Regulation of Banking Organizations

The complexity of the current regulatory framework and shortcomings on the part of regulators have been cited as contributing factors in the financial crisis. The Dodd-Frank Act makes numerous key changes in the regulation of banks, thrifts, their parent companies and their affiliates.

The Act does little to rationalize the historical structural "patchwork" of U.S. banking agencies. Different types of institutions will continue to be regulated by multiple and overlapping federal and state agencies. The Act eliminates one banking regulator, but it creates a number of new agencies, bureaus and offices. The Board of Governors of the Federal Reserve System (the "Board of Governors") emerges with significantly expanded jurisdiction and powers.

The Act will increase the cost of doing business for banking organizations. Many of the costs associated with the Act will be borne by the largest banking organizations, but even the smallest community banks will need to increase their financial and management resources dedicated to compliance and risk management.

Key aspects of many of the Act's most important provisions are left to be implemented by the banking agencies through rulemaking. A large number of rulemakings will occur over the next two years to give substance to the outline provided by Congress in the Act — a process that is likely to preoccupy the regulators and tax their staffs' ability to do the day-to-day work of supervision. The rulemaking process will be subject to industry, public and Congressional input.

The Act is more than 2,300 pages, and many of its provisions involve complex, technical and inter-related areas of law. Chairman Frank has already promised a "technical corrections" bill. Even with such corrections, banking organizations and their regulators will face an extended transition period as they identify and deal with ambiguities, inconsistencies and interpretive questions.

We outline below key provisions of the Act related to the regulation of banking organizations, which are principally contained in Titles III and VI.[1]

Elimination of the Office of Thrift Supervision

There are currently more than 750 federal thrifts and 400 state thrifts. The primary federal regulator for these institutions and their parent companies is the Office of Thrift Supervision (the "OTS"). The Act will eliminate the OTS. It will not, however, eliminate the thrift charter itself, whether for existing or newly chartered institutions.

[1] See "Consumer Protection Provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act," "The Volcker Rule," "Derivatives" and "Analysis of the Orderly Liquidation Authority, Title II of the Dodd-Frank Wall Street Reform and Consumer Protecion Act" for the areas of the Act that will affect banking organizations that are not covered in this summary.

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Transfer of OTS Responsibility to Other Agencies. The Act requires that federal regulation and supervision of thrifts be transferred from the OTS to specified banking agencies on a transfer date within one year of enactment.[2] The Secretary of the Treasury may extend the transfer date up to an additional six months, after consultation with the other banking agencies. The following summary reflects the Act's division and transfer of the powers of the OTS among the existing banking agencies:[3]

Office of the Comptroller of the Currency ("OCC")	• supervisory authority over federal thrifts • rulemaking authority for federal and state thrifts, except in areas reserved for the Board of Governors
Federal Deposit Insurance Corporation ("FDIC")	• supervisory authority over state thrifts
Board of Governors	• supervisory and rulemaking authority for savings and loan holding companies • rulemaking authority for federal and state thrifts with respect to affiliate transactions, loans to insiders and anti-tying prohibitions

The Act requires the OCC to designate a deputy comptroller to supervise and examine federal thrifts.[4] We believe that thrift organizations will be expected to meet the expectations of their new regulators and that the transition from the OTS to another supervisor will be challenging for many institutions. The transition may be particularly difficult for state thrift organizations, which will become regulated in part by four separate banking regulators: the state, the FDIC for examinations, the OCC for rulemaking and the Board of Governors for holding company and certain other regulations.

The Act contains several savings provisions to continue the validity of OTS orders, resolutions, determinations, agreements, regulations, interpretations, guidelines and other supervisory materials.[5]

Provisions Affecting Thrift Holding Companies. The Act retains distinctions between thrift holding companies and bank holding companies. However, it takes a number of steps to align the regulation of thrift holding companies with that of bank holding companies. The Board of Governors will become responsible for the supervision of thrift holding companies, and it will have examination and enforcement authority over thrift holding companies similar to its authority over bank holding companies.

The Act directs the Board of Governors to require that any depository institution holding company (including a thrift holding company) serve as a source of financial strength for its subsidiary depository institutions. In addition, the Act authorizes the Board of Governors to promulgate capital requirements for thrift holding companies.[6]

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[2] Act § 311.

[3] Act § 312.

[4] Act § 314 (to be codified at 12 U.S.C. § 1).

[5] Act § 316.

[6] Act § 616 (to be codified at 12 U.S.C. § 1844(b)).

A number of thrift holding companies operate otherwise impermissible nonbanking businesses under grandfather authority (*e.g.*, unitary thrift holding companies). The Act preserves this grandfather treatment but authorizes the Board of Governors to direct a grandfathered thrift holding company to house its thrift and other financial activities in an intermediate thrift holding company subject to the full panoply of regulation.[7] The Act specifies the level of regulation that applies to the intermediate thrift holding company in contrast to the parent holding company.

Thrift holding companies that do not rely upon the grandfather authority, and have diverse financial businesses such as securities and insurance firms, have been permitted under current law to conduct "financial" activities that would be permitted for a financial holding company under the BHCA. However, those thrift holding companies have not been required to meet the financial holding company criteria applicable to bank holding companies. The Act requires that a non-grandfathered thrift holding company meet the capital and management criteria for financial holding company status in order to conduct "financial" activities.[8] This change — when coupled with the change in financial holding company criteria discussed below — increases the supervisory leverage of the Board of Governors over those thrift holding companies that rely heavily on financial authority, such as insurance and securities firms.

Creation of the Consumer Financial Protection Bureau

A major component of the Act is the creation of a new Consumer Financial Protection Bureau (the "CFPB").[9] The CFPB will be a largely autonomous bureau within the Board of Governors. Its director will be appointed by the President and confirmed by the Senate. The CFPB will have a broad mandate to issue regulations, examine compliance and take enforcement action under the federal financial consumer laws. See "Consumer Protection Provisions."

The President's selection of the first director of the CFPB will be critical in shaping the role of this new agency. He or she will be responsible for issuing and implementing numerous important regulations and establishing the CFPB's enforcement posture. The director of the CFPB also will serve on the board of directors of the FDIC, replacing the seat previously held by the director of the OTS.[10]

Enhanced Supervision and Standards for Large Institutions

The Act establishes the Financial Stability Oversight Council (the "Council") to monitor and manage systemic risk. The Act provides the Council with the authority to designate systemically significant nonbank financial companies for prudential supervision. The Act also grants the Board of Governors broad new authority to establish prudential standards for nonbank financial companies and for bank holding companies with assets of $50 billion or more. See "Key Measures to Address Systemic Risk."

More Rigorous Examination and Supervision of Nonbank Affiliates

Under current law, the nonbank affiliates of banking organizations are generally subject to bank regulatory examination and enforcement. The Act will eliminate certain procedural hurdles to that authority

[7] Act § 626 (to be codified at HOLA § 10A).

[8] Act § 606 (to be codified at 12 U.S.C. § 1467a(c)(2)(H)).

[9] Act Title X.

[10] Act § 336 (to be codified at 12 U.S.C. § 1812(a)(1)(B)).

and, in some cases, mandate that the Board of Governors regularly and rigorously examine the nonbank affiliates of banking organizations.

Mandatory Examination of Bank-Permissible Activities in Nonbank Affiliates. The Act mandates that the Board of Governors conduct regular and rigorous examinations of any activities conducted by a nonbank affiliate that would be permissible for a bank subsidiary.[11] These examinations must be conducted in the "same manner, subject to the same standards, and with the same frequency" as if the activity were being conducted in a bank subsidiary. For example, a mortgage banking or commercial finance company that is a sister affiliate of a bank will become subject to bank-like examination by the Board of Governors on a regular basis.

Banking organizations should be prepared for the Board of Governors to hold their nonbank affiliates to the same standards and expectations as their subsidiary banks, such as with respect to risk management, internal controls and compliance.

This new examination requirement does not apply to functionally regulated subsidiaries or to subsidiaries of depository institutions. The Act also includes a number of procedural provisions under which the Board of Governors shall seek to avoid duplication and by which the other federal banking agencies can exercise back-up authority.

Less Deference to Functional Regulators. When the Gramm-Leach-Bliley Act of 1999 expanded the ability of banking organizations to affiliate with securities and insurance firms, Congress sought to balance the role of the Board of Governors, as the umbrella regulator of bank holding companies, against the functional jurisdictions of the SEC, CFTC and state insurance regulators. Current law limits the ability of the Board of Governors to examine and take action against the "functionally regulated subsidiaries" (*e.g.*, broker-dealers, investment advisers and insurance companies) of a bank holding company and includes provisions requiring deference to the functional regulator.

The Act eliminates existing restrictions on the Board of Governors' ability to make regulations, issue guidance or take action against functionally regulated subsidiaries.[12] The Act also reduces the procedural hurdles for the Board of Governors to examine and obtain information from functionally regulated subsidiaries — requiring only that the Board of Governors give notice, consult with the functional regulator, and avoid duplication of examination activities "to the fullest extent possible." The Act therefore expands the Board of Governors' power to monitor and enforce "safety and soundness" standards across the entire banking organization, including its functionally regulated subsidiaries.

The Volcker Rule: Proprietary Trading and Fund Activities

The Act contains broad prohibitions on proprietary trading and fund activities by depository institutions and their affiliates.[13] These prohibitions are the so-called "Volcker Rule." The Volcker Rule generally prohibits depository institutions and their affiliates from sponsoring a hedge fund or private equity fund or investing in such funds. It provides certain carve outs for qualifying fund sponsorship and investment in seed capital, provided all such investments do not exceed certain aggregate limits as a percentage of

[11] Act § 605 (to be codified at FDIA § 26(b)).

[12] Act § 604 (to be codified at 12 U.S.C. § 1848(a)).

[13] Act § 619 (to be codified at BHCA § 13(a)(1)).

Tier 1 capital. The Volcker Rule also prohibits depository institutions and their affiliates from conducting proprietary trading in securities and other instruments, other than federal, state and municipal securities. The prohibition affects the purchase and sale of a range of securities and other instruments in a trading book that holds "near term" transactions or transactions that involve "short-term price movements." See "The Volcker Rule."

Derivatives Activities

The Act substantially revamps the regulation of derivatives, including provisions that require banks to reorganize their derivatives business by transferring certain aspects of the business to a nonbank affiliate.[14] See "Derivatives."

Capital Regulation

The Act includes provisions related to capital standards affecting banking organizations, securities firms and nonbank financial companies designated by the Council and supervised by the Board of Governors. The overall theme underlying these provisions is to increase the amount of capital to be held by banking organizations and other systemically important firms. However, with the exception of the Collins Amendment described below, the Act largely avoids establishing substantive capital measures — leaving such measures for adoption and implementation by the regulators.

The Collins Amendment; Status of Trust Preferred Securities. An amendment offered by Senator Susan Collins (R-ME) and included in the Act has a significant effect on the capital requirements for bank holding companies and nonbank financial companies supervised by the Board of Governors.[15] The Collins Amendment requires that bank holding companies hold the same amount and same type of leverage and risk-based capital that is required of an insured depository institution.

A key consequence of the Collins Amendment would be to exclude trust preferred securities from the regulatory capital of bank holding companies. A large number of banking organizations of all sizes rely on this type of capital at the holding company level. In recognition of this effect, the Collins Amendment includes a number of transition provisions.

- The Collins Amendment will be deemed effective as of May 19, 2010, with respect to securities issued on or after May 19, 2010.
- For institutions with consolidated assets of less than $15 billion on December 31, 2009, the Collins Amendment will not apply to securities issued before May 19, 2010.
- For institutions with consolidated assets of $15 billion or more on December 31, 2009, the Collins Amendment will phase in over three years beginning on January 1, 2013.
- Holding companies that were not subject to supervision by the Board of Governors on May 19, 2010, would become subject to the Collins Amendment five years after enactment of the Act.
- The Act exempts from the Collins Amendment small bank holding companies subject to the Board of Governors' Small Bank Holding Company Policy Statement, which generally covers bank holding companies with less than $500 million of total consolidated assets.

[14] Act Title VII.

[15] Act § 171.

Another consequence of the Collins Amendment is to create a capital floor based on Basel I capital standards — even for those large banking organizations required to calculate capital under Basel II.

Studies Regarding Capital. The Act instructs the GAO (in consultation with the Board of Governors, OCC and FDIC) to conduct a study of hybrid capital instruments as a component of capital for banking organizations and the potential consequences of prohibiting the use of such instruments.[16] The Act also instructs the GAO (in consultation with the Board of Governors, OCC, FDIC and Treasury) to conduct a study of capital requirements applicable to U.S. intermediate holding companies that are bank or thrift holding companies and that are controlled by non-U.S. banking organizations. The Act sets forth a number of factors to be considered in these GAO studies. Within 18 months of enactment of the Act, the GAO must report the results of these studies to Congress and include specific recommendations for legislative or regulatory action regarding the treatment of hybrid capital instruments, including trust preferred securities.

Source of Strength Obligation. Regulations and historical practice of the Board of Governors currently require that bank holding companies serve as a "source of strength" for their subsidiary depository institutions. The Act statutorily codifies this requirement and expands it to cover any company that controls an insured depository institution — whether or not that company is a bank holding company under the BHCA.[17] The expanded source of strength obligations would apply to thrift holding companies and the parent companies of nonbank banks, such as industrial banks, credit card banks and trust banks.

The Act also requires that, if a nonbank financial company supervised by the Board of Governors organizes an intermediate holding company to house its financial activities, then the parent company must serve as a source of strength for the intermediate holding company.[18]

Counter-Cyclical Capital Requirements. The Act adds the following language to the Board of Governors' authority to adopt capital regulations: "[T]he Board shall seek to make such requirements countercyclical, so that the amount of capital required to be maintained by a company increases in times of economic expansion and decreases in times of economic contraction, consistent with the safety and soundness of the company."[19] The Act does not provide more specificity on this point.

Change to Criteria for Financial Holding Company Status

Under current law, a bank holding company can qualify to become and remain a "financial holding company" permitted to engage in a broad range of nonbank "financial" activities based on the capital status, examination ratings and CRA ratings of its subsidiary depository institutions. The Act requires that the holding company itself also meet the well-capitalized and well-managed requirements.[20] In practice, this change will give more supervisory leverage to the Board of Governors over banking organizations that rely on financial holding company status to conduct financial activities, such as securities underwriting and dealing, merchant banking, and insurance underwriting. As discussed above, this change will affect not only bank holding companies, but also thrift holding companies. This change will become effective on the date when the OTS responsibilities are transferred to the other banking agencies.

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[16] Act § 174.

[17] Act § 616 (to be codified at FDIA § 38A).

[18] Act § 167(b)(3).

[19] Act § 616 (to be codified at 12 U.S.C. § 1844(b)).

[20] Act § 606 (to be codified at 12 U.S.C. § 1843(l)(1)).

Deposit Insurance and Assessments

Changes in Deposit Insurance Coverage. The Act permanently increases the standard maximum federal deposit insurance coverage amount to $250,000.[21] The Act makes this increase retroactive to January 1, 2008, with respect to insured depository institutions for which the FDIC was appointed receiver or conservator after that date. The effect of this retroactive application is to provide the increased coverage to depositors in a handful of institutions (including IndyMac) that failed between January 1, 2008, and the date on which the Emergency Economic Stabilization Act of 2008 first temporarily increased coverage from $100,000 to $250,000.

The Act also extends until January 1, 2013, federal deposit coverage for the full net amount held by depositors in noninterest-bearing transaction accounts.[22] The Act defines "noninterest-bearing transaction accounts" as: accounts maintained at an insured depository institution on which the depositor is permitted to make withdrawals by negotiable or transferable instruments, payment orders of withdrawal, telephone or other electronic media transfers, or similar items for the purpose of making payments on transfers to third parties or others; and deposits or accounts on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.

These changes in deposit insurance coverage apply to both insured depository institutions and credit unions.

Change in Assessment Base. The FDIC has a set of regulations that provide formulae for determining the amount of an institution's deposit insurance premiums. Under current law, these formulae create an "assessment base" related to the amount of U.S. deposits held by a particular institution. The Act will change the "assessment base" to be founded generally on the amount of liabilities held by the institution.[23] The FDIC has additional discretion with respect to custodial banks and bankers' banks. The effect of this provision will be to shift the burden of deposit insurance premiums toward those depository institutions that rely on funding sources other than U.S. deposits. Smaller community banks tend to rely primarily on U.S. deposits; whereas, large money-center banks tend to have a broader base of funding sources.

Minimum Reserve Ratio Increase for Deposit Insurance Fund. Current law requires the FDIC annually to designate a reserve ratio for the Deposit Insurance Fund, which may not be less than 1.15% of the estimated amount of total insured deposits. The Act raises the minimum designated reserve ratio to 1.35% and requires the FDIC to take steps to achieve this higher level by September 30, 2020.[24] When setting the assessments necessary to achieve this higher level, the FDIC is required by the Act to "offset" the effect of such assessments on insured depository institutions with total consolidated assets of less than $10 billion. The result of this offset requirement is to shift the assessment burden to larger banking organizations.

Measures to Eliminate Pro-Cyclical Assessments. Current law establishes a ceiling on the designated reserve ratio of the Deposit Insurance Fund and requires the FDIC to pay dividends from the Deposit Insurance Fund if it reaches certain levels. These requirements are seen as being "pro-cyclical" because

[21] Act § 335 (to be codified at 12 U.S.C. § 1821(a)(1)(E)).

[22] Act § 343 (to be codified at 12 U.S.C. § 1821(a)(1)).

[23] Act § 331 (to be codified at 12 U.S.C. § 1817(b)(2)).

[24] Act § 334 (to be codified at 12 U.S.C. § 1817(b)(3)(B)).

they limit the growth of the Deposit Insurance Fund during positive economic conditions. The Act will eliminate the ceiling on the designated reserve ratio and allow the FDIC to suspend or limit the declaration of dividends.[25]

Limits on Size

Limit Based on Combined Liabilities of All Financial Companies. The Act imposes a new limit on the size of any single banking organization or nonbank financial company designated by the Council.[26] Limiting the overall size of financial firms was proposed by President Obama as a key element of financial reform on the grounds that risk should not be concentrated in a handful of massive financial firms. It is also a nod to the idea that no institution should grow "too big to fail."

The Act will prohibit a banking organization or nonbank financial company designated by the Council from conducting a merger or acquisition if the total consolidated liabilities of the resulting company would exceed 10% of the aggregate consolidated liabilities of all financial companies (calculated as of the end of the preceding calendar year). The Board of Governors may approve exceptions to this size limit for transactions involving troubled institutions, FDIC assistance or a *de minimis* increase in liabilities.

Within six months of enactment, the Council must complete a study on the extent to which this size limit affects financial stability, moral hazard in the financial system, the efficiency and competitiveness of U.S. financial firms and markets, and the cost and availability of credit and other financial services to households and businesses in the United States. The Council's study shall make recommendations on modifying the concentration limit. Within nine months after the Council completes its study, the Board of Governors must issue final rules reflecting the Council's recommendations. It is therefore possible that this new size limit could be established by regulation at a level below 10%.

Expansion of 10% Nationwide Deposit Cap. Current law includes a 10% nationwide deposit concentration cap on certain types of interstate mergers and acquisitions involving banks. The Act would expand the nationwide deposit cap to apply to a broader universe of depository institution transactions, including those involving thrifts and industrial banks.[27] The Act provides exceptions for transactions involving troubled institutions.

Enhanced Lending and Concentration Limits

The Act strengthens a number of existing laws that limit a depository institution's credit exposure to one borrower, to its affiliates and to its insiders. Many of these changes seek to address credit exposure arising from derivative transactions, repurchase agreements, and securities lending and borrowing transactions.

Loans to One Borrower. Current banking law limits a depository institution's ability to extend credit to one person (or group of related persons) in an amount exceeding certain thresholds. The Act expands the scope of these restrictions to include credit exposure arising from derivative transactions, repurchase agreements, and securities lending and borrowing transactions.[28] The Act includes provisions intended to implement these changes with respect to national banks, federal thrifts and state-chartered depository institutions.[29]

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[25]Act §§ 332 & 334 (to be codified at 12 U.S.C. §§ 1817(e)(2) & 1817(b)(3)(B)).

[26]Act § 622 (to be codified at BHCA § 14(b)).

[27]Act § 623 (to be codified at 12 U.S.C. §§ 1828(c), 1843(i) & 1467a(e)(2)).

[28]Act § 610 (to be codified at 12 U.S.C. § 84(b)).

[29]See Act §§ 610 & 611.

Transactions With Affiliates: Section 23A. Section 23A of the Federal Reserve Act is a key statutory provision that imposes quantitative limits, qualitative standards and collateral requirements on certain transactions by an insured depository institution with its affiliates. The Act expands the scope of Section 23A. Some of the key changes are outlined below.[30]

- The Act expands the definition of "affiliate" for purposes of Section 23A to include any investment fund advised by the depository institution or its affiliates. In addition, other sections of the Act include outright prohibitions on a depository institution or its affiliates conducting any transaction covered by Section 23A with a fund they advise or sponsor.[31] See "Private Fund Investment Advisers."
- The Act expands the applicability of Section 23A to derivative transactions, repurchase agreements, and securities lending and borrowing transactions that create credit exposure by a depository institution to its affiliates. Among other things, the Act will require that a depository institution's credit exposure to its affiliates resulting from securities lending and borrowing, repurchase agreements and derivative transactions be secured at all times.
- The Act raises significantly the procedural and substantive hurdles required to obtain an exemption from Section 23A. The Board of Governors will no longer have the authority to grant exemptive orders. Instead, the Act will require that the depository institution's primary federal regulator approve the exemption with the concurrence of the Board of Governors and the non-objection of the FDIC — in each case, under standards specified in the Act.
- The Act also will eliminate an existing provision that excludes transactions by a depository institution with its "financial subsidiary" from the 10% single affiliate limit of Section 23A.[32]

Transactions With Insiders. The Act broadens the existing limitations on transactions by a depository institution with its insiders to include credit exposure arising from derivative transactions, repurchase agreements, and securities lending and borrowing transactions.[33]

The Act prohibits an insured depository institution from purchasing or selling an asset to an executive officer, director, or principal shareholder (or any related interest of such a person) unless the transaction is on market terms and, if the transaction exceeds 10% of the institution's capital, it is approved in advance by a majority of disinterested directors.[34] The Board of Governors has rulemaking authority with respect to this new provision (after consultation with the OCC and FDIC).

Nonbank Banks

Under current law, certain types of depository institutions are not treated as "banks" for purposes of the BHCA. These so-called "nonbank banks" include credit card banks, industrial banks and trust banks that meet certain legal requirements. Companies owning nonbank banks are not required to become bank holding companies regulated by the Board of Governors and are therefore not limited in their ability to conduct commercial activities.

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[30] Act § 608 (to be codified at 12 U.S.C. § 371c).

[31] Act § 619 (to be codified at BHCA § 13(f)(1)).

[32] Act § 609 (to be codified at 12 U.S.C. § 371c(e)).

[33] Act § 614 (to be codified at 12 U.S.C. § 375b(9)(D)(i)).

[34] Act § 615 (to be codified at 12 U.S.C. § 1828).

The Act stops short of eliminating the exemptions for nonbank banks, but it constrains the ability of commercial firms to take advantage of them. The Act imposes a three-year moratorium on applications by commercial firms either to obtain deposit insurance for a new nonbank bank and or to acquire control of an existing nonbank bank.[35] The Act also requires the GAO to study the necessity of the nonbank bank exemptions from the BHCA. The GAO must report the results of its study to Congress within 18 months of enactment of the Act.

Elective Federal Reserve Supervision for Securities Holding Companies

The Act creates a new regime through which companies that control an SEC-registered broker-dealer (but not a bank) may elect to become subject to consolidated supervision by the Board of Governors.[36] This regime is intended to allow U.S. securities firms to satisfy the requirements of the European Union and certain other foreign countries that the company be subject to comprehensive supervision on a consolidated basis. This new regime replaces the current "investment bank holding company" system by which securities firms can elect to be supervised on a consolidated basis by the SEC.

Securities holding companies supervised by the Board of Governors will become subject to most provisions of the BHCA but not its limitations on nonbanking activities. The Board of Governors will have the same reporting, examination and rulemaking authority over these securities holding companies as it has over bank holding companies. The Board of Governors must prescribe capital adequacy and risk management standards for supervised securities holding companies consistent with the safety and soundness of the companies and any risks posed to financial stability. In applying these standards, the Board of Governors may differentiate among securities holding companies on an individual basis or by category depending on the specified factors. Furthermore, the Act provides the Board of Governors with enforcement authority over supervised securities holding companies that is similar to its enforcement authority over bank holding companies.

Miscellaneous Provisions

Financial Stability as a Regulatory Objective. The Act adds financial stability as an express regulatory objective of the banking laws. For example, the Act identifies "the stability of the financial system of the United States" as a statutory purpose for Board of Governors examination of banking organizations.[37] The Act also adds financial stability as a statutory factor to be considered in the application process, such as for mergers and acquisitions involving banking organizations.

Fees for Federal Banking Regulators. The Act grants the OCC, FDIC and Board of Governors broad discretion to establish and collect supervisory and examination fees from their respective supervised institutions.[38] In the case of the Board of Governors, such fees may be assessed only against bank and thrift holding companies with consolidated assets of $50 billion or more and nonbank financial companies designated by the Council. The fee authority of the OCC and FDIC is not limited by size of the institution. Neither the FDIC nor the Board of Governors currently charge examination or supervision fees.

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[35] Act § 603.

[36] Act § 618.

[37] Act § 604 (to be codified at 12 U.S.C. § 1844(c)(2)).

[38] Act § 318 (to be codified at U.S. Rev. Stat. tit. LXII, ch. 4, § 5240A; 12 U.S.C. §§ 1820(e), 248).

Expanded Backup Authority for FDIC. The FDIC has historically had back-up examination and enforcement authority over banking organizations for purposes of safeguarding the Deposit Insurance Fund. The Act strengthens this back-up authority and removes various procedural hurdles for its use. For example, the Act will eliminate an existing requirement that the FDIC obtain agreement of the primary federal regulator before requiring reports from an institution.[39]

The Act also grants the FDIC back-up examination authority over large bank holding companies and non-bank financial companies designated by the Council when deemed necessary for insurance purposes or to implement the FDIC's orderly liquidation authority. See "Orderly Liquidation Authority."

Prohibition on "Excessive Compensation." The Act requires the federal banking and securities regulators to adopt regulations applicable to "covered financial institutions" (including banking organizations) to prohibit incentive-based compensation arrangements that encourage inappropriate risks by providing "excessive compensation" or which could lead to material financial loss to the covered financial institution.[40] See "Executive Compensation." This continued focus on executive compensation follows the Guidance on Sound Incentive Compensation Policies jointly adopted by the federal banking agencies on June 21, 2010.[41]

Interstate Branching. Under current law, banks are limited in their ability to establish branches outside their home state. Depending on a particular state's law, banks are often required to "buy" their way into a new state by acquiring an institution or branch in the target state. The Act relaxes these requirements and allows national banks and state banks to establish branches in any state if that state would permit the establishment of the branch by a state bank chartered in that state.[42] The Act also allows a thrift that converts to a bank to retain any branches operated prior to the conversion and to establish additional branches in the states where it operated.[43]

Interest on Demand Deposits. The Act repeals the longstanding prohibition on the payment of interest on demand deposit accounts.[44] The repeal will become effective one year after enactment of the Act.

Charter Conversions by Institutions Subject to Enforcement Action. The Act prohibits a bank or thrift from consummating a charter conversion if it is subject to an enforcement action with respect to a "significant supervisory matter."[45] This provision is intended to prevent institutions from "forum shopping" for a more lenient regulator. The Act provides an exception to the prohibition if (i) the resulting regulator gives the departing regulator notice of the conversion and a plan to address the significant supervisory matter; (ii) the departing regulator does not object to the plan; (iii) the resulting regulator implements the plan; and (iv) in cases involving final action by a state attorney general, approval of the conversion is conditioned on compliance with the terms of the state attorney general's action.

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[39] Act § 333 (to be codified at 12 U.S.C. § 1817(a)(2)(B)).

[40] Act § 956.

[41] 75 Fed. Reg. 36,395 (June 25, 2010).

[42] Act § 613 (to be codified at 12 U.S.C. § 36(g)(1)(A)).

[43] Act § 341.

[44] Act § 627 (to be codified at 12 U.S.C. §§ 371a, 1464(b)(1)(B) & 1828(g)).

[45] Act § 612.

Office of Minority and Women Inclusion. The Act requires that an Office of Minority and Women Inclusion be established within each of the Treasury, Board of Governors, Federal Reserve Banks, FDIC, OCC, CFPB, SEC, Federal Housing Finance Agency and National Credit Union Administration.[46] This Office will be responsible for agency matters relating to diversity in management, employment and business activities. Each Office will have a director that reports to its respective agency administrator. The Act requires that each Office develop standards for equal employment opportunities and the diversity of the agency's workforce, increased participation of minority and women-owned businesses in agency activities, and assessment of the agency's diversity policies and practices.

The Act also requires that each agency's contracting policies include a component giving consideration to an applicant's diversity. We note that the scope of this contracting provision includes not only personnel and vendor hiring decisions, but also contracts for "all business and activities of an agency, at all levels, including contracts for the issuance or guarantee of any debt, equity, or security, the sale of assets, the management of the assets of the agency, [or] the making of equity investments by the agency."[47]

[46]Act § 342.

[47]Act § 342(d).