companies. Under GLB, a company that wishes to participate in such industries must apply with the FRB to attain a financial holding company status. This new type of bank holding company, known as a financial holding company, may engage in expanded financial activities, either directly or via subsidiaries. A bank holding company that is not a financial holding company will be restricted in its activities to those that were previously determined to be closely related to banking. To that effect, Section 102 of GLB amends Section 4(c)(8) of the Bank Holding Company Act, allowing a bank holding company to control "shares of any company the activities of which had been determined by the Board by regulation or order under this paragraph . . . to be so closely related to banking as to be proper incident thereto . . . ."

Only banks that are "well capitalized" and "well managed" may elect to become a financial holding company. GLB also establishes the FRB as the "umbrella regulator."

GLB modernizes the delivery of financial services to consumers, allowing the financial industry to cross-market services among affiliates and third parties. The elimination of legal barriers to affiliations among banks, securities firms, and insurance companies will facilitate "one-stop shopping" consumer offerings for banking, insurance, and securities

107. Id.
111. Id.
112. Id.
113. Id.
115. See generally Nguyen & Watkins, supra note 61. Under the umbrella regulator structure, the Federal Reserve Board will regulate financial holding companies and their activities. Antitrust agencies such as the Department of Justice, Office of the Comptroller of Currency, Federal Trade Commission, the Fed, and the Federal Deposit Insurance Corporation retain the authority to review mergers and acquisitions. Other agencies—i.e., the SEC and state insurance regulators—will continue to functionally regulate securities and insurance activities. See generally id.
116. See id.
transactions. Greater competition and a more efficient financial service system should result in substantial savings to the consumer. Also, GLB should increase the international competitiveness of American financial firms.

GLB provides flexibility in structuring these affiliations and addresses how these structures will be regulated, including safeguards against adverse consequences from consolidation. By allowing most activities "financial in nature" to be conducted by either a holding company or a bank's financial subsidiary, GLB provides financial organizations with flexibility in structuring these new activities. Although the FRB's role of umbrella supervisor is maintained, GLB provides for functional regulation, thus utilizing the strengths of the various federal and state regulators. How this will develop remains unclear: with banking, insurance, and securities products becoming increasingly similar, a rationalization of the regulatory structure may be revisited by Congress in the future.

GLB provides for safeguards designed to mitigate adverse consequences from consolidation within the financial industry, such as

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118. Id.
119. Id.
120. Id.
121. Activities that are "financial in nature" include: underwriting, dealing in, or making a market in securities; 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 such insurance, in any state; lending, exchanging, transferring, investing for others, or safeguarding money or securities; issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly; providing financial, investment, or economic advisory services, including advising an investment company; all activities the Board determined were closely related to banking or managing or controlling banks as to be a proper incident thereto as of November 12, 1999; engaging in all activities that traditional bank holding companies may engage in outside of the United States; engaging in all activities that the Board determined were "usual in connection with the transaction of banking or other financial operations abroad" as to November 11, 1999; engaging in merchant banking by directly or indirectly owning securities acquired and held by a securities affiliate, an investment adviser affiliate or an insurance underwriting affiliate as part of a bona fide underwriting or merchant or investment banking activity; and directly or indirectly owning securities as an investment made in the ordinary course of business as an insurance underwriter.
122. Id.
123. See Macey, supra note 59, at 692.
requiring a bank holding company seeking financial holding company status to be "well capitalized" and "well managed." Another provision calls for a study to prevent the possible damage that would arise from the failure of a "too big to fail" institution.

GLB also provides for various consumer protection provisions, such as privacy of personal information and ATM fees disclosure. A minimum federal standard of financial privacy has also been established. However, as information sharing among affiliates is not subject to the new rules, the financial industry is not seriously affected in its ability to cross-market services among affiliates and third parties. More legislation on privacy can be expected, such as on the sharing of medical information that financial conglomerates may possess through their insurance subsidiaries. Major consumer protection provisions also include disclosure of surcharges on ATMs and consumer protection rules for insurance practices together with disclosure and advertisement requirements, including anti-tying provisions.

GLB maintains international supervisory standards established by the Basle Committee, which states that the holding company of a bank organization with multinational operations must be supervised by the home country of that bank. However, subsidiaries must register with the FRB as a "representative office." Foreign banks that do not maintain an American office may still be subject to United States banking supervision. Foreign-owned United States broker-dealer and investment managers may be required to register with the FRB. Also, a foreign banking organization that operates a branch or agency, or that owns or controls a bank or commercial lending company in the United States, is subject to the limits applicable to domestic bank holding companies and

124. Id.
129. Bartlett, supra note 126.
130. Id.
131. McCoy, supra note 8.
133. Id.
134. Id.
financial holding companies. Therefore, the FRB applies domestic requirements of capital management and activities to foreign banks that operate branches in the United States.

IV. NEW REGULATIONS

The regulations instituted since GLB significantly affect foreign banks that operate in the United States. In January 2000, the FRB issued an interim rule that:

sets forth the procedures by which bank holding companies and foreign banks may submit to the Board an election to become a financial holding company and describes the period in which the Board will act on financial holding company elections. [The rule] also enumerates the criteria that bank holding companies and foreign banks must meet in order to qualify as a financial holding company. In addition, the newly added sections set forth the limitations that the Board will apply to financial holding companies that fail to maintain compliance with applicable capital, management, and CRA criteria.

In order to make the treatment of elections by foreign banks equal to those elections filed by domestic bank holding companies, the interim rule was amended to allow elections filed by foreign banks that meet the "well managed" and "well capitalized" provisions of the Act to become effective on the thirty-first day after filing, unless the Board finds the election unsatisfactory or the foreign bank agrees to extend the review period. In addition, the Board amended the interim rule to require that all domestic depository institution subsidiaries (such as thrifts and nonbank trust companies) of electing foreign banks be "well capitalized" and "well managed" and have satisfactory or better composite and Community Reinvestment Act ratings. This provision makes the requirements for foreign banks consistent with the requirements imposed on domestic bank holding companies. Finally, the Board amended the interim rule to deal

135. Id.
136. Id.
138. Id.
140. Id.
141. Id.
with banks that are chartered in countries where there is no comprehensive consolidated supervision determiner. Banks in such a situation should use the pre-clearance process provided by the interim rule if such a bank is considering making a financial holding company election.

The first amendment is intended to equalize the processing of elections filed by foreign banks and the processing of elections filed by domestic bank holding companies. Under the provisions of the interim rule as issued on January 19, 2000, an application to attain financial holding company status by a foreign bank or company is not effective until the Board makes an affirmative finding that the foreign bank meets specific capital and management standards.

However, a domestic bank holding company's election for financial holding company status is effective within thirty-one days of its filing unless the Board determines otherwise. Therefore, when a foreign bank applied to the FRB to obtain financial holding company status, the foreign bank was at the mercy of the FRB. The FRB had no time limitations on its review of the foreign bank. New regulations, however, impose a thirty-one-day time limit in which the FRB must determine whether the foreign bank is adequately capitalized and managed to be a financial holding company.

Under the amendment, the Board retains the authority to declare the election ineffective because of inadequate capital in comparison to the capital required for a domestic bank owned by a financial holding company. The rule was also amended to allow the Board to find an election ineffective if the Board does not have sufficient information to assess whether the foreign bank meets the criteria of a financial holding company. These changes ensure that qualified foreign banks will receive equal treatment as similarly situated domestic bank holding companies. If a foreign bank does not meet the rule's specified requirements, it may file a pre-clearance request for a specific determination on the comparability of

142. Id.
143. Id.
146. Id.
147. Id.
148. Id.
150. Id.
151. Id.
its capital and management.152 This pre-clearance request means that the FRB will return an assessment of what areas of the company’s capital and management do not meet the requirements needed to become a financial holding company.153

The second amendment clarifies the interim rule with respect to foreign banks that do not have a United States subsidiary bank, but may have other United States depository institution subsidiaries, such as thrifts and nonbank trust companies.154 The Gramm-Leach-Bliley Act requires that, in order for a bank holding company to be eligible to become a financial holding company, all depository institutions controlled by the bank holding company must be “well capitalized” and “well managed.”155 The interim rule required only that a foreign bank and each of its United States branches, agencies, and commercial lending subsidiaries be well capitalized and well managed in order for the foreign bank to be eligible as a financial holding company.156 In order to make the requirements for foreign banks consistent with the requirements imposed on bank holding companies, the interim rule was amended to mandate that all domestic depository institution subsidiaries of the foreign bank must be “well capitalized” and “well managed” for the foreign bank to qualify as a financial holding company.157 As a result, the rule was also amended to require that the foreign bank certify that its United States depository institution subsidiaries are “well capitalized” and “well managed.”158

A bank is deemed to be “well capitalized” if:

1. (i) its home country supervisor, as defined in §211.21 of the Board’s Regulation K (12 CFR 211.21), has adopted risk-based capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision (Basel Accord);

2. (ii) the foreign bank maintains a Tier 1 capital to total risk-based assets ratio of six percent and a total capital to total risk-based assets ratio of ten percent, as calculated under its home country standard;

153. Id.
154. Id.
155. Id.
158. Id.
(iii) the foreign bank maintains a Tier 1 capital to total assets leverage ratio of at least three percent; and

(iv) the foreign bank's capital is comparable to the capital required for a United States bank owned by a financial holding company; or

(2) the foreign bank has obtained a determination from the Board under § 225.91(c) that the foreign bank's capital is otherwise comparable to the capital that would be required of a United States bank owned by a financial holding company.

(c) standards for "well managed." A foreign bank will be considered "well managed" if: Each of the United States branches, agencies, and commercial lending subsidiaries of the foreign bank has received at least a satisfactory composite rating at its most recent assessment;

(2) the home country supervisor of the foreign bank considers the overall operations of the foreign bank to be satisfactory or better; and

(3) the management of the foreign bank meets standards comparable to those required of a United States bank owned by a financial holding company.”

A bank is “well managed” if:

(i) at its most recent inspection or examination or subsequent review by the appropriate Federal banking agency for the depository institution, the institution received:

(A) at least a satisfactory composite rating; and

(B) at least a satisfactory rating for management; or

(ii) in the case of a depository institution that has not received an examination rating, the Board has determined, after a review of managerial and other resources of the

depository institution and after consulting the appropriate Federal banking agency for the institution, that the institution is well managed.\textsuperscript{160}

The third amendment to the interim rule relates to the review of comprehensive consolidated supervision ("CCS") in connection with elections by foreign banks to become a financial holding company.\textsuperscript{161} Home country supervision is an important factor in the determination of whether a bank is "well managed."\textsuperscript{162} Most foreign banks that elect to be treated as financial holding companies will be subject to comprehensive consolidated supervision.\textsuperscript{163}

The interim rule allows a foreign bank or company to request a review of its qualifications prior to formally filing its election to become a financial holding company.\textsuperscript{164} In order to assist the Board's review of whether the management of a foreign bank meets the appropriate standards, the interim rule was amended. It encourages foreign banks that have not been reviewed by the Board with respect to home country supervision and that are chartered in countries where no other bank from that country has received a CCS determination from the Board (including a determination that the home country supervisor is actively working toward a system of CCS) to use the pre-clearance process if such bank is considering making an election to be treated as a financial holding company.\textsuperscript{165}

The amendment to the interim rule regarding bank holding companies is a revision of the definition of "well managed" applicable to a depository institution for purposes of determining qualification as a financial holding company under the Gramm-Leach-Bliley Act.\textsuperscript{166} For this purpose, the Board initially adopted the existing Regulation Y definition of "well managed."\textsuperscript{167} The Board's definition requires that a depository institution

\textsuperscript{160. Id.}
\textsuperscript{161. Id.}
\textsuperscript{162. Id.}
\textsuperscript{163. Id.}
\textsuperscript{164. 65 Fed. Reg. 3785 (Jan. 25, 2000).}
\textsuperscript{165. 65 Fed. Reg. 15053 (Mar. 21, 2000).}
\textsuperscript{166. Id.}
\textsuperscript{167. (c) Well managed—(1) In general. For purposes of this subpart, a depository institution is well managed if:

(i) at its most recent inspection or examination or subsequent review by the appropriate Federal banking agency for the depository institution, the institution received:

(A) at least a satisfactory composite rating; and

(B) at least a satisfactory rating for management; or}
have at least a satisfactory composite examination rating and at least a satisfactory rating for both management and compliance. This three-part definition was initially adopted by the Board as part of its effort to determine whether a bank holding company qualifies for expedited treatment in applications processing.

Therefore, a bank holding company qualifies for expedited processing if eighty percent of the depository institution assets of the company were “well managed.” In order to become and remain a financial holding company under the Gramm-Leach-Bliley Act, all of the depository institution assets of a bank holding company must be “well managed.”

The Gramm-Leach-Bliley Act does not address compliance ratings in determining whether an institution is “well managed.” Accordingly, the Board is amending its regulatory definition of “well managed” for purposes of determining qualification as a financial holding company to reflect the two-part test in the statute. Thus, a depository institution will be considered “well managed” for this purpose if it has a satisfactory composite rating and a satisfactory rating for management.

The Board continues to believe that compliance ratings are important and will address issues relating to compliance in other contexts. In particular, the Board and other federal banking agencies have supervisory authority to take full action against an institution if compliance issues are raised. In addition, each agency may consider compliance ratings when determining whether to approve any merger or expansion proposal involving the depository institution or the parent bank holding company of the institution.

The Gramm-Leach-Bliley Act allows financial holding companies in the United States to conduct banking, investment and insurance business

(ii) in the case of a depository institution that has not received an examination rating, the Board has determined, after a review of managerial and other resources of the depository institution and after consulting the appropriate Federal banking agency for the institution, that the institution is well managed.

169. Id.
170. Id.
171. Id.
172. Id.
174. Id.
175. Id.
through separate subsidiaries. This is a step toward the universal banking system already in existence in Germany. However, these steps imposed more rigid capital and management standards for foreign banks with United States branches thus having a discriminatory effect on foreign banks. In the final implementing regulations, the FRB relaxed the requirements for foreign banks. As a result, it will be easier for German banks to obtain and preserve United States financial holding company status.

The new regulations will make it easier for foreign banks to enter the United States market. Not only do the regulations level the playing field between domestic and foreign banks, by applying the same standards and time limits, but they also clarify the process for becoming a financial holding company.

The first amendment to the interim ruling will eliminate the discriminatory effect that GLB had against the election of German financial service institutions to become financial holding company in the United States. By applying the same time period in which the Federal Reserve Board must decide whether or not an election for financial holding company status is effective, domestic financial service companies and foreign financial service companies have the same opportunity to gain the perks of being a financial holding company. Prior to the amendment, a German bank would have to wait until the FRB assessed its election, without any given time schedule. Now, German banks will be afforded the same thirty-one-day period as any domestic bank would receive.

The second and third amendments will continue to tear down barriers that GLB instituted by clarifying the election procedures for foreign companies. The original standards for becoming a financial holding company in GLB were vague and difficult for German banks to be in compliance. These new criteria apply the same tests to domestic applicants as well as foreign companies. As such, German banks will be on equal footing with United States banks.

V. CONCLUSION

The new regulations promulgated by the Federal Reserve Board will alleviate the discriminatory effect that Gramm-Leach-Bliley had on German banks operating in the United States. By equalizing the playing field, both domestic banks and foreign banks will have the same opportunities regarding the election of becoming a financial holding company.

176. McCoy, supra note 8.