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U P D A T E

News of Developments in the Financial Sector and Related Areas

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Real Estate Activities of Financial Holding Companies

Earlier this year, the Federal Reserve Board and the Treasury Department jointly proposed a rule permitting real estate brokerage and management activities for financial holding companies, their subsidiaries and subsidiaries of national banks. The proposed rule sets forth that financial holding companies and financial subsidiaries would be permitted to provide real estate brokerage services including, among things, acting as an agent for a buyer, seller, lessor or lessee of real estate; listing and advertising real estate; providing advice in connection with real estate transactions; and providing real estate management services, including, among other things, procuring tenants, negotiating leases, and generally overseeing the inspection, maintenance and upkeep of real estate. The jointly proposed rule seeks comments on whether to determine by rule that real estate brokerage and management services are financial in nature or incidental to a financial activity, and therefore permissible for financial holding companies and financial subsidiaries under the Gramm-Leach-Bliley Act of 1999 (the "Act"). The National Association of Realtors has urged the banking regulatory agencies to determine that real estate brokerage activities are not financial in nature or incidental to a financial activity and are not authorized by the Act. The National Association of Realtors takes the position that real estate brokerage is a commercial and not a financial activity, and the proposed rule would allow financial holding companies and financial subsidiaries to buy up large brokerage firms and force the closure of smaller brokers who are unable to compete with the financial resources of banking entities. As a result of the position by the National Association of Realtors in opposition to the proposal, the comment period has been extended until May 1 on the proposed rule. The proposed rule that would allow financial holding companies and financial subsidiaries to act as real estate brokers and managers is reprinted in Fed. Banking L. Rep. (CCH) ¶No. 92-591.

Accounting for Goodwill

The Financial Accounting Standards Board ("FASB") has issued a revised draft of its 1999 proposed Statement, *Business Combinations and Intangible Assets*. The revised draft contains the FASB's tentative decisions requiring use of a nonamortization approach to accounting for purchased goodwill. Under the revised draft, goodwill would not be amortized against earnings as originally proposed, but instead would be reviewed for impairment, that is, written down and expensed against earnings only in the periods in which the recorded value of goodwill exceeded its implied fair value. The revised draft would require merged companies to allocate a pro rata share of goodwill to each of its "reporting" units, which the FASB defines as "the lowest level of an entity that is a business and that can be distinguished,

physically and operationally and for internal reporting purposes, from the other activities, operations, and assets of the entity." The revised draft would require companies to test the value of goodwill by determining the fair market value of each business unit as a stand-alone entity, and subtracting from that the value of its tangible assets. The draft lays out a number of events that would require the company to re-test the goodwill to check for impairment such as follows:

- A new product or technology is introduced in the market by the competition.
- The revenue of a reporting unit is lower than expected.
- There is a decrease in operating profit of a reporting unit.
- There is a mismatch of acquired product or technology with those that the company can use.
- The company has made a decision to restructure business units of operation.
- There is a loss of key personnel.

The revised draft would also include the triggering events in FASB Statement No. 121 for re-testing goodwill which include a change in market events, a physical change of the asset or the use of the asset, certain legal factors regarding the asset or excessive accumulated costs for the acquisition or asset. In the event a loss of value is detected at any business unit, the company would have to take a charge against earnings equal to the difference. The draft issued by the FASB is available on its website at *http://www.rutgers.edu/Accounting/raw/fasb/draft/edwebintro.html.*

Taxation of Banks for Cooperatives

Director of Revenue of Mo. v. CoBank ACB, 531 U.S. ____ (2001) involved the taxation of banks for cooperatives organized under the Farm Credit Act of 1933. The issue in this case was whether the banks for cooperatives being federally charted instrumentalities of the United States, are exempt from state income taxation. The cooperatives specialize in short-term loans to farmers and agricultural businesses. In the present case, the National Bank for Cooperatives filed Missouri corporate income tax returns for the years 1991 through 1994 and paid the taxes shown on those returns. However, in 1996, CoBank, the successor to all rights and obligations of the National Bank for Cooperatives, filed amended tax returns requesting exemption from all state income taxes. CoBank asserted that the Supremacy Clause of the United States Constitution accords federal instrumentalities immunity from state taxation unless Congress has expressly waived this immunity. CoBank further argued that because the current version of the Farm Credit Act does not expressly waive this immunity, banks for cooperatives are exempt from Missouri's corporate income tax. The Director of Revenue of Missouri denied the request for refunds, but the Missouri Supreme Court reversed the Commission's decision and held that banks for cooperatives are exempt from state income taxation holding that because the current version of the Farm Credit Act being silent as to banks for cooperatives' immunity from state taxation, Congress cannot be said to have expressly consented to state income taxes and, thus, the cooperatives are exempt from state income taxes. However, the Supreme Court concluded that had Congress intended to confer upon banks for cooperatives the more comprehensive exemption from taxation, it would have done so expressly and Congress' silence with respect to banks for cooperatives indicates that banks for cooperatives are subject to state taxation.