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FEATURE ARTICLES

The Consumer Advocates v. the Banks: Public Debate of Regulation Issues Survives Passage of the Financial Services Modernization Act

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Introduction

The Financial Services Modernization Act of 1999[2] was signed into law by President Clinton on November 12, 1999. The new law permitted banks to do securities and insurance business, two areas where as a general rule banks were not allowed. The reform law repeals 1930's Depression era law, particularly the Glass-Steagall Act[3], that separated the business of commercial banking from other businesses.

When Congress considered this financial services reform legislation, consumer advocates used this opportunity to argue for regulation to solve perceived consumer problems. Many of the issues argued by the advocates were not resolved by passage of the legislation. Some surviving issues have immediate impact on the wallets of consumers and taxpayers. These "pocketbook" issues include high bank fees to customers, bank protection of customer privacy, and Community Reinvestment Act obligations of financial institutions to poor communities. Also surviving is a series of issues concerning the safety and soundness of the country's financial institutions.

This article focuses on the continuing debate of the above issues.

Consumer advocates and bankers generally have opposing views on the need for regulation of financial services. Consumer advocates frequently recommend government regulation to meet perceived problems. Bankers generally oppose regulation, arguing that market forces usually solve consumer problems, and that failures in operation of the market should be met with the narrowest possible government intervention.

There are legitimate reasons to be interested in the ongoing arguments between consumer advocates and banking interests. Consumers need to be aware of instances where financial institutions may cause them harm. The aware consumer can shop for better services, take positions on relevant public policy questions, or consider other remedies.

Financial institutions need to take the measure of particular consumer arguments and consider the consequences should the public strongly support them. Although it is uncertain whether and when the general public will become strongly concerned about any particular consumer argument, the banking business could be inviting trouble by ignoring possible public outcries.

Legislators and policy makers interested in balanced issue resolution need to consider the character of the ongoing debates. Consumer advocates and banking interests generally present sharply conflicting arguments on particular regulation issues. The arguments reflect opposing philosophies concerning need for regulation and may be difficult to resolve.

Before considering the debates between consumer and banking institution advocates on particular issues, this article discusses the role of consumer advocates in the recent Congressional debate of financial deregulation.

The role of consumer organizations in debate of the recent financial reform law

Consumer advocacy organizations frequently testified to Congressional committees as Congress deliberated passage of what would be the Financial Modernization Act. The issues the advocates pressed most vigorously were pocketbook issues with obvious impact on ordinary people. The pocketbook issues included the following: (1) the high price of bank fees to customers for ATM and other services; (2) customer privacy rights with regard to information held by banks; and (3) Community Reinvestment Act issues concerning the obligation of financial institutions to invest in poor communities.

To a lesser extent, consumer advocates addressed the broader issues of the sufficiency of regulation to protect the nation's major financial institutions and the nation's economy. First, will the regulatory structure, particularly Federal Deposit Insurance provisions, be adequate to preserve the safety and soundness of the country's various financial institutions? Next, will the new multi-product institutions permitted by the new legislation be "too big to fail?" In other words, institutions so big that in the event of their business failure, the economy would be profoundly affected forcing the government to use great amounts of taxpayer money to bail them out. Finally, will the mixing together of commerce and banking activities in one enterprise create incentives for "crony capitalism," the kind of imprudent lending to closely related businesses that is often blamed for recent Asian bank failures?

Outline of the discussion to follow

This article next discusses each of the preceding series of issues brought to the attention of Congress by consumer advocates. Discussion of each issue begins with review of arguments of the advocates. The discussion then focuses on the debate likely to occur in the future. After reviewing the debates on particular issues, the article turns to topics that provide context. These topics include the following: (1) the recent disengagement of the general public from banking issues; and (2) an overview of the issues of financial institution deregulation.

A. "Pocketbook" Issues

1. High Bank Fees

Arguments made to Congress concerning high bank fees

Ralph Nader testified to a Senate Committee in June 1998 and offered his vision of vigorous financial services regulations. These regulations would be efficiently carried out by a single agency resulting in low cost financial institution services to the public.[4]

With regard to bank fees, he concluded that fees imposed by banks have become a disgrace because few, if any, are based on costs.[5]

Mary Griffin, of Consumers Union, reported to a Congressional committee the following information:

> In a 1996 study, Consumer Reports identified 100 separate fees that banks now impose on consumers. The size of those charges has been rising at better than twice the rate of inflation, jumping more than 50 percent on checking accounts between 1990 and 1996.[6]

Ed Mierzewski, U.S. Public Interest Research Group's Consumer Program Director, argued to Congress' House Banking Committee that bigger banks means bigger fees. Both PIRG and Federal Reserve Bank fee studies have confirmed that bigger banks use monopoly muscle to charge their customers higher fees than small banks and credit unions do.[7]

The Financial Services Modernization Act of 1999 generally does not meet the concerns about fees expressed to Congress by consumer advocates. For example, with regard to ATM fees, the new law simply requires notice to consumers by any automated teller machine operator who imposes a fee for providing host transfer services.[8] The fee notice, to be provided at the time of the ATM transaction, is intended to permit the consumer to choose another less expensive service provider.

The prospects for future debate on bank fees

Debate on bank fees continues. President Clinton has advocated a plan for low-cost bank accounts that responds to the wish of consumer advocates for low fees. He expressed concern that far too many families have no bank accounts at all.[9]

The *Washington Post* reports that from ATM fees to bounced-check charges to credit-card late fees, fees have become so numerous and so high that in some cases they have become a political issue.[10] *The American Banker* reports, "A movement against ATM surcharges appears to be picking up steam across the nation."[11]

Donald G. Ogilvie, executive vice president of the American Bankers Association, argues that no business should be expected to provide free services to non-customers. Mr. Ogilvie explains that federal law is on the side of the banks with regard to local regulation of ATM fees:

> There's already legislation that makes these municipal laws [prohibiting ATM use fees] illegal. The comptroller of the currency, which regulates national banks, has the authority

> and we believe will intervene to overturn these ordinances violating the National Bank Act. Efforts two or three years ago in Congress to bar these fees did not get any traction.[12]

The relationship between litigation and politics was discussed in an editorial in The Atlanta Journal-Constitution.[13] The editorial states that national banks argue that because federal law regulates them, local governments cannot regulate ATM fees.[14] The editorial then suggests that the issue is as much one of politics as law.[15] The editorial notes recent introduction of legislation in Congress that would help to regulate ATM fees.[16]

The issues of law and policy raised by high bank fees are two-sided, but it is hard to argue with the suggestion that the connection between public complaints and the possibility of new federal regulation is largely one of politics. There is no obvious legal obstacle to new federal law regulating aspects of the electronic payment system.

2. *Customer Privacy Rights*

Arguments made to Congress concerning privacy rights

Consumer advocates argued to Congress that a bank should not be allowed to share a customer's financial information with insurance or securities broker affiliates. In July 1999, Edmund Mierzwinski testified to Congress about privacy issues, speaking on behalf of Consumer Federation of America, Consumers Union, as well as U.S. PIRG.[17] He pointed out that numerous surveys, such as the recent AARP reports, have documented that consumers value their financial privacy.[18] He argued that Congress should enact legislation that does the following:

* Gives consumers the right to opt-in for all information sharing for secondary purposes, whether to affiliates or to third parties.
* Gives consumers clear notice and full disclosure of a bank's privacy policies for both affiliate and third party sharing and of the consumer's right to choose.
* Provides consumers with enforceable legal rights against violators.[19]

Mr. Mierzwinski explained that both affiliates and third parties make privacy invasions.[20] Failing to give consumers control over their information when it is shared among affiliates is failing to solve the problem.

The November 1999 Financial Services Modernization Act does not satisfy consumer advocates' points. It provides, in part, that generally "a financial institution may not, directly or through any affiliate, disclose to a *non-affiliated* third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer notice..."[emphasis added][21]

The prospects for future debate on privacy

Debate about financial institution privacy policies continues. Senator Paul Sarbanes said, "The issue of privacy will not go away with the passage of this legislation [The Financial Services Modernization Act]."[22] President Clinton, speaking at the bill signing ceremony for the Financial Services Modernization Act, said,

> I do not believe that the privacy protections go far enough. I am pleased the act actually instructs the Treasury to study privacy practices in the financial services industry, and to recommend further legislative steps. Today, I'm directing the National Economic

> Council to work with Treasury and OMB to complete that study and give us a legislative proposal that the Congress can consider next year.

State legislatures are reportedly considering financial institution privacy laws that would impose harder restrictions on banks than the federal financial reform law signed Nov. 12 by President Clinton.[23] Others in the news industry have declared that state "privacy laws may be set to spread like wildfire."[24]

3. Community Reinvestment Act Issues

Arguments made to Congress concerning Community Reinvestment Act issues

The Community Reinvestment Act ("CRA") requires that regulators review the adequacy of financial institution lending into poor communities. Recent Congressional debate of financial services reform included questions of the reach and underlying fairness of the CRA.

A number of consumer advocates testified to Congress in support of strengthening CRA requirements. Mary Griffin of Consumer's Union testified:

> Banks should not be permitted to avoid CRA obligations when their affiliates conduct lending activity. All lending activity conducted by banks and their affiliates should come under the CRA. As insurance companies and securities firms merge with depository institutions, they should come under obligations comparable to the federal CRA and other obligations of the type applied to banks.[25]

Consumer advocate Ralph Nader similarly argued that new financial reform law should expand CRA coverage to the new insurance and brokerage activities of banks.

At one point Congressional wrangling over CRA issues threatened the financial reform bill. Disagreements arose on which banks would have to follow CRA's community-lending guidelines and how often they would be examined.[27]

Also, Senator Phil Gramm was disturbed about CRA issues claiming that even frivolous protests on CRA grounds can delay bank mergers or expansions.[28] Additionally, banks have taken to paying community groups to go away. Gramm supported a legislative "sunshine" provision requiring banks to reveal payments to community groups. These groups then must reveal how they spend the money.[29]

For the most part, Congress ignored the views of consumer advocates. Some sunshine disclosure and filing requirements are imposed concerning bank dealings with community groups. The new Act provides for reduced CRA compliance review for banks with less than $250 million in assets and good CRA ratings.[30]

There is, however, some broadening of CRA obligations. For instance, the Federal Reserve Board may not approve the formation of a holding company that will form subsidiaries in non-banking businesses if any of the insured depository institutions in the system received poor CRA ratings.[31]

The prospects for future debate on CRA issues

Ralph Nader said that Congress caved to Senate Banking Committee Chairman Phil Gramm who has conducted a long, vitriolic attack on the Community Reinvestment Act and the low- and moderate-income and minority citizens who organize community organizations.[32]

Debate about CRA policies continues. The Houston Chronicle of November 12, 1999, reported,

> Critics say banking regulators are no longer serious about enforcing the Community Reinvestment Act...And they argue that what is already lax supervision is about to be weakened further...[C]ritics such as John Henneberger, co-director of the Texas Low Income Housing Information Center, say the new [financial services reform law] will send a signal 'that the Community Reinvestment Act is not going to be enforced as vigorously as it has been.'[33]

The following section will now move from pocketbook issues to broader systemic issues affecting the economy as a whole.

B. Systemic Issues

Core issues of the recently passed Financial Services Modernization Act concern the appropriate extent of government regulation of the financial institutions crucial to the U.S. economy as a whole. One such question is whether broadening the business that banks can do puts the nation's system of Federal Deposit Insurance at risk.

A broader question is whether permitting conglomerate firms to pursue banking, insurance, and securities business will lead to financial behemoths that are too big to fail. In other words, these companies would be so crucial to the national economy that government will inevitably be forced to subsidize their bail out from business failures at taxpayer expense. If so, what should be done about it?

Of course, the recent reform legislation does not eliminate all restrictions on what bank-based businesses may do. In general, they will not be permitted to do business beyond banking, insurance, and securities. That raises the question of whether the government's continuing restrictions that keep banks out of other businesses (for example, manufacturing) are reasonable.

Consumer advocates and systemic issues

The issues that affect the health of the economic system as a whole are of great importance to consumer advocates. If the U.S. economy were to weaken or collapse because of poorly considered regulation, the suffering that would follow dwarfs the consequences of high bank fees, privacy problems, or weak community lending practices.

Systemic issues are difficult challenges for advocates. It is hard to guess in advance just what the nature and extent of financial institution regulation needs to be to keep the economy healthy. Harm from inadequate regulation is contingent on financial institution failures that might or might not happen. Because the possible harm to consumers and taxpayers is not immediate, the harm is difficult for advocates to explain to the public.

Not all consumer advocates took on broad systemic issues in the recent Congressional debate of financial reform. Ralph Nader was perhaps the most noticeable consumer participant.

1. Federal Deposit Insurance Issues -- Does Reform Legislation Put FDIC Funds Under Great Stress?

Arguments made to Congress

While testifying to Congress in February 1999, Ralph Nader argued that after large past failures in savings and loan and commercial banks, "[T]here was an implicit promise...that new risks would not be added to deposit insurance and the federal safety net without commensurate strengthening of regulation. HR 10 [financial services reform legislation] does not keep that promise."[34] He added, "It would be shameful for this Committee to provide for trillion dollar conglomerates and leave taxpayers protected by the current rickety, overlapping and inadequate regulatory apparatus."[35]

Ralph Nader believes that financial institutions that have the benefit of Federal Deposit Insurance should be closely regulated to prevent risky behavior, thus avoiding putting FDIC funds in jeopardy.[36] He supports the approach of existing statutes that limit risky bank behavior.[37] For example, in 1991 Congress enacted the Federal Deposit Insurance Corporation Improvements Act ("FDICIA"), a system of early regulatory intervention in the operation of banks with insufficient capital.[38] This legislation is intended to reduce the cost of failures to the FDIC. In 1994, Congress amended the FDICIA to provide that Government bail-out of banks should stay within the bounds of paying the losses of insured depositors to the extent of the prescribed $100,000 payment limit.[39]

FDIC related issues were a source of mildly contentious Congressional testimony by Alan Greenspan of the Federal Reserve Board, on the one hand, and Treasury Secretary Rubin, on the other. Some of their comments addressed the same sort of safety and soundness concerns discussed by Nader, particularly whether permitting banks to be in new businesses would put greater stress on FDIC insurance of bank deposits. A May 1999 press report explained that the Federal Reserve has argued for a holding company structure for new financial services firms. Dr. Greenspan believes more risky businesses such as investment banking and securities underwriting should be done under a holding company structure, through affiliates.[40] He is trying to keep a bank's riskier businesses at arm's length from the insured consumer deposits. But Mr. Rubin [then Secretary of the Treasury], representing the Clinton Administration, believes that financial services companies should be able to decide for themselves whether to conduct new businesses such as investment banking and underwriting through operating subsidiaries.[41]

The tone of Alan Greenspan's testimony to Congress was sometimes quite strong:

> The Board believes that any version of financial modernization legislation that authorizes banks to conduct in their subsidiaries any activity as principal that is prohibited to the bank itself, is potentially a step backward to greater federal subsidization [of the bank's business]...I and my colleagues, accordingly, are firmly of the view that the long-term stability of U.S. financial markets and the interests of the American taxpayer would be better served by no financial modernization bill rather than one that allows the proposed new activities to be conducted by the bank ...[42]

The Financial Services Reform Act of 1999 represents a compromise between the Treasury and Federal Reserve Board views. Obviously, neither Agency has expressed public criticism of the compromise. It does appear that the Federal Reserve Board largely prevailed in its insistence on some form of holding company structure that minimizes the draining effect of new bank businesses on FDIC funds.[43]

The prospects for future debate on stress caused the FDIC by broadened bank business

Whether the FDIC structure is sufficient to meet the stress of future bank failures is a matter for conjecture. Future broad public debate of stress on FDIC funds will most likely be triggered only if there are great bank failures and drain of FDIC funds.

The public did notice when banks failed and FDIC funds were drained in the relatively recent past. In the early 1980's, Continental Illinois was among the banks the U.S. Government bailed out. That bail out reportedly caused the FDIC a loss of $1.7 billion in 1984.[44] In 1988, the FDIC rescued the nation's 13th largest bank holding company, First Republic Bank Corp., in a package reportedly worth $5 billion.[45]

Current concerns about stress on the FDIC are minor by comparison, but there are some who fear that the number of U.S. bank failures is spiking. Worse, the costs are skyrocketing: Seven failures so far this year will cost the Federal Deposit Insurance Corp. $864 million, the biggest loss since 1992.[46] Reporter Mike McNamee observed, "If bank regulators can't do better during these fat times at fixing troubled banks -- or taking prompt action to shut them down -- the next downturn in the economy could be ugly indeed."[47]

McNamee's point applies to the discussion of stress on the FDIC that could be caused by the entry of banks into new businesses, as permitted by the new Financial Services Modernization Act. If a downturn in the economy leads to bank failures; if the FDIC has difficulty dealing with the failures; if narrow regulatory fixes don't take hold; then the real possibility arises of a public outcry about the sufficiency of FDIC related regulation. An outcry could involve advocacy of increased regulation limiting the riskiness of the businesses in which banks involve themselves.

2. "Too Big to Fail" Issues

Arguments made to Congress

In February 1999, Deborah Goldberg of the Center for Community Change expressed to Congress the common perception that financial reform legislation will lead to mergers.[48] These mergers would then result in large conglomerate financial institutions that the government would protect from financial failure.[49] Broadening the authority for banks and other types of financial services firms to affiliate with one another is likely to result in unprecedented levels of concentration and consolidation within our financial system, giving rise to a handful of superbanks.[50] She predicted that the massive financial conglomerates promoted by this bill will surely be judged by the regulators to be "too big to fail."[51]

Ms. Goldberg thinks existing legal limitations on too big to fail financial institution bailouts may be illusory: "Although technically non-bank affiliates should be allowed to fail in an economic crunch, we question whether the proposed firewalls will be adequate to withstand the heat."[52]

The prospects for future debate on "too big to fail" concerns

The prospects for future debate are reviewed in Barbara Rehm's American Banker article titled "Reform Law Leaves The 'Too Big' Picture Too Fuzzy, Critics Say."[53] She writes, "It is common sense that the Government simply would not let a big financial firm collapse."[54] House Banking Committee Chairman Jim Leach said "The too big to fail problem exists in modern-day financial services despite all desires to the contrary."[55] That is, while there are legal constraints on Government help to failing institutions, those legal limitations will have little practical effect in the event of a great financial crunch.[56]

The Financial Services Modernization Act itself notes the need to avoid application of "too big to fail" doctrine, and insures future discussion. The new law gives the Fed and the Treasury until May 12, 2001, to recommend ways Congress could use the market to discipline large banks and limit risk of bank failure. One example is to require large banks and their parent companies to hold some portion of their capital as subordinated debt.

3. Should Banks Be Permitted to Reach for Businesses beyond Commercial Banking, Securities, and Insurance?

Arguments made to Congress

The Financial Services Modernization Act generally precludes banks from businesses beyond commercial banking, securities, and insurance, and so erects a barrier between banking and commerce.[57]

Ralph Nader testified,

> The great concern about mixing banking and commerce, of course, is the potential for banks to make credit decisions on the basis of incestuous corporate relationships, rather than on credit worthiness. Such combinations ultimately would lead to a concentration of banking and economic resources as well as creating lending decisions that could damage safety and soundness of insured banks and place taxpayer-supported deposit insurance funds at risk.[58]

Mary Griffin of Consumers Union testified to a similar effect, pointing out the potential that combining banking with commercial enterprise would skew the availability of credit, raise conflict of interest issues, and risk over-expanding the reach of the safety net provided to banks by the government.[59]

The prospects for future debate on universal banking

In testimony to Congress, Federal Reserve Board Chair Alan Greenspan explained that the current expansion of banking into securities underwriting and insurance is a tentative step toward universal banking, where banks are permitted to engage in all sorts of commerce:

> It seems to us wise to move first toward the integration of banking, insurance, and securities as envisaged in H.R. 10, and employ the lessons we learn from that important step before we consider whether and under what conditions it would be desirable to move to the second stage of full integration of commerce and banking.[60]

Greenspan explains that some caution about universal banking is appropriate, as international experience with universal banking has been concerning:

> Nothing is lost, in my judgment, by making this a two-stage process. Indeed, there is much to be gained. The Asian crisis last year highlighted some of the risks that can rise if relationships between banks and commercial firms are too close and make caution at this stage prudent, in our judgment.[61]

C. Putting the Issues in Context

The consumer issues discussed in this article may be difficult to resolve. Bankers may have little incentive to agree to substantial government intervention to resolve particular issues, and the government may find no need to impose regulations. Great public concern could create pressure for new regulation, but recently the public has shown little interest in bank regulation issues. The lack of public engagement is discussed below. That discussion is followed by consideration of the broad regulatory philosophies that inform consumer advocacy on particular issues.

1. The Disengagement of the Public from Banking Issues

The recent Financial Services Modernization Act was enacted after acrimonious debate mainly involving the affected financial institution interests -- banking, insurance and brokerage houses. A member of The Wall Street Journal editorial board approved of the new financial institution reform legislation as pure, unpasteurized special interest legislation:

> Does anyone think the U.S. Congress would have gotten off its duff without the continuous and concentrated applications of lobbying and PAC money? There aren't enough votes in banking reform to swing a lifeguard election in Greenland in the wintertime, let alone a congressional race. If it were up to soccer moms, angry white men, victims of color and other voting blocs identified by pollsters, American legislators would never have found time, even in 200 years, to write a banking law.[62]

There was greater public involvement when the recently repealed Depression era law was enacted in the 1930s. The Glass-Steagall Act has often been likened to "a scapegoat" law--one that fed collective fears that banks engaging in risky stock market speculations were ultimately responsible for the Wall Street crash of 1929 and the economic misery that followed in its wake.[63] By 1933, when Glass-Steagall was passed, a quarter of American workers were unemployed, and 11,000 banks -- a third of the country's total -- had failed.[64]

The 1930s experience suggests that if our relatively placid national economy goes bad, the public may again focus on bankers as a cause of the economic downturn. If so, a regime of reduced bank regulation born in our period of low economic stress may be challenged. A bad national economy increases the possibility of increased public interest in the economy, increased public hostility toward banking interests, and public pressure to regulate banking, as happened in the 1930s.

2. Broad Issues of Financial Institution Deregulation

This article has focused on particular debates between consumer and bank interests that are really part of a broader debate. The broader debate is about the need for regulation of financial services. Arguably, the attention of the public is better engaged by explicitly tying arguments on particular consumer issues to more general points on the need for regulation. Some consumer advocates appear to take that view; others do not. Some consumer advocates who recently addressed Congress advocated a broad and rigorous regulatory regime, while others tended to present particular issues as separate and distinct. Consumer advocate Ralph Nader was, for example, emphatic in relating his advocacy on particular issues to broader advocacy of an aggressive regulatory regime.

Robert Litan's 1998 book *American Finance for the 21st Century*[65] provides a touchstone for identifying the broad regulation issues that divide consumer advocates and bankers. Litan's view is that government regulation of financial services should be sharply limited and honed to well-defined purposes.[66] His points follow the basic idea that a regulatory solution of a problem is to be avoided unless market mechanisms fail. Any regulation should be limited and interfere with the market as little as possible.

For example, concerning government regulation to prevent recurrence of something like the 1929 stock market crash and the ensuing Depression of the 1930s, Litan tells us that it is the safety of the financial *system*, rather than any particular bit of it that must concern government regulators.[67] So the question is how to let individuals and companies make financial decisions that suit their needs, while still making sure that the system as a whole operates with an ample margin of safety if the worst happens.[68]

In Litan's view, what regulators need to address is the possibility of a sudden, unusually unexpected, event that disrupts the financial markets, and thus the efficient channeling of resources, quickly enough and on a large enough scale to cause a significant loss to the real economy.[69] Disruption of financial markets could occur because of mishaps affecting, as examples, mutual funds, commercial paper, uninsured bank deposits, debts of countries as a whole (like Mexico), or the stock market.

He suggests that it is desirable to move away from the high regulation regimen born of the Great Depression of the 1930's and instead reduce regulation.

> The goal of financial services regulation should be sharply limited: to isolate and contain mishaps, localizing, and so minimizing, the system wide effects of crashes. Emphasis would shift toward early quarantine of problem cases, rather than last minute rescues; toward the use of timely information, rather than just flat mandates, as a safety system; towards buffers and shock absorbers designed by market participants and enforced by the marketplace as well as by the government, rather that one-size-fits-all standards enforced by regulators.[70]

Litan's is obviously not the only possible overview of financial services regulation. Some think he recommends too much regulation, others want more. Consumer advocates would seem to generally be in the group that would like more vigorous regulation. Ralph Nader is an example of a consumer advocate who argues with vehemence for vigorous regulation of banking.

Questions about the nature and optimal extent of financial services regulation are difficult. Financial services markets operate in ways dramatically different than even a few years ago. For example, today ordinary people put money into uninsured stock funds and other speculative investments that might once have been put in federally insured savings accounts. New investment vehicles, such as derivatives, have novel potential for loss of investor money. As Litan puts it, "perhaps all that can be said with certainty is that the next system shaking crisis—if there is one—is likely to look different than any that has gone before."[71]

Conclusion

Many of the consumer issues aired in debate of the new Financial Services Modernization Act of 1999 are unresolved. It seems likely that argument of the issues will continue. It is not clear that the issues will resolve quickly or easily. Bankers may have little incentive to agree to regulation to resolve particular issues, and the government may see little need for new regulation. Great public concern could create pressure to impose regulation, but great public concern can take a long time to develop, or never develop at all. Public concern is more likely to develop if general economic conditions worsen, and or if there are crises relevant to particular issues. However, resolution of issues in a crisis environment is not ideal. Resolution of issues in a crisis environment facilitates political opportunism that can lead to unfortunate regulation.

The challenge to government is to achieve a regime of well-reasoned financial regulation that balances legitimate interests of consumers and the desire of business to avoid the fetters of unnecessary regulation. It should advance that goal to include a well-informed and engaged public in the ongoing policy debates. Public debate on particular issues might be enhanced if it included a broader dialogue about financial services regulation policy.

Endnotes

1. Views expressed in this article are the responsibility of the author, and are not necessarily the same as views of the Antitrust Division, United States Department of Justice.

2. S. 900, H.R. 10 106th Cong. (1999) (enacted).

3. *See* Glass Steagall Act, Pub. L. No. 73-66, 48 Stat. 162 (1933).

4. *See Hearing on H.R. 10 - The Fin. Services Act of 1998 Before Senate Comm. on Banking, Hous. and Urban Affairs,* 105th Cong. (1998) (statement of Ralph Nader, Consumer Advocate).

5. *See id.*

6. *Full Comm. Hearing on Fin. Modernization Before House Comm. on Banking and Fin. Services,* 106th Cong. (1999) (statement of Mary Griffin, Insurance Counsel, Consumers Union).

7. *See id.*

8. *See* Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338, 702 (electronic fund transfer fee disclosures at any host ATM).

9. *See* Dean Anason, *Clinton Calls for Low-Cost Accounts for Wage Earners,* AM. BANKER, Jan. 14, 2000, at 2.

10. *See* Albert Crenshaw, *Cash Flow, When It Doesn't Pay to Stay; Make Change if Your Bank Is Nickel-and-Diming You*, AM. BANKER, Nov. 14, 1999, at H02.

11. Olaf de Senerpont Domis, *Opposition to ATM Fees Spreading Coast to Coast*, AM. BANKER, Nov. 17, 1999, at 4.

12. Robert D. Hershey, Jr., *Donald G. Ogilvie: Users May Be Shortchanged if Ban on ATM Fees*, N.Y. TIMES, Nov. 14, 1999, sec. 3 at 4.

13. *See* Benita M. Dodd, *Conversation Starter: Are ATM Charges Justified*, ATLANTA J. CONST., Nov. 13, 1999, at 18A.

14. *See id.*

15. *See id.*

16. *See id.*

17. *See Fin. Institutions Subcomm. Hearing on Fin. Privacy Before House Subcomm. on Fin. Inst. and Consumer Credit*, 106th Cong. (1999) (statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group).

18. *See id.*

19. *See id.*

20. *See id.*

21. Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338, (1999) (obligations with respect to disclosures of personal information).

22. Robert O'Harrow, Jr., *A Postscript on Privacy; Bank Bill's*

Late Change Gives States Last Word, WASH. POST, Nov. 5, 1999, at E01.

23. Dean Anason, *Consumer Privacy Laws May Be Set to Spread Like Wildfire in States*, AM. BANKER, Dec. 6, 1999, at 1.

24. *See id.*

25. *Full Comm. Hearing on Fin. Modernization Before House Comm. on Banking and Fin. Services*, X06th Cong. (1999) (statement of Mary Griffin, Insurance Counsel, Consumers Union).

26. *See id.*

27. *See* Clifford Glickman, *Community-Lending Provisions Nearly Sank Financial Reform Bill*, KNIGHT-RIDDER TRIB. BUS. NEWS, Oct. 29, 1999.

28. *See id.*

29. *See Ode to a Scapegoat*, WALL ST. J., Oct. 26, 1999, sec. A at 26.

30. *See* Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338,_ 809 (small bank regulatory relief).

31. *See* Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338,_ 103 (financial activities).

32. *See* Ralph Nader, *Outlook: These Banking 'Reforms' Are a Menace to Consumers*, HOUSTON CHRON., Nov. 7, 1999, at 4.

33. *See id.*

34. *Full Comm. Hearing on Fin. Modernization Before House Comm. on Banking and Fin. Services*, 106th Cong. (1999) (state-

ment of Ralph Nader, Consumer Advocate).

35. *Id.*

36. *See id.*

37. *See id.*

38. *See* Federal Deposit Insurance Corporation Improvements Act (FDICIA)_ 141(a), 12 U.S.C._ 1823(c)(4)(E)(i) (1994).

39. *See id.*

40. *See* Joanne Gray, John Fairfax Group Pty Ltd, AUSTRALIAN FINANCIAL REVIEW, May 7, 1999.

41. *See id.*

42. *Hearing on H.R. 10 and Fin. Modernization Before the Subcomm. on Fin. and Hazardous Materials of the House Comm. on Commerce*, 106th Cong. (1999) (statement of Alan Greenspan, Chairman, Bd. of Governors of the Fed. Reserve Sys.).

43. *See* Clyde Mitchell, *H.R. 10 – So Near and Yet So Far*, N.Y.L.J., Oct. 21, 1998 at 6.

44. *See* Winston Williams, *U.S. Puts Together $7.5 Billion in Aid for Illinois Bank*, N.Y. TIMES, May 18, 1984, sec. A at 1.

45. *See* Kathleen Day and John M. Berry, *FDIC Rescues Texas Bank with $1 Billion Loan*, WASH. POST, Mar. 18, 1988, at B1.

46. *See* Mike McNamee, *Bank Watchdogs Need to Use the Teeth They Have*, BUS. WK., Dec. 13, 1999, at 50.

47. *Id.*

48. *See Full Comm. Hearing on Financial Modernization Before House Comm. on Banking and Fin. Services*, 106th Cong. (1999) (statement of Deborah Goldberg, Center for Community Change).

49. *See id.*

50. *See id.*

51. *See id.*

52. *Id.*

53. Barbara A. Rehm, *Reform Law Leaves the 'Too Big' Picture Too Fuzzy*, AM. BANKER, Nov. 29, 1999, at 3.

54. *See id.*

55. *Id.*

56. *Id.*

57. *See* Kelly Childs, *Millennium Milestones*, INDEP. BANKER, Dec. 1, 1999.

58. *Full Comm. Hearing on Fin. Modernization Before House Comm. on Banking and Fin. Services*, 106th Cong. (1999) (statement of Ralph Nader, Consumer Advocate).

59. *See id.*

60. *Id.*

61. *Id.*

62. Holman Jenkins, Jr., *Hooray for Special Interest Money*, ASIAN WALL ST. J., Oct. 28, 1999.

63. *See* Sam Ali, *Congress Tears Down Wall Separating Banks, Brokerages, Insurers*, KNIGHT-RIDDER TRIB. BUS. NEWS, Nov. 7, 1999.

64 *See id.*

65. ROBERT E. LITAN & JONATHAN RAUCH, AMERICAN FINANCE FOR THE 21[ST] CENTURY (Brookings Institution Press 1998).

66. *See id* at 140.

67. *See id.*

68. *See id.* at 117.

69. *See id.*

70. *See id.* at 140.

71. *See id.* at 137.