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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*

In connection with the proposed rule permitting real estate brokerage and management activities for financial holding companies, their subsidiaries and subsidiaries of national banks, the Federal Reserve Board and the Treasury Department have continued to delay action on the proposed rule. The proposed rule would have permitted financial holding companies and financial subsidiaries to provide real estate brokerage and servicing including, among other things, acting as 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 procuring tenants, negotiating leases, and generally overseeing the inspection, maintenance and upkeep of real estate. The National Association of Realtors opposes the proposed rule and 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. Proposed legislation has been introduced in both the United States Senate and the House of Representatives which would bar banks from such activities and which would prevent federal regulators from finalizing a rule allowing banking companies into the real estate business. Because of the support which has been gathered by the National Association of Realtors, it is expected that Congress will enact legislation prohibiting financial holding companies and national banks from engaging in real estate brokerage and management activities.

### *Check Clearing Act*

The *Check Clearing for the 21st Century Act* (the "Check Clearing Act") was recently signed into law by President Bush, which will require banks to accept image replacement documents. The Check Clearing Act will become effective on October 28, 2004. The staff of the Federal Reserve Board is currently drafting regulations, including model disclosure language for depository institutions to utilize in notifying consumers of their rights under the law, which will be available for comment. The Check Clearing Act facilitates check truncation by creating a new negotiable instrument called a *substitute check*, which would permit banks to truncate original checks, to process check information electronically and to deliver substitute checks to banks that want to continue receiving paper checks. A substitute check would be the legal equivalent of the original check and would include all the information contained on the original check. The Check Clearing Act does not require banks to accept checks in electronic form and does not require banks to use the new authority granted by the law to create substitute checks. Prior to the enactment of the new law, a dispute arose

between the Federal Reserve Board and AirNet Systems, Inc., the nation's largest check transportation company, over the Federal Reserve's disclosure of its check transportation cost. As a result, the law was revised to require the Federal Reserve to disclose the expenses and revenues of transporting commercial checks between processing facilities.

### *FDIC Insurance Coverage*

There was recently a quiz on the Yahoo Finance web site which asked the question as to how much could a married person arrange to deposit in certificates of deposit at a small bank and still have it insured by the FDIC. A majority of those responding to the quiz answered "up to $100,000," which reflects the difficulty of the populous in understanding FDIC insurance coverage. While it is true that the basic insured amount for a individual depositor is $100,000, deposits maintained in different categories of legal ownership are separately insured, resulting in more than $100,000 insurance coverage in a single institution. The most common categories of ownership are: single ownership, joint ownership and testamentary accounts. Additional insurance coverage is also available for funds held for retirement purposes, such as individual retirement accounts, Keoghs and pension or profit-sharing plans. A depositor cannot increase FDIC insurance coverage by dividing funds owned in the same ownership category among different accounts, such as checking and savings in the same institution; and the use of Social Security numbers or tax identification numbers does not determine insurance coverage. CDARS, pronounced "cedars," stands for *Certificate of Deposit Account Registry Service*. CDARS is a new financial product which allows small and medium banks to offer their customers insurance on deposits greater than $100,000, the usual amount to be insured, because the excess is placed with other banks. A community bank can spread large deposits across other institutions in the CDARS network in amounts under the $100,000 threshold. At the same time, an equal amount of funds from these other participating institutions in the CDARS network are placed in the initiating bank. As a result, each bank in the CDARS network ends up with the same amount of deposits brought to it by its customers, but the entire amount in each bank is insured, instead of just the original portion under $100,000. Information regarding FDIC insurance coverage, including questions and answers, is available at *www.fdic.gov*.

### *Cases, Releases and Rulings*

The Office of the Comptroller of the Currency ("OCC") has recently made available a publication entitled *A Pocket Guide to Detecting Red Flags in Board Reports* which is primarily written for bank directors and describes information which should be found in board reports and "red flags" areas, ratios and trends that may signal existing or potential problems for the bank. The *Pocket Guide* is available on the web site of the OCC at *www.occ.treas.gov*.

The OCC has recently issued Interpretive Letter No. 974 regarding the activities and the amount of interest that may be imposed by an operating subsidiary of a national bank. The fact situation in the Interpretive Letter was whether or not an operating subsidiary could originate mortgage loans and charge interest, including fees that constitute interest, of the state in which the main office of its parent national bank is located to borrowers residing in all states and without regard to the site of the real property securing the loan. The OCC held that the operating subsidiary may contract with borrowers in any state for interest at the maximum rate permitted by the law of the state in which the main office of its parent national bank is located and impose rates of interest without regard to the law of the state where the borrower resides.

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