

December 22, 2003

Mr. Robert Coleman
Director, Regulation and Policy Division
Office of Regulation and Policy and Analysis
Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102-5784

Dear Director Coleman:

On behalf of the National Association of REALTORS® and the REALTORS® Land Institute, I am pleased to provide comments regarding the Notice to approve a System institution's request to offer farm management and agricultural trust services. The National Association of REALTORS® represents more than 970,000 professional members who are appraisers, auctioneers, commercial, residential, farm and ranch brokers. REALTORS® also include real estate professionals who specialize in the management of all types of property, including farm managers and other investment properties, commercial and investment property managers, developers of commercial, investment, urban and rural real estate. REALTORS® also are involved in foreign real estate investment.

The REALTORS® Land Institute is an affiliate of the National Association whose 1,100 members specialize in farm, ranch and residential sales, commercial development and management of properties, and the full range of rural land and real estate transactions in all parts of the nation.

Many members of the REALTORS® Land Institute are designated Accredited Land Consultants (ALCs), who are awarded the designation by the National Association of REALTORS® Board of Directors. Accredited Land Consultants complete a comprehensive program of education and service and constitute a national network of recognized specialists. As land professionals, ALCs know current market values and work diligently to secure the best sale or purchase price for their clients. ALCs assist buyers and sellers in such areas as finance, leasing and land management.

The National Association of REALTORS® and the REALTORS® Land Institute oppose the Notice and urge the FCA not to move forward with granting the proposed request.

FCA Proposal

The Farm Credit Administration (FCA) is proposing to authorize a Farm Credit System (FCS) member institution to offer farm management and agricultural trust services. Should the authority be granted, there is the potential that farm management and agricultural trust services could be open to all FCS member institutions.

As listed by the Notice, the farm management services proposed are nearly identical with what

any real estate or property management services would involve. Professionals familiar with the market would provide management of agricultural properties for real estate owners in the service area. Farm management includes defining ownership goals, identifying problems, analyzing alternatives, and making recommendations for achieving business goals. Farm managers would present the customer with a full spectrum of lease or custom farming alternatives and help the owner decide how to ultimately get the best return on assets. Key factors of the service would include developing a comprehensive farm operating plan, securing operators and negotiating leases, providing property reporting, including annual budgets and projections, analyzing government programs, formulating and implementing capital improvements and repairs, and handling commodity sales.

With regard to agricultural trust services, the Notice indicates that the applicant would assist customers in creating a trust and managing the assets of the trust. As the trustee, the applicant would handle the responsibilities involved in settling the estate, including record keeping, asset management, asset disposition, tax filings, and income distributions.

The Notice outlines a significant departure for FCS institutions and deserves much more explication than what is provided. This is particularly so regarding farm management, which, like any property management, is a commercial activity that is currently off-limits to most nationally chartered banks and savings and loan institutions.

Commercial banks do not have property management authority, though taking advantage of the Gramm-Leach-Bliley Act (GLBA or GLB Act), financial holding companies and the financial subsidiaries of national banks are seeking authority from the Federal Reserve Board and the Secretary of the Treasury to broker real estate (including relocation services) and manage real estate properties. Noteworthy for this discussion is this: the joint proposal of the Federal Reserve and the Treasury attempts to redefine real estate activities as a financial services, not on the merits of a significant change in the marketplace, but by regulation.

Proponents of the pending Federal Reserve-Treasury regulation are seeking to accomplish a mix of banking and commerce by regulation where Congress denied such by statute because the GLB Act deliberately provided that banks, securities firms, and insurance companies could enter each other's business. In doing so, Congress did not go beyond removing the affiliation limits established by the Glass-Steagall Act and did not remove the divide between banking and commerce.

Banking and Financial Services Post-Gramm-Leach-Bliley Act

The GLB Act authorized the Federal Reserve Board and the Secretary of the Treasury to create financial services by joint agreement based on changes in the financial services marketplace or changes in the delivery of financial services to consumers. A strong case can be made that even nearly four years after the GLB Act became law little has changed in the financial services industry that would meet the tests to determine real estate brokerage and management as new financial services for financial holding companies and national bank operating subsidiaries.

The Federal Reserve Board and Treasury Department proposed in December 2000 a regulation that would redefine real estate brokerage (including relocation services) and property management as financial services to permit banks to broker and manage real estate. The proposed rule is extremely controversial. Two bills are pending in Congress that would permanently bar the Federal Reserve and the Secretary of the Treasury from declaring real estate brokerage and management as financial services going forward. We note that neither bill seeks to retroactively remove permissible activities for national banks prior to enactment of the Gramm-Leach-Bliley Act such as real estate trust activities. Of further note, a majority of the members of Congress are actively co-sponsoring the two bills. H.R. 111, the “Consumer Choice in Real Estate Act,” had 241 co-sponsors, as of October 21, 2003. Twenty-three Senators are co-sponsoring a similar bill, S.98, as of the same date.

Few bills have such broad, bipartisan support in Congress. Significantly the policy issue that the bill seeks to address goes to the heart of the matter of banks engaging in commerce. The majority of Congress holds that the sort of policy change contemplated by the proposed Federal Reserve-Treasury regulation is a matter for their decision, not that of the regulatory agencies.

The controversy is so important to members of Congress that FY2003 Treasury appropriations were frozen and could not be used to promulgate the proposed regulation. Congress again expressed displeasure at the prospect of banks engaging in real estate brokerage and management when it again prohibited FY 2004 Treasury appropriations from being used to finalize the proposed regulation.

Effectively, banking institutions regulated by the Federal Reserve and the Treasury Department are prohibited in expanding into real estate brokerage and management. The Farm Credit Administration is the new target of opportunity for member banking institutions. In fact, it would seem that an old pattern is being repeated. In the mid-1990s banks attempted to engage in real estate brokerage and property management. Specifically, a bank holding company petitioned the Federal Reserve to grant property management as a new non-banking activity. The Federal Reserve proposed a regulation, but subsequently withdrew the proposal in the face of objections from the real estate industry.

Not long after the Federal Reserve proposed and withdrew its property management regulation, the Farm Credit Administration proposed granting real estate and property management authority upon the request of a member institution. We would note that the FCA did not grant the farm management services request in 1995 because the requesting institution withdrew its request.

System-wide and Overarching Concerns

The FCA Notice raised several important questions relating to the mix of banking and commerce, conflicts of interest and self-dealing, liability to the FCA and member banks, and competition.

Mixing Banking and Commerce

Permitting a financial institution to expand into commercial activities is a major policy dispute as noted above. The issue is actually a perennially controversial expansion of authority as financial institutions maintain that they can better serve customers or markets despite the fact that they actually seek to expand into presumed profitable lines of business already provided by private, commercial sector entities. In debating the Gramm-Leach-Bliley Act, Congress considered and rejected expanding the commercial activities of banks beyond securities and insurance. The Act banned specifically real estate development as a permissible activity for national bank financial subsidiaries.

Farm Management Services

The current proposal to authorize “Related Services” is remarkable similar to the 1995 proposal. REALTORS® specializing in property management and farm management are quick to point out that nothing seems to have changed. Indeed, this observation is appropriate. We would point out that removing the farm label from the description underlines the fact that farm management is hardly distinct from management of any other real estate. Property management is a commercial activity that essentially creates obvious conflicts of interest and could expose the FCA to significant liability.

The management of real estate, whether it is commercial properties and shopping centers, offices, apartment buildings, hotels and motels, farms or ranches, is fundamentally the same. The type of property introduces variations in practice, but there are fundamentals that are associated with the financial aspects of property management that are similarly prominent.

Under the Gramm-Leach-Bliley Act real estate management is not a permissible activity for financial holding companies or national bank financial subsidiaries. The statute explicitly denies real estate development as a permissible activity. Noted above is the pending Federal Reserve-Treasury real estate regulation that would redefine real estate brokerage and property management as financial services thereby allowing financial holding companies and national bank subsidiaries to engage in these activities.

Issues and Concerns

The House Financial Institutions and Consumer Credit Subcommittee conducted a hearing on July 24, 2002 to examine the issues associated with the precursors to H.R. 111 and S. 98 in the 105th Congress and the pending joint real estate regulation proposed by the Federal Reserve and the Secretary of the Treasury. Among the witnesses was a representative of the International Council of Shopping Centers (ICSC), a major trade association representing shopping center owners, developers, managers, investors, lenders, retailers and other professionals. In testimony the ICSC representative raised significant concerns about conflicts of interest that could erode fair competition in property management. It was pointed out that a financial institution’s objectivity could be compromised or eroded when it reviews a proposed loan that also gives it the opportunity to participate in the profits of a project as a broker or property manager.

Conflicts of Interest and Self-Dealing

Whenever a financial institution may act as lender and fiduciary, there is the potential for self-dealing and conflicts of interest. The situation could occur where a farm management firm must seek funding from the FCS institution. The loan evaluation process necessitates the borrower divulging the underlying economic assumptions of the firm regarding markets, properties, and competition that could be used to undermine the firm.

A not unlikely scenario could occur where a farm property owner may provide detailed information to an institution's loan officer. Highly problematic lending arrangements are raised when an institution seeks to provide management services (or is able to steer away such services from another provider). There are clearly potential conflicts where the financial institution provides lending and anticipates management fees on the gross income of the property once it is operational.

Farm management and agricultural trust services are necessarily complementary and clearly can create conflicts of interest and self-dealing opportunities. In the absence of information to the contrary as provided by the Notice, REALTORS® must ask what standards of conduct will be established should the requested services be granted? What firewalls will be established to protect the FCA, the bank, and bank clients?

Successful real estate management involves many of the same functions as a real estate developer, including:

- Defining goals and identifying problems;
- Analyzing alternative and recommending business goals;
- Providing a full spectrum of lease and custom farming alternatives, and aid in decision-making;
- Marketing the property to potential lessees;
- Continually reevaluating the property for further development and redevelopment in order to stay competitive within the marketplace; and
- Engage in government relations and negotiations.

Liability

The vagueness of the Notice does not offer the opportunity to fully consider potential liability exposure that the FCA and its member banks may be encounter in farm management. It is a certainty, however, that property management entails environmental liability under federal and state laws.

Other scenarios also be imagined that can have their impact on the FCA and the System banks that involve attempts to cure default, debt restructure or foreclosure on property, when acting as

a fiduciary. Similar liability is raised when the FCA member bank seeks to maintain fiduciary loyalty to the beneficiaries.

Market and Competition

Permitting FCA institutions to provide farm management services is an unwarranted expansion in to activities currently provided by real estate professionals. There is already a significant infrastructure of fully competent and successful real estate land professionals available to provide farm management services. The real estate industry is one of the most competitive businesses in the country because of its relative ease of entry. The proposed farm management services will give an unfair competitive advantage to member banks. Moreover, it is quite inappropriate for a government-sponsored enterprise to move into farm management at this juncture. To do so extends to member institutions benefits with which the private sector farm management firms simply cannot compete.

Conclusion

In 1995 the FCA noticed a proposal that called for real estate brokerage and farm management services (60 Federal Register 36415, July 17, 1995). The current proposal is strikingly similar but does not include real estate brokerage, however the farm management services proposal is nearly exactly, word for word, the same proposal from the 1995 Notice. The National Association of REALTORS® opposed the earlier real estate brokerage and farm management proposal in 1995. We oppose the new proposal now and urge the FCA not to authorize either the farm management or agricultural trust services as related services for member institutions.

The Farm Credit Administration and its member institutions serve an important role in financing agricultural and farming transactions. In effect, FCA institutions that serve a critical purpose with considerable expertise and experience could be given incentives to venture into essentially new lines of business that would expose the System to conflicts of interest, political risks and new liabilities.

The Notice does not explain a reason for these new ventures or a rationale for allowing a government-sponsored enterprise to facilitate competition with a private sector property managers and related services providers. REALTORS® believe that FCA institutions could better serve farm and agricultural management interests by utilizing the existing private sector providers on a contract and cooperative basis.

The National Association of REALTORS® appreciates this opportunity to comment on the Farm Credit Administration Notice. We hope that these comments will be considered as positive efforts to assure that the Farm Credit Administration and the Farm Credit System institutions continue to function as the mainstay for financing rural and agricultural lenders, but without the potential entanglements that may threaten the System should member institutions expand their activities into real estate management and trust

services.

Sincerely,

David Lereah
Senior Vice President & Chief Economist