1

Regulatory Structure and Charter Choice

Richard A. Schaberg & Laura R. Biddle

The U.S. financial institutions system is marked by extensive choice, variety, and complexity. Not only does the system consist of a large number of different types of financial institutions, there is also a detailed array of intersecting and overlapping laws and regulations applicable to such institutions and their holding companies.

A cornerstone of the U.S. financial institutions system is the "dual banking system," through which both the federal government and each of the fifty states may issue insured depository institution (IDI) charters. In addition to the choice between federal and state charters, it is possible to organize an IDI pursuant to a variety of different charter types, such as a commercial bank or a thrift.

This chapter provides a basic overview of the regulatory framework and the varied supervisory regimes applicable to the different types of IDIs, and the knowledge that is necessary to understand the more complex questions relating to the different types of IDIs and how they are regulated. In this book, we focus only on depository institutions, the deposits of which are insured by the Deposit Insurance Fund (DIF) of the Federal Deposit Insurance Corporation (FDIC). There are other depository structures and financial institutions, such as credit unions and money market funds, but we do not address them here.

Organization and Charters 1–3
Banks 1–5
National Banks 1–8
Basics of National Banks 1–8
National Bank Activities 1–9
State (Member and Nonmember) Banks 1–11
Bank Service Companies 1–13
Bank Holding Companies 1–14
Basics of Bank Holding Companies 1–14
Bank Holding Company Activities 1–16
Financial Holding Companies 1–18
Financial Holding Company Activities 1–21
Thrifts 1–23
Basics of Thrifts 1–23
Thrift Activities 1–24
Savings and Loan Holding Companies 1–26
Basics of Savings and Loan Holding Companies 1–26
Savings and Loan Holding Company Activities 1–28
Foreign Banking Organizations 1–29
International Activities of Domestic Banks 1–30
Charter Conversions 1–32

Organization and Charters

Q 1.1 What is an IDI?

We limit our discussion of "insured depository institutions" to those defined by the Federal Deposit Insurance Act (the "FDI Act").[1] The FDI Act defines "insured depository institution" as a bank or savings association the deposits of which are insured by the FDIC.[2] Although we occasionally reference credit unions, we do so only where necessary in the context, such as the conversion of credit unions to savings associations. We do not, however, cover the general regulatory framework of credit unions, which are regulated and insured by the National Credit Union Administration.

Q 1.2 Is a financial institution the same as an IDI?

The term "financial institution" is defined broadly and can be used generically to refer to any organization engaged primarily in financial activities. With respect to the U.S. financial regulatory regime, the term "financial institution" is defined differently for different purposes. However, "financial institution" is almost always defined to include institutions such as IDIs that engage in the business of banking, though often the term is defined more broadly to include nonbank lenders, securities broker-dealers, and insurance companies.

Q 1.2.1 What is the "business of banking"?

The "business of banking" is an evolving concept; however, in the United States it is generally comprised of five core functions:

- discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt;
- receiving deposits;
- buying and selling exchange, coin, and bullion;
- lending money on personal security; and
- obtaining, issuing, and circulating notes.[3]

Today, more than ever, it is technology that is continually driving the evolution of the business of banking.

Q 1.2.2 Why is the business of banking highly regulated in the United States?

Banking in the United States is regulated in order to protect depositors, promote monetary and financial stability, promote an efficient and competitive financial system, and provide for consumer protection. Notably, the regulatory framework is not designed to protect bank stockholders or other investors.

Q 1.3 What is a charter?

A charter is essentially a license for an IDI to engage in the business of banking. Depending on the chartering authority, this license often is evidenced by a certificate also known as a charter. An IDI must obtain a charter in order to begin its banking operations. Both federal and state banking agencies may issue charters.

For all types of IDIs, the charter application process involves an application not only to the chartering agency (whether state or federal), but also to the FDIC to obtain deposit insurance through the federal DIF.

The holding companies of IDIs do not have banking charters and do not go through a charter application process. Rather, with the exception of mutual holding companies that are chartered by the Board of Governors of the Federal Reserve System (the "Federal Reserve") through the reorganization of a mutual federal savings association, holding companies are corporations that go through the incorporation process required by the appropriate state of incorporation, and an application and prior approval process with the Federal Reserve in order to become bank or savings and loan holding companies.

Q 1.3.1 What different types of charters are available?

In the United States, the business of banking is offered from a number of different charter types. On the federal level, currently IDI charters are issued by the Office of the Comptroller of the Currency (OCC), and typically consist of either a commercial bank charter or a savings association charter. However, the OCC also issues charters for trust banks and credit card banks. These entities are discussed

further below and, due to limitations on powers and authority, may or may not need federal deposit insurance.

State chartering authorities also issue charters depending on the specific state law. Many different forms exist today, including commercial banks, trust banks, savings bank, industrial loan companies, and savings and loan associations. The banking powers permitted by these charters, including investment authority, fiduciary powers, and lending authority, vary by state law.

Q 1.3.2 What factors are involved in choosing one type of charter over another?

There are a number of considerations associated with charter selection. The charter type dictates the breadth and depth of an IDI's banking powers, including its permissible activities and investments, as well as the regulator or regulators that will supervise the IDI. The different fees and deposit insurance premiums associated with different charters may also be a factor in charter selection.

Banks

Q 1.4 What is a bank?

A bank is an institution authorized by a particular type of charter to engage in the business of banking. The term "bank" is often used generically to refer to any IDI. However, legally the term "bank" has different meanings under different statutory authorities. For example, under the FDI Act, "bank" is defined to include national and state banks, but does not include federal and state savings associations. In contrast, the Bank Holding Company Act (the "BHC Act")[4] broadly defines "bank," subject to the exclusions discussed below, as:

- an insured bank as defined in section 3(h) of the FDI Act (that is, an FDIC-insured bank); or
- an institution organized under federal or state law that both:
  - accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and
  - is engaged in the business of making commercial loans.[5]

In practical terms, under the BHC Act, a "bank" is any entity the control of which would make the controlling company a "bank holding company" (BHC).[6] However, the BHC Act excludes a number of entities from the definition of "bank," including credit unions, thrifts, and foreign institutions that do not operate in the United States beyond maintaining a branch in the United States. Also, three types of institutions that otherwise have characteristics of banks are excluded from the definition of "bank" under amendments to the BHC Act made by the Competitive Equality Banking Act of 1987 (the "CEBA")[7] and are popularly referred to as "CEBA banks," "CEBA nonbanks," or "nonbank banks."

Q 1.5 What are CEBA banks?

The CEBA, among other things, amended the BHC Act to close a perceived loophole in the definition of "bank" for BHC Act purposes, but continued to carve out certain types of charters from the definition of "bank." This means that an entity owning or controlling a CEBA bank will not be considered to be a BHC, and thus will not be subject to the restrictions applicable to BHCs on engaging in non-financial activities. This makes CEBA banks attractive to non-financial companies—such as automobile manufacturers, energy companies, or retailers—that otherwise would not be allowed to own banks.

Q 1.6 What are the types of CEBA banks?

Three main types of CEBA (nonbank) banks are:

- ***CEBA credit card banks.*** This includes an institution, including an institution that accepts collateral for extensions of credit by holding deposits under $100,000, that
  - engages only in credit card operations;
  - does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others;
  - does not accept any savings or time deposits of less than $100,000;
  - maintains only one office that accepts deposits; and
  - does not engage in the business of making commercial loans, other than issuing credit cards to small businesses.[8]

CEBA credit card banks are often owned by department stores and other retailers, and are used to issue the store's own private label credit card.

- ***Industrial loan companies.*** Industrial loan companies (ILCs), also known as industrial loan corporations or industrial banks, are state chartered institutions regulated by the chartering state and the FDIC.[9] Their deposits are insured by the FDIC. Post-CEBA, to qualify for the exclusion from the definition of "bank," ILCs must either:
  - not accept demand deposits that the depositor may withdraw by check or similar means for payment to third parties; or
  - have total assets of less than $100,000,000.[10]

Currently, only a handful of states charter ILCs, and that list cannot expand under the BHC Act, which provides that the state law must have required FDIC insurance for industrial banks as of March 5, 1987.[11]

- ***Trust banks.*** An "institution that functions solely in a trust or fiduciary capacity" qualifies for exclusion from the definition of "bank" if:
  - all or substantially all of the deposits of such institution are in trust funds and are received in a bona fide fiduciary capacity;
  - no deposits of such institution that are insured by the FDIC are offered or marketed by or through an affiliate of such institution;
  - such institution does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others, or make commercial loans; and
  - such institution does not obtain payment or payment-related services from any Federal Reserve Bank, including any service referred to in section 11a of the Federal Reserve Act (FRA), or exercise Federal Reserve discount borrowing privileges.[12]

National Banks

Basics of National Banks

Q 1.7 What is a national bank?

A national bank is a bank chartered by the OCC, an independent bureau of the U.S. Treasury Department.

Q 1.8 Who regulates national banks?

The OCC, as the chartering agency and primary federal regulator for national banks, regulates national banks and their subsidiaries.

Q 1.9 Do national bank activities enjoy preemption from state law?

Historically, courts have interpreted the National Bank Act (NBA) as broadly preempting state laws with respect to national banks and their activities. Accordingly, national banks were immune from coverage by many state laws, regulations, and examination and enforcement activities by state authorities. This preemption authority was bolstered by the U.S. Supreme Court case, *Barnett Bank of Marion County, N.A. v. Nelson*,[13] which allows for preemption of state laws that "significantly interfere" with national bank powers, and affirmed the OCC's issuance of its preemption rules[14] in 2004 that clarified the agency's view that the NBA preempted state laws that "obstruct, impair, or condition" a national bank's exercise of its powers.[15] The 2006 Supreme Court case of *Watters v. Wachovia* held that the NBA also preempted state laws with respect to operating subsidiaries of national banks.[16]

Recently, NBA preemption of state laws has been challenged—and weakened. In 2009, the Supreme Court held, in *Cuomo v. Clearing House Association*,[17] that states were preempted only from exercising their *visitorial* (supervisory and examination) powers over national banks, and not precluded from exercising their ordinary powers to enforce state laws. In practical terms, this means that states may obtain information from national banks in connection with a formal law enforcement action under state law, but may not exercise an administrative, supervisory, or day-to-day authority over a national bank. The Dodd-Frank

Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") also curtailed the OCC's broad preemptive authority by codifying the *Barnett Bank* standard of "significantly interfere," rather than the OCC's "obstruct, impair, or condition" standard. The Dodd-Frank Act also eliminated preemption for operating subsidiaries of national banks.[18] In order to conform with the Dodd-Frank Act and the Supreme Court's decision in *Cuomo*, in 2011 the OCC issued new preemption rules that, in relevant part, remove the "obstruct, impair, or condition" language from the preemption standard and recognize the authority of state attorneys general to bring actions against national banks to enforce applicable laws.[19]

National Bank Activities

Q 1.10 What activities are permissible for national banks to engage in directly?

Under the NBA,[20] the statute that authorizes national banks, national banks may engage in any activity that is part of or incidental to the business of banking,[21] including activities that the OCC determines, based on their or another's authority, to be permissible for a national bank. The OCC periodically issues formal interpretive letters in response to queries requesting opinions on whether a given activity would be permissible for a national bank.[22]

Q 1.11 What activities may national banks engage in through a subsidiary?

National banks may invest in operating subsidiaries[23] and financial subsidiaries.[24] A notice or application to the OCC is generally required in order to invest in either type of entity.[25]

An operating subsidiary may conduct any activity that the bank is permitted to engage in directly, other than taking deposits.[26] Financial subsidiaries, created by the Financial Services Modernization Act of 1999 (the "Gramm-Leach-Bliley Act")[27] may engage in a broader range of financial activities beyond those the bank may engage in directly. A national bank must meet certain supervisory criteria, including being well managed and well capitalized, in order to be permitted to hold an interest in a financial subsidiary.[28]

Q 1.12 In what activities may a national bank's financial subsidiary engage?

A financial subsidiary may engage in activities that are "financial in nature" or activities that are "incidental to a financial activity" and authorized pursuant to 12 U.S.C. § 24a. OCC regulations provide a non-exhaustive list of activities permissible for a financial subsidiary.[29] These include:

- lending, exchanging, transferring, investing for others, or safeguarding money or securities;
- engaging as agent or broker in any state for purposes of insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, death, defects in title, or providing annuities as agent or broker;
- providing financial, investment, or economic advisory services, including advising an investment company as defined in section 3 of the Investment Company Act;[30]
- issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly;
- underwriting, dealing in, or making a market in securities;
- engaging in any activity that the Federal Reserve has determined, by order or regulation in effect on November 12, 1999, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto;
- engaging, in the United States, in any activity that a BHC may engage in outside the United States and, for which, the Federal Reserve has determined, under regulations prescribed or interpretations issued pursuant to section 4(c)(13) of the BHC Act[31] as in effect on November 11, 1999, to be usual in connection with the transaction of banking or other financial operations abroad; and
- activities that the Secretary of the Treasury, in consultation with the Federal Reserve, determines to be "financial in nature" or "incidental to a financial activity."

Consistent with the Gramm-Leach-Bliley Act, OCC regulations also specify activities that are *not* permissible for a financial subsidiary.[32] These include engaging as principal in the following:

- insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability or death, or defects in title (except to the extent permitted under section 302 or 303(c) of the Gramm-Leach-Bliley Act, such as credit insurance)[33] or providing or issuing annuities, the income of which is subject to special tax treatment under section 72 of the Internal Revenue Code;[34]
- real estate development or real estate investment, unless expressly authorized by law; and
- activities authorized for bank holding companies by section 4(k)(4)(H) or (I) of the BHC Act,[35] except activities authorized under section 4(k)(4)(H) that may be permitted in accordance with section 122 of the Gramm-Leach-Bliley Act (merchant banking activities).

Q 1.13 What types of investments may national banks make?

Generally, the permissible investments in debt and equity securities that national banks may make for their own accounts are described in detail in 12 C.F.R. Part 1.[36] There are specific limits on the amount of securities the national bank may hold, depending on the type of security involved.

National banks have no broad, general authority to make equity investments in other companies, including in other financial institutions. Rather, the investment must be specifically authorized by law. For instance, national banks may make certain investments for the purpose of community development.[37] They may also invest in bank service companies, described elsewhere in this chapter.[38]

State (Member and Nonmember) Banks

Q 1.14 What types of IDIs may be state chartered?

Most states offer several types of IDI charters including, among others, commercial bank, trust bank, savings bank, savings and loan association, and building and loan association charters.

Q 1.15 What is a state member bank?

A state member bank is a state chartered bank that is a member of the Federal Reserve System.[39]

Q 1.16 What is the Federal Reserve System?

The Federal Reserve System is the central bank of the United States composed of a Board of Governors and twelve District Federal Reserve Banks. It has a number of responsibilities, including managing a nationwide check-clearing system and overseeing monetary policy, as well as regulating and supervising state member banks, bank holding companies, and savings and loan holding companies.

Q 1.17 Who regulates state member banks?

State member banks are regulated by their state chartering authority, as well as by the Federal Reserve as their primary federal regulator.

Q 1.18 Can a national bank be a member of the Federal Reserve System?

Yes—in fact, national banks are required to be members of the Federal Reserve System.[40]

Q 1.19 What is a state nonmember bank?

A state nonmember bank is a state chartered bank that is not a member of the Federal Reserve System.[41]

Q 1.20 Who regulates state nonmember banks?

State nonmember banks are regulated by their state chartering authority, as well as by the FDIC as their primary federal regulator.

Q 1.21 Why would a bank choose (not) to be a member of the Federal Reserve System?

There are advantages and disadvantages to both options. State nonmember banks are generally permitted greater flexibility to engage in certain activities and to make certain investments under the FDI Act and the FDIC's rules and regulations, so long as those activities

do not present a risk to the DIF or cause safety and soundness concerns, and the bank meets and continues to meet applicable capital standards.[42] As discussed in Q 1.22 below, the activity also must be permitted under the relevant state law. Banks that are members of the Federal Reserve System must purchase shares in the appropriate Federal Reserve Bank equal to 6% of the member bank's paid in capital.[43]

There also are advantages to being a state member bank. For example, for banks that are subsidiaries of bank holding companies, there may be some convenience in having the same federal regulator regulate both the bank and its holding company.

Q 1.22 What activities are permissible for state banks?

Permissible state bank activities vary by state. Many states have a parity or "wild card" statute that permits that state's IDIs to exercise the powers and privileges of their federal counterparts. In addition, the FDI Act and the rules and regulations of the FDIC may permit state nonmember banks to engage in a broader range of activities than their federally chartered counterparts.[44]

Bank Service Companies

Q 1.23 What is a bank service company?

Under the Bank Service Company Act,[45] a bank service company is any corporation or limited liability company that is organized to perform certain services for, and whose ownership or membership is comprised solely of, one or more insured banks.[46] For IDIs only, bank service companies are permitted to provide the following services:

- check and deposit sorting and posting;
- computation and posting of interest and other credits and charges; and
- preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a depository institution.[47]

Bank service companies may also perform certain services for nonbanks.[48]

Q 1.24 Are bank service companies regulated and examined like IDIs?

Yes, a bank service company is subject to regulation and examination by the appropriate federal banking agency of its principal investor and to the same extent as its principal investor.[49]

Q 1.25 Are companies that perform these same services for banks subject to regulation and examination?

Yes, any company that performs the above services for an IDI is subject to regulation and examination by the IDI's primary federal regulator with respect to those activities to the same extent as the IDI.[50] The Bank Service Company Act requires all IDIs to provide notice to their primary federal regulator of contracts and relationships with third parties that provide these services for the IDI.[51] Notice is required within thirty days after the making of the service contract or the performance of the service, whichever occurs first.[52]

Bank Holding Companies

Basics of Bank Holding Companies

Q 1.26 What is a bank holding company?

Under the BHC Act, a BHC is a company that has direct or indirect control over any bank.[53] The term "bank" under the BHC Act is generally defined to include federal and state commercial banks and state savings banks, but not certain special-purpose banks, as noted in Q 1.6 above.[54] For a detailed discussion of what is a bank, see Q 1.4 above.

Q 1.27 What is a "company"?

The BHC Act defines "company" very broadly to include any corporation, partnership, business trust, association, or similar organization.[55] It can also include a trust, unless the trust is a testamentary or

inter vivos trust established for the benefit of natural persons who are related by blood, marriage, or adoption.[56]

Q 1.28 Can a natural person be a BHC?

No, a natural person cannot be a BHC.

Q 1.29 What is "control" for purposes of the BHC Act?

A company controls a bank if it, directly or indirectly, owns, controls, or has the power to vote 25% or more of the outstanding shares of any class of voting shares of the bank.[57] A company also controls a bank if it controls in any manner the election of a majority of the directors or trustees of the bank or a company that controls the bank.[58] Importantly, the BHC Act also provides the Federal Reserve with the authority to determine that a company directly or indirectly controls a bank if, after notice and an opportunity for hearing, the Federal Reserve determines that the company exercises a controlling influence over the management or policies of the bank or a company that controls the bank.[59]

Whether a company "controls" a bank or other entity is the subject of intense regulatory scrutiny, and the banking agencies, including the Federal Reserve, have developed extensive regulatory guidance, particularly around presumptions of control. The concept of control is discussed in more depth in chapter 5, Change in Bank Control.

Q 1.30 Who regulates BHCs?

BHCs are regulated by the Federal Reserve.

Q 1.30.1 What does it mean for a BHC to serve as a "source of strength" to its IDI subsidiaries?

The Dodd-Frank Act codified the Federal Reserve's policy requiring a BHC to serve as a "source of strength" to its subsidiary IDIs.[60] This means that a BHC must "stand ready to use available resources to provide adequate capital funds to its subsidiary banks during times of financial distress."[61] It also means that a BHC must maintain the

financial flexibility to raise capital in the event a subsidiary bank needs additional capital funds.[62]

Q 1.30.2 What happens if a BHC fails to serve as a source of strength?

When a BHC is in a position to provide financial support to a troubled subsidiary bank but fails to do so, the Federal Reserve may deem this lack of support to be an unsafe and unsound practice, a violation of the Federal Reserve's Regulation Y, or both.[63] Under the Dodd-Frank Act, failure to do so may also be a violation of the FDI Act.[64]

Bank Holding Company Activities

Q 1.31 What types of activities are permissible for a BHC?

BHCs are permitted to engage in both "banking" and permissible "nonbanking" activities. The BHC Act, with certain exceptions, limits the activities of a BHC to those that involve the business of banking, or managing or controlling banks, and those activities that the Federal Reserve has determined to be "so closely related to banking as to be a proper incident thereto," or permissible nonbanking activities.[65]

Q 1.31.1 Which activities are considered to be "so closely related to banking as to be a proper incident thereto"?

The activities that the Federal Reserve has determined by regulation to be permissible nonbanking activities include the following activities set forth in the Federal Reserve's Regulation Y:

- extending credit and servicing loans;
- activities related to extending credit, such as real estate appraising, arranging commercial real estate equity financing, check guaranty services, collection agency services, credit bureau services, asset management, servicing and collection activities, acquiring debt in default, and real estate settlement services;

- leasing real or personal property;
- operating nonbank depository institutions, including ILCs and thrifts;
- trust company functions;
- financial and investment advisory activities;
- agency transactional services for customer investments, including certain securities brokerage, riskless principal transactions, private placement services, and acting as a futures commission merchant;
- investment transactions as principal, including certain underwriting and dealing in government obligations and money market instruments, investing and trading activities, and buying and selling bullion, and related activities;
- management consulting and counseling services, including certain management consulting services, employee benefits consulting services, and career counseling services;
- support services, including certain courier services, and printing and selling MICR-encoded items;
- certain insurance agency and underwriting activities;
- certain community development activities;
- money orders, savings bonds, and traveler's checks; and
- data processing.[66]

In addition, there are a number of activities that the Federal Reserve has permitted by order on an individual basis, such as providing administrative services to mutual funds.[67] Further, there are a number of activities that the Federal Reserve has determined are *not* closely related to banking, including, among others, underwriting general life insurance not related to credit extension, operating a travel agency, and general management consulting.[68] However, as discussed below, bank holding companies that are also financial holding companies are permitted to engage in a wider range of activities.

PRACTICE NOTE

The Gramm-Leach-Bliley Act amended the BHC Act to permit qualifying BHCs to elect financial holding company status and to engage in a broader range of financial activities (see Q 1.33 below). As a result of the Gramm-Leach-Bliley Act, activities that are "so closely related to banking as to be a proper incident thereto" are limited to those activities identified as of November 11, 1999.[69]

Q 1.32 Is a bank holding company permitted to own a thrift as well as a bank?

Yes. The ownership of a thrift is considered a permissible nonbanking activity for a BHC.[70] (A holding company that owns only one or more thrifts—and no banks—is a savings and loan holding company rather than a BHC, while a holding company that owns one or more banks is a BHC, whether or not it owns any thrifts or other entities.)

Financial Holding Companies

Q 1.33 What is a financial holding company?

A financial holding company (FHC) is a BHC that meets the following requirements:

- all depository institutions controlled by the BHC are and remain well capitalized;
- all depository institutions controlled by the BHC are and remain well managed; and
- the BHC has made an effective election to become a FHC.[71]

In addition, the Dodd-Frank Act requires a BHC to be well capitalized and well managed before it may elect to become a FHC and to remain well capitalized and well managed in order to maintain its FHC status.[72]

Q 1.34 What benefits does FHC status provide a BHC?

In addition to being able to engage in activities that are "so closely related to banking so as to be a proper incident thereto," FHC status permits a BHC to engage in an expanded range of activities—those that are "financial" in nature, or incidental or complementary to financial activities.[73]

Q 1.35 What steps must a BHC take in order to qualify as a FHC?

In order to become a FHC, a BHC must file a written declaration that includes the following:

- a statement that the BHC elects to be a FHC;
- the name and head office address of the BHC and of each depository institution controlled by the BHC;
- a certification that each depository institution controlled by the BHC is well capitalized as of the date the BHC submits its declaration;
- the capital ratios as of the close of the previous quarter for all relevant Prompt Corrective Action capital measures for each depository institution controlled by the BHC on the date the BHC submits its declaration;
- a certification that the BHC itself is well capitalized and well managed as of the date the BHC submits its declaration; and
- a certification that each depository institution controlled by the BHC is well managed as of the date the BHC submits its declaration.

The election to become a FHC is effective on the thirty-first calendar day after the date a complete declaration was filed, unless otherwise notified by the Federal Reserve.[74] In addition, in order to be effective, as of the date of the declaration, all IDI subsidiaries of the BHC must have received a rating of "Satisfactory" or better at the IDI's most recent Community Reinvestment Act (CRA) examination.[75]

Q 1.36 Who regulates FHCs?

As a BHC, FHCs are regulated by the Federal Reserve.

Q 1.37 What are the consequences of a FHC failing to meet the well capitalized and well managed standards?

If a FHC is engaged in expanded financial activities, but is no longer considered well capitalized and well managed, or if any of its IDIs are no longer considered well capitalized and well managed, the FHC will be required to enter into an agreement, commonly referred to as a "4(m) Agreement," with the Federal Reserve to cure the deficiencies and comply with the FHC requirements.[76] In addition, the Federal Reserve may impose limits on the FHC's activities or on the activities of any affiliate of the FHC.[77] If a FHC fails to correct the deficiencies within 180 days (subject to possible extensions), the Federal Reserve may require the FHC to cease all activities that are not permissible for a BHC or divest control of any subsidiary IDI.[78]

Q 1.38 What are the consequences of a subsidiary IDI failing to maintain the required CRA rating?

In the event a subsidiary IDI fails to maintain a "Satisfactory" or better CRA rating, the FHC generally may not begin any new activity not otherwise permissible for a BHC, and may not directly or indirectly acquire control of a company engaged in any activity that is not permissible for a BHC.[79]

Q 1.39 Are there any downsides to being a FHC?

When FHC status became available following enactment of the Gramm-Leach-Bliley Act, a large number of BHCs elected FHC status. Today, only a few of those BHCs engage in expanded FHC activities. Regardless of whether a BHC with FHC status engages in expanded FHC activities, the failure of the BHC and its IDIs to maintain the required well capitalized and well managed standards will result in the BHC being subject to a supervisory 4(m) Agreement. If the BHC

is unable to raise the required capital or otherwise fulfill the requirements of the 4(m) Agreement within the designated time frame, the BHC could be required to divest its IDIs.[80]

Financial Holding Company Activities

Q 1.40 What types of activities can FHCs engage in that other BHCs cannot?

Section 4(k) of the BHC Act permits FHCs to engage in any activity that the Federal Reserve determines, by regulation or order, to be (i) financial in nature or incidental to such financial activity; or (ii) complementary to a financial activity and does not pose a substantial risk to the safety or soundness of IDIs or the financial system generally.[81] These activities are permitted in addition to those permissible for BHCs.

Q 1.40.1 What activities are "financial in nature"?

Section 4(k)(4) of the BHC Act has defined the following activities as financial in nature:

- lending, exchanging, transferring, investing for others, or safeguarding money or securities;
- insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any state;
- providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940);
- issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly;
- underwriting, dealing in, or making a market in securities;
- merchant banking activities; and
- activities determined to be usual in connection with the transaction of banking abroad.

By regulation, activities related to acting as a finder are "financial in nature."[82]

Q 1.40.2 Can additional activities be added to the list of activities that are "financial in nature"?

Yes. Regulation Y sets forth a process for FHCs to seek a determination from the Federal Reserve, together with the Secretary of the Treasury, that an activity not listed in Regulation Y is financial in nature or incidental to a financial activity.[83]

Q 1.40.3 What activities are complementary to a financial activity?

Section 4(k) of the BHC Act permits FHCs to engage in any activity that the Federal Reserve, in its sole discretion, determines is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of IDIs or the financial system generally. The Federal Reserve has determined that this authority is intended to allow it to permit FHCs to engage, on a limited basis, in an activity that appears to be commercial rather than financial in nature, but that is meaningfully connected to a financial activity such that it complements the financial activity.[84] In this regard, the Federal Reserve has determined the following, under certain circumstances, to be complementary to a financial activity:

- physical commodity trading in energy-related commodities;[85]
- disease management and mail order pharmacy activities as complementary to the underwriting and selling of health insurance;[86]
- energy management services as complementary to engaging as principal in commodity derivatives and the provision of derivatives investment advisory services;[87]
- energy tolling services as complementary to engaging in commodity derivatives activities;[88] and
- trading in certain commodities not approved by the Commodity Futures Trading Commission for trading on a U.S. futures exchange or on certain non-U.S. exchanges.

Regulation Y also sets forth a process for FHCs to seek a determination that activities are complementary to a financial activity.[89]

Thrifts

Basics of Thrifts

Q 1.41 What is a thrift?

The term "thrift" or "thrift institution" is widely used to define savings and loan associations, savings banks and savings associations, institutions that were historically focused on consumer savings (thrift) and home lending, in order to distinguish those institutions from commercial banks, which were focused on business accounts and commercial lending. The term thrift is still used despite the increasing overlap in products offered by so-called thrift institutions and commercial banks. The term "thrift" is not defined under the FDI Act. However, for purposes of the BHC Act, a "thrift institution" is any domestic building and loan or savings and loan association, any cooperative bank, and any federal savings bank.[90] As a result, at least with respect to BHC status, a "thrift" includes federal savings banks or associations, and state savings and loan associations, but not state savings banks.[91]

Q 1.42 Can a thrift be federally chartered or state chartered?

Yes, thrifts can be federally chartered or state chartered. Federal savings associations are chartered by the OCC. States generally offer several types of "thrift" charters, including savings and loan associations and building and loan associations.

Q 1.43 Who regulates thrifts?

Federal thrifts were historically regulated by the OTS. However, as a result of the Dodd-Frank Act, effective July 21, 2011, they are regulated by the OCC. State thrifts are regulated by their state chartering authority and, as of July 21, 2011, are also regulated by the FDIC.

Q 1.44 Why choose to be a thrift versus a bank?

The differences between thrifts and banks used to be very distinct, based on permissible lending activities, but today these differences are less pronounced. Historically, thrifts were created to promote

homeownership and fund the housing industry. Over the last several decades, thrift activities have expanded to include commercial lending, and banks as well as nonbank lenders have, in turn, entered the mortgage financing industry.[92] In addition, the freedom federal thrifts previously had to associate with commercial firms was eliminated by the Gramm-Leach-Bliley Act. Federal thrifts also historically had much greater freedom to branch nationwide than did national banks. However, the Dodd-Frank Act extended similar branching authority to national banks. Further, federal thrifts will now be regulated by the OCC instead of the Office of Thrift Supervision (OTS), which is abolished under the Dodd-Frank Act. Therefore, the continued utility or appeal of the federal thrift charter is subject to some debate.

Thrift Activities

Q 1.45 What types of activities are permissible for thrifts?

Federal savings associations are permitted to engage in activities that are expressly authorized by the Home Owners' Loan Act (HOLA)[93] or that are incidental to expressly authorized activities. While these activities were traditionally limited to providing savings accounts and home financing to consumers, over the years Congress has expanded these activities and today, federal savings associations may generally engage in a full range of deposit, loan, and investment activities. However, the HOLA sets volume limits on certain types of loans and investments. For example, a federal savings association's commercial loans are limited to no more than 20% of total assets, and amounts in excess of 10% of total assets must only be used for small business loans, with certain exceptions.[94]

In addition, the HOLA requires a federal savings association's qualified thrift investments (QTI) to equal or exceed 65% of the thrift's portfolio assets on a monthly average basis in nine out of every twelve months.[95] This is the so-called Qualified Thrift Lender (QTL) Test. QTI must fall into one of two categories: assets that are includable in QTI without limit and assets limited to 20% of portfolio assets.[96] Assets includable without limit include the following:

- loans (including qualifying real estate owned as a result of such loans) to purchase, refinance, construct, improve, or repair domestic residential or manufactured housing;
- home equity loans;
- educational loans;
- small business loans;
- loans made through credit cards or credit card accounts;
- securities backed by or representing an interest in mortgages on domestic residential or manufactured housing;
- Federal Home Loan Bank stock; and
- obligations of the FDIC, Federal Savings and Loan Insurance Corporation (FSLIC), Resolution Trust Corporation, and FSLIC Resolution Fund (depending on the date of the issue of such obligations).

Assets limited to 20% of the thrift's portfolio assets include the following:

- 50% of the amount of domestic residential housing mortgage loans originated and sold within 90 days (an institution may, on a consistent basis, include as QTI either the sales amounts from a previous quarter or the previous rolling 90-day or 3-month period);
- investments in a service corporation that derives at least 80% of its gross revenues from activities related to domestic or manufactured residential housing;
- 200% of the amount of loans and investments in "starter homes";
- 200% of the amount of certain loans in "credit-needy areas";
- loans for the purchase, construction, development, or improvements of "community service facilities" not in credit-needy areas;
- loans for personal, family, or household purposes (other than those reported in the assets includable without limit category); and
- Federal National Mortgage Association (known as "Fannie Mae") and Federal Home Loan Mortgage Corporation (known as "Freddie Mac") stock.

Federal savings associations may engage in a somewhat broader range of activities through service corporations, including broader real estate activities.[97]

State savings associations[98] are generally limited to the activities permissible for federal savings associations.[99] However, they may also engage in additional activities with permission from the FDIC, which may give its approval on a case-by-case basis, if it determines that the activity would not pose a risk to the DIF.[100] State savings associations must also look to the laws of their chartering state for additional limits on their activities.

Savings and Loan Holding Companies

Basics of Savings and Loan Holding Companies

Q 1.46 What is a savings and loan holding company?

A savings and loan holding company (SLHC) is defined under the HOLA as any company that directly or indirectly controls a savings association or that controls another company that is a SLHC.[101] However, a company that controls both a bank and a savings association is a BHC rather than a SLHC.

Q 1.46.1 What is a "company" under the HOLA?

"Company" is broadly defined by the HOLA to include any corporation, partnership, trust, joint stock company, or similar organization.[102] The term generally does not include testamentary trusts.[103]

Q 1.46.2 What is "control" under the HOLA?

A company controls a savings association if it, directly or indirectly or acting in concert with others, owns, controls or has the power to vote (including by proxy) 25% or more of the voting shares of the savings association.[104] A company also controls a savings association if it controls in any manner the election of a majority of the directors of a savings association.[105] Importantly, the Federal Reserve may determine that a company directly or indirectly controls a savings association, if, after notice and an opportunity for hearing, the Federal

Reserve determines that the company exercises a controlling influence over the management or policies of a savings association.[106]

Q 1.47 Will a holding company that owns both a bank and a thrift be considered a BHC or a SLHC?

A holding company that owns both a bank and a thrift is considered a BHC.

Q 1.48 Who regulates SLHCs?

Historically, SLHCs were regulated by the OTS. Effective July 21, 2011, regulation of SLHCs was transferred to the Federal Reserve.

Q 1.49 What is the practical difference between a BHC and a SLHC?

At one time, SLHCs enjoyed expanded activities, no consolidated capital requirement, no source of strength requirement, and only a single regulator for both the SLHC and its subsidiary thrift. Since enactment of the Gramm-Leach-Bliley Act in 1999, which eliminated the so-called "Unitary Thrift Holding Company loophole" by limiting the activities of SLHCs to those permissible for BHCs, and the Dodd-Frank Act, which instituted consolidated capital and source of strength requirements and transferred supervisory authority over SLHCs to the Federal Reserve, there are few notable differences between a BHC and a SLHC. The main difference is that SLHCs are permitted to engage in certain real estate development activities that are not permissible for BHCs or FHCs.[107]

Q 1.50 What is the 10(*l*) election?

Section 10(*l*) of the HOLA permits state chartered savings banks and insured cooperative banks that are not OCC regulated to be deemed savings associations for purposes of the regulation of their holding company.[108] The only requirement the electing institution must meet is that it must satisfy the QTL Test. Because these institutions are considered "banks" for purposes of the FDI Act and the BHC Act, without the election their holding companies would be BHCs regulated by the

Federal Reserve. However, while the Dodd-Frank Act does not directly eliminate section 10(*l*) of the HOLA,[109] the practical effect of making a 10(*l*) election is effectively eliminated as the Federal Reserve will remain the holding companies' regulator and, as discussed above, the Dodd-Frank Act all but eliminated the material differences between SLHCs and BHCs. In addition, any state savings bank opting for a 10(*l*) election would be unnecessarily subject to QTL requirements.

Savings and Loan Holding Company Activities

Q 1.51 What types of activities are permissible for SLHCs?

Prior to the Dodd-Frank Act, the HOLA generally permitted SLHCs to engage in any activity that the Federal Reserve has permitted for FHCs under section 4(k) of the BHC Act and any activity that the Federal Reserve permits for BHCs under section 4(c) of the BHC Act.[110] The Dodd-Frank Act requires that SLHCs engaging in expanded section 4(k) activities meet the same standards as FHCs.[111]

PRACTICE NOTE

Prior to enactment of the Gramm-Leach-Bliley Act, SLHCs that owned only a single thrift (so-called "unitary thrift holding companies") were generally unrestricted in their activities. As a result, many insurance companies and commercial firms acquired thrifts and became SLHCs. In order to close what was deemed to be a loophole, the Gramm-Leach-Bliley Act restricted the creation of new SLHCs that engage in commercial or other non-financial activities. The Gramm-Leach-Bliley Act grandfathered in and permitted existing SLHCs to continue to operate. A grandfathered SLHC may still operate without activity restriction if (i) it continues to hold the one thrift (or its successor) that it controlled on May 4, 1999, or that it acquired under an application pending with OTS on or before that date, and (ii) the subsidiary thrift(s) maintain QTL status.[112]

Foreign Banking Organizations

Q 1.52 What is a foreign banking organization?

Under the International Banking Act of 1978, as amended,[113] and the Federal Reserve's implementing Regulation K,[114] a foreign banking organization (FBO) is a foreign bank that operates a branch, agency, or commercial lending company subsidiary in the United States, controls a bank in the United States, or controls an Edge Act corporation in the United States, and any company of which the foreign bank is a subsidiary.[115]

Q 1.53 Who regulates FBOs?

FBOs are regulated by the Federal Reserve. In addition, the U.S. branch, agency, or representative offices of foreign banks are regulated by the Federal Reserve and the applicable state banking department or, if the branch or agency is a federal branch or agency, by the Federal Reserve and the OCC.

Q 1.54 What is a qualifying foreign banking organization?

Generally, FBOs are subject to the provisions of the BHC Act, including the restrictions on nonbank activities, as if they were BHCs. This means that a FBO may only engage in BHC permissible activities, inside or outside the United States. The BHC Act provides two exceptions specifically for FBOs in order to limit the extraterritorial effect of the BHC Act on those FBOs with limited U.S. activities.[116] A qualifying foreign banking organization (QFBO) is a FBO that meets the requirements set forth in Regulation K necessary to take advantage of these two exceptions, such as primarily being engaged in banking activities outside the United States.[117]

International Activities of Domestic Banks

Q 1.55 Are domestic IDIs permitted to operate internationally?

Yes, presuming its charter permits it to do so, a domestic IDI is permitted to operate internationally through any of the following:

- a foreign branch;
- an Edge Act corporation, which is a U.S. corporation organized under section 25(a) of the Federal Reserve Act to carry out international banking activities; or
- an agreement corporation, which is a state chartered entity chartered to carry out international banking activities.

Q 1.56 Can domestic IDIs engage in the same activities internationally as they can domestically?

Both national banks and state chartered member banks can engage in the same banking activities abroad as they can in the United States so long as such activities are usual in connection with the business of banking in the country in question.[118] In addition, if permitted by its charter, the IDI may also engage in certain additional activities and investments through a foreign branch if the activities and investments are usual in connection with the business of banking in the country in which the IDI is seeking to operate.[119] These activities and investments, among others, include:

- provision of certain guarantees;
- underwriting, distributing, buying, selling, and holding certain government obligations;
- lending on foreign real estate;
- acting as insurance agent or broker;
- employee deposit benefits programs;
- engaging in certain repurchase agreements; and
- investing in subsidiaries that engage in bank-permissible activities or activities that are incidental to the activities of the foreign branch.[120]

State chartered nonmember banks are permitted to engage internationally in commercial and other banking activities. In addition, subject to applicable state law, state chartered nonmember banks are permitted to engage internationally in the following activities:[121]

- financing, including commercial financing, consumer financing, mortgage banking, and factoring;
- leasing real or personal property;
- acting as a fiduciary;
- underwriting credit life, credit accident, and credit health insurance;
- performing services for other direct or indirect operations of a domestic banking organization permissible pursuant to sections 4(2)(A) and 4(c)(1)(C) of the BHC Act;
- holding the premises of a branch or an Edge Act corporation or insured state nonmember bank or of a subsidiary;
- investment, financial, or economic services compliant with 12 C.F.R. § 225.28(b);
- general insurance agency and brokerage;
- data processing;
- organizing, sponsoring, and managing certain mutual funds;
- performing certain management consulting services;
- underwriting, distributing, and dealing in debt and equity securities outside the United States;
- operating a travel agency in connection with financial services offered outside the United States;
- providing futures commission merchant services subject to compliance with 12 C.F.R. § 225.28(b); and
- engaging in any activities permissible under 12 C.F.R. § 225.28 (see Q 1.31.1 above).

Additional activities may also be permitted, subject to regulatory approval.[122]

The HOLA neither explicitly prohibits nor explicitly permits federal savings associations to engage in foreign activities. The OTS determined that if an activity is not explicitly prohibited or explicitly

permitted, a federal savings association may engage in the activity abroad if:

- it is otherwise permissible for the association;
- it can be conducted in a safe and sound manner; and
- it is incidental to the clearly permissible activities of a federal savings association.[123]

While the OTS approved the establishment of foreign agency offices and operating subsidiaries to engage in limited activities, it had not approved the establishment of a foreign branch of a federal savings association.[124] The OCC, as successor to the OTS, has not addressed this issue since the July 21, 2011, transfer date.

Q 1.57 Who regulates the international activities of domestic IDIs?

The international activities of domestic IDIs are regulated by the IDI's primary federal regulator and any state regulator, as applicable, subject to the Federal Reserve's Regulation K. In addition, the Federal Reserve regulates Edge corporations and agreement corporations.

Charter Conversions

Q 1.58 What is the process for one type of IDI to convert to another type?

In order to convert from one type of IDI to another, the converting IDI must follow the conversion processes set forth in the appropriate statutes, regulations and regulatory guidance applicable to both the IDI's current and intended charter. In some cases there may not be a direct statutory conversion process available. In those instances it may be necessary to first convert to another charter on an interim basis, and then ultimately to convert to the desired type of charter.

Q 1.59 How does a credit union convert to a bank?

As an initial matter, in order to convert to a bank or other IDI charter type, a credit union must file the necessary applications with and obtain the approval of the appropriate IDI regulator and also file an application with and obtain deposit insurance from the FDIC.

The Federal Credit Union Act (FCUA) permits an insured credit union (state or federal) to convert to a state or federal mutual savings bank or mutual savings association.[125] The FCUA sets forth a member notification and voting process.[126] While such a conversion does not require the approval of the National Credit Union Administration (NCUA) Board, it does require the NCUA to oversee the member voting process and approve the voting methodology and disclosure documentation.[127]

Q 1.59.1 Can a bank or thrift convert to a credit union?

Depending on the laws of its chartering authority, an IDI may be permitted to convert to a credit union. The FDI Act appears to contemplate the conversion of an IDI to a non-FDIC-insured institution,[128] but the regulations of the FDIC do not provide a direct conversion process. Neither the NBA nor the HOLA directly provide for such a conversion, though an indirect path may be available. In addition, state laws must be considered for state chartered IDIs.

The FCUA also does not provide for the conversion of banks or thrifts to credit unions. However, the NCUA has issued guidance with respect to such a possibility[129] and provides that the process for conversion may require the chartering of a new credit union and the immediate merger of the existing IDI into the newly formed credit union.[130]

PRACTICE NOTE

In 1996, Eastman Savings and Loan Association, a New York-chartered mutual savings and loan association, converted to a federal credit union, ESL Federal Credit Union. ESL Federal Credit Union serves employees of Eastman Kodak Company and a number of its subsidiaries. This may have been the only IDI conversion to a credit union before Thrivent Financial Bank completed its conversion to a federal credit union in November 2012.

Q 1.59.2 Why would an IDI want to convert to a credit union?

The reasons for any conversion are generally unique to the converting IDI and its business plan. The possible reasons an IDI might seek to convert to a credit union include the desire to limit its services to a limited field of membership; exemption from the obligations of the CRA; and the tax-exempt status enjoyed by federal credit unions. (It should be noted that the CRA and tax exemptions are the subject of much controversy and their exempt status may be subject to future legislative activity.)

Q 1.60 What is a mutual-to-stock conversion?

A mutual-to-stock conversion refers to the conversion of a mutual IDI to a stock IDI.

Q 1.60.1 Why choose a mutual-to-stock conversion?

The primary reason a mutual IDI would convert to a stock IDI would be to enhance its ability to raise capital, and to use stock-based equity compensation plans to attract and retain management.

Q 1.61 What is a minority stock mutual holding company conversion?

A minority stock mutual holding company conversion is the conversion of a mutual IDI to stock form with at least a majority of the voting stock held by a mutual holding company (MHC). The depositors of the converting IDI have their mutual interests preserved in the MHC, which retains the corporate governance structure of the mutual bank. The MHC structure was created by Congress in 1987 as part of CEBA to allow a mutual IDI to raise capital while at the same time permitting its members to retain majority ownership and control.[131]

While there are several conversion structures, in a typical conversion, a mutual IDI charters an interim stock IDI that is owned by the mutual IDI. Thereafter, the mutual IDI transfers the substantial part of its assets and liabilities, including its deposit liabilities, to the interim stock IDI.[132]

An intermediate stock holding company may also be established between the MHC and the stock IDI.[133] The OTS first permitted this multi-tier MHC structure in 1998 in order to facilitate stock repurchases that would otherwise trigger adverse tax consequences related to bad debt reserves recapture provisions.[134]

PRACTICE NOTE

Minority stock MHCs may be set up by state or federal savings banks and thrifts. While many thrifts and state banks are part of a MHC structure, currently only a single national bank is part of a MHC structure.[135]

Q 1.61.1 Why choose a minority stock MHC conversion?

A minority stock MHC conversion may facilitate acquisitions and better position the IDI to compete in the banking market and respond to regulatory developments. In addition, MHCs also may engage in a broader array of activities than the bank itself. Further, this structure provides better access to capital markets and permits the MHC and any intermediate stock holding company to borrow funds and to issue debt publicly or through a private placement. However, these structures are no longer as desirable as they once were. First, the capital treatment of certain of these debt securities, including trust preferred securities, as Tier 1 capital has been eliminated by section 171 of the Dodd-Frank Act, subject to a phase-out schedule for existing securities. Second, section 625(a) of the Dodd-Frank Act and the Federal Reserve's Regulation MM limit the ability of MHCs to waive dividends declared by a subsidiary of the MHC.[136]

Q 1.61.2 What is a second-step conversion?

A second-step conversion is the conversion of a MHC to stock form.

Q 1.61.3 What is a no-stock MHC reorganization?

A no-stock MHC reorganization is the reorganization of a mutual bank into stock form where the MHC remains entirely mutual. As intended by CEBA, the no-stock MHC structure provides the IDI with some of the critical benefits of a stock organization (that is, the ability to raise capital through the issuance of subordinated debentures or trust preferred securities and facilitate multi-bank acquisition structures) while at the same time permitting the depositors to retain full control of the IDI and its community-oriented focus.

Notes to Chapter 1

1. Federal Deposit Insurance Act, 12 U.S.C. §§ 1811 *et seq*.
2. 12 U.S.C. § 1813(c)(2).
3. *See* 12 U.S.C. § 24 (Seventh).
4. The Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841 *et seq*.
5. 12 U.S.C. § 1841(c)(1).
6. 12 U.S.C. § 1841(a).
7. Competitive Equality Banking Act, Pub. L. No. 100-86, 101 Stat. 552, 554 (Aug. 10, 1987).
8. 12 U.S.C. § 1841(c)(2)(F). The ability for CEBA credit card banks to issue credit cards to small businesses is an expansion of the exemption made in 2010 by the Dodd-Frank Act.
9. *See, e.g.*, FDIC, The FDIC's Supervision of Industrial Loan Companies: A Historical Perspective (last updated June 25, 2004), http://www.fdic.gov/regulations/examinations/supervisory/insights/sisum04/industrial_loans.html.
10. 12 U.S.C. § 1841(c)(2)(H).
11. California, Colorado, Hawaii, Indiana, Minnesota, Nevada, and Utah have the ability to charter ILCs. Currently, there are only 29 ILC charters, and these are located in Utah, California, and Nevada. *See* NAT'L ASSOC. OF INDUS. BANKERS, http://industrialbankers.org/.
12. 12 U.S.C. § 1841(c)(2)(D). Referenced services include currency and coin services, check clearing and collection services, wire transfer services, automated clearinghouse services, settlement services, securities safekeeping services, Board of Governors of the Federal Reserve System (the "Federal Reserve") float, and any services the Federal Reserve offers, including but not limited to payment services to effectuate the electronic transfer of funds. 12 U.S.C. § 248a.
13. Barnett Bank of Marion Cty., N.A. v. Nelson, 517 U.S. 25 (1996).
14. 12 C.F.R. §§ 7.4007–.4009; 12 C.F.R. §§ 34.3–.4, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (*Federal Register* notice accompanying the final regulations), http://www.occ.treas.gov/news-issuances/federal-register/69fr1904.pdf.
15. *See* Office of the Comptroller of the Currency (OCC) News Release 2004-3, OCC Issues Final Rules on National Bank Preemption and Visitorial Powers; Includes Strong Standard to Keep Predatory Lending Out of National Banks (Jan. 7, 2004), https://www.occ.gov/news-issuances/news-releases/2004/nr-occ-2004-3.html.
16. Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007).
17. Cuomo v. Clearing House Ass'n, LLC, 129 S. Ct. 987 (2009).
18. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) [hereinafter Dodd-Frank Act].

19. 76 Fed. Reg. 43,549 (July 21, 2011).
20. The National Bank Act, 12 U.S.C. §§ 1 *et seq.*
21. 12 U.S.C. § 24 (Seventh). For a compilation of the OCC's precedent letters on the subject of national banks, see OCC, ACTIVITIES PERMISSIBLE FOR NATIONAL BANKS AND FEDERAL SAVINGS ASSOCIATIONS, CUMULATIVE (Oct. 2017) [hereinafter OCC, PERMISSIBLE ACTIVITIES] (periodically updated), https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-other-activities-permissible-october-2017.pdf.
22. These letters are made available on the OCC's website. *See* OCC, INTERPRETATIONS AND ACTIONS, http://www.occ.treas.gov/interp/monthly.htm.
23. 12 C.F.R. § 5.34.
24. 12 U.S.C. § 24a, 12 C.F.R. § 5.39.
25. 12 C.F.R. § 5.34(b) (operating subsidiaries); 12 C.F.R. § 5.39(b) (financial subsidiaries).
26. *See, e.g.*, OCC, PERMISSIBLE ACTIVITIES, *supra* note 21, at 1.
27. Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999). *See also* 12 U.S.C. § 24a.
28. 12 C.F.R. § 5.39(g). Among other criteria, the national bank and each of its affiliated depository institutions must, under applicable supervisory criteria, be both "well capitalized" and "well managed."
29. 12 C.F.R. § 5.39(e).
30. 15 U.S.C. § 80a-3.
31. 12 U.S.C. § 1843(c)(13).
32. 12 C.F.R. § 5.39(f).
33. 15 U.S.C. § 6712 or § 6713.
34. 26 U.S.C. § 72.
35. 12 U.S.C. § 1843.
36. National banks may make investments in debt and equity securities pursuant to other authorities, for example, pursuant to their lending authority.
37. This authority is described in 12 C.F.R. pt. 24, and thus such investments are known as "part 24 investments."
38. 12 C.F.R. § 5.35.
39. 12 U.S.C. § 1813(d)(2).
40. 12 U.S.C. § 222.
41. 12 U.S.C. § 1813(e)(2).
42. *See* 12 U.S.C. § 1831a; 12 C.F.R. § 362.3(b)(2).
43. 12 U.S.C. § 287.
44. 12 U.S.C. §§ 1831a, 1831e; 12 C.F.R. pt. 362, subpts. A, C.
45. 12 U.S.C. §§ 1861–1867(c).
46. 12 U.S.C. § 1861(b)(2).
47. 12 U.S.C. § 1863.
48. 12 U.S.C. § 1864.
49. 12 U.S.C. § 1867(a).
50. 12 U.S.C. § 1867(c)(1).
51. 12 U.S.C. § 1867(c)(2).

52. *Id.*
53. 12 U.S.C. § 1841(a)(1).
54. 12 U.S.C. § 1841(c).
55. 12 U.S.C. § 1841(b).
56. *Id.*; 12 C.F.R. § 225.2(d).
57. 12 U.S.C. § 1841(a)(2)(A); 12 C.F.R. § 225.2(e)(1)(i).
58. 12 U.S.C. § 1841(a)(2)(B); 12 C.F.R. § 225.2(e)(1)(ii).
59. 12 U.S.C. § 1841(a)(2)(C); 12 C.F.R. § 225.2(e)(1)(iii).
60. 12 U.S.C. § 1831o-1; 12 C.F.R. § 225.4(a).
61. "Policy Statement on the Responsibility of Bank Holding Companies to Act as Sources of Strength to Their Subsidiary Banks," F.R.R.S. 4-878 (Apr. 24, 1987).
62. *Id.*
63. *Id.*
64. 12 U.S.C. § 1831o-1.
65. 12 U.S.C. § 1843(a).
66. 12 C.F.R. § 225.28.
67. *See* 12 C.F.R. § 225.86(a).
68. *See* 12 C.F.R. § 225.126.
69. 12 U.S.C. § 1843(c)(8).
70. 12 C.F.R. § 225.28(b)(2)(4)(ii).
71. 12 C.F.R. § 225.81.
72. 12 U.S.C. § 1843(*l*)(1)(C), (*l*)(1)(D).
73. 12 U.S.C. § 1843(k). As further discussed in response to Q 1.40.1.
74. 12 C.F.R. § 225.82(e).
75. 12 U.S.C. § 1843(*l*)(2); 12 C.F.R. § 225.82(c)(1).
76. 12 U.S.C. § 1843(m)(1)–(2).
77. 12 U.S.C. § 1843(m)(3).
78. 12 U.S.C. § 1843(m)(4).
79. 12 U.S.C. § 1843(*l*)(2); 12 C.F.R. § 225.84(a)(1).
80. 12 U.S.C. § 1843(m)(4).
81. 12 U.S.C. § 1843(k)(1).
82. 12 C.F.R. § 225.86(d).
83. 12 C.F.R. § 225.88.
84. Federal Reserve Approval Order (June 22, 2004), citing 145 Cong. Rec. H11529 (daily ed. Nov. 4, 1999) (Statement of Chairman Leach) ("It is expected that complementary activities would not be significant relative to the overall financial activities of the organization.").
85. *See, e.g.*, Citigroup Inc., 89 Federal Reserve Bulletin 508 (2003); UBS AG, 90 Federal Reserve Bulletin 215 (2004).
86. Wellpoint, Inc. 93 Federal Reserve Bulletin 133 (2007).
87. Fortis S.A./N.V., 94 Federal Reserve Bulletin 20 (2008).
88. The Royal Bank of Scotland Group plc, 94 Federal Reserve Bulletin 60 (2008).
89. 12 C.F.R. § 225.89.

90. 12 U.S.C. § 1841(i).

91. *See* 12 U.S.C. § 1813(a)(2), (b)(3).

92. The commercial lending capacity of federal thrifts is limited, and federal thrifts also are required to maintain at least 65% of their portfolio assets in qualified thrift investments such as residential mortgages and other qualifying consumer-related loans. 12 U.S.C. §§ 1464(2)(A), 1467a(m).

93. Home Owners' Loan Act (HOLA), 12 U.S.C. §§ 1461 *et seq.*

94. 12 U.S.C. § 1464(c)(2)(A); 12 C.F.R. § 160.30.

95. 12 U.S.C. § 1467a(m)(1). In the alternative, the thrift may qualify as a domestic building and loan association pursuant to 26 U.S.C. § 7701(a)(19). 12 U.S.C. § 1467a(m)(1).

96. COMPTROLLER'S HANDBOOK, QUALIFIED THRIFT LENDER (Nov. 2013), http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/m-qtl.pdf. Portfolio assets are total assets minus goodwill and other intangible assets, office property, and liquid assets not exceeding 20% of total assets. *Id.*

97. 12 U.S.C. § 1464(c)(4)(B); 12 C.F.R. § 159.4.

98. Defined as state chartered building and loan associations, savings and loan associations, homestead associations, and certain cooperative banks. *See* 12 U.S.C. § 1813(b)(3).

99. 12 U.S.C. § 1831e; 12 C.F.R. pt. 362, subpt. C.

100. 12 U.S.C. § 1831e; 12 C.F.R. § 362.11(b)(2).

101. 12 U.S.C. § 1467a(1)(D).

102. 12 U.S.C. § 1467a(a)(1)(C).

103. 12 U.S.C. § 1467a(a)(3)(B).

104. 12 U.S.C. § 1467a(a)(2)(A).

105. *Id.*

106. 12 U.S.C. § 1467a(a)(2)(D).

107. *See* 12 C.F.R. § 238.53(b)(4)–(8).

108. 12 U.S.C. § 1467a(*l*).

109. Dodd-Frank Act § 369.

110. 12 U.S.C. § 1467a(c)(2). Additionally, the HOLA permits a savings and loan holding company (SLHC) to furnish or perform management services for its thrift subsidiary; conduct an insurance agency or an escrow business; hold, manage, or liquidate assets owned by, or acquired from, its thrift subsidiary; hold or manage properties used or occupied by its thrift subsidiary; act as trustee under deed of trust; and engage in any activity that multiple SLHCs were authorized (by regulation) to engage in directly on March 5, 1987. *Id.*

111. 12 U.S.C. § 1467a(c)(2)(H). *See also* 12 C.F.R. § 238.63.

112. 12 U.S.C. § 1467a(c)(9)(C).

113. 12 U.S.C. §§ 3101 *et seq.*

114. 12 C.F.R. pt. 211.

115. 12 C.F.R. § 211.21(o).

116. 12 U.S.C. §§ 1841(h)(2), 1843(c)(9); 45 Fed. Reg. 81,537 (Dec. 11, 1980).

117. 12 C.F.R. § 211.23.

118. 12 C.F.R. §§ 28.4(a), 211.4(a).
119. *Id.*
120. 12 C.F.R. §§ 28.4(b), 211.4(a).
121. 12 C.F.R. § 347.105(b)(1)–(17).
122. 12 C.F.R. § 347.105(b)(18), (d).
123. OTS Chief Counsel Opinion (Jan. 14, 2000).
124. *See* OTS Order No. 2007-61 (Dec. 6, 2007) (permitting the establishment of an operating subsidiary in China to engage in corporate lending, small business lending, and trade finance activities); OTS Chief Counsel Opinion (Jan. 14, 2000) (permitting an operating subsidiary chartered in a foreign country to hold financial assets in order to shelter the income on investments from state taxes); OTS Order (July 6, 1994) (approving establishment of an operating subsidiary in Bermuda to manage a substantial portion of the association's investment portfolio); OTS Chief Counsel Opinion (June 13, 1994) (approving the establishment of agency offices in England and Australia to perform clearinghouse functions to facilitate trust services to be provided to certain U.S.-based institutional trust customers).
125. 12 U.S.C. § 1785(b)(2).
126. *Id.*
127. *Id.*
128. 12 U.S.C. § 1828(c)(1)(A).
129. NCUA, BANK TO CREDIT UNION CONVERSIONS (CONVERSION OF A NON-CREDIT UNION TO A CREDIT UNION CHARTER), https://www.ncua.gov/services/Pages/field-of-membership-chartering/conversions.aspx.
130. *Id.*
131. 12 U.S.C. § 1467a(o).
132. 12 U.S.C. § 1467(o)(1); 12 C.F.R. pt. 575.
133. *See* 12 C.F.R. § 575.14.
134. 63 Fed. Reg. 11,361 (Mar. 9, 1998); 62 Fed. Reg. 30,778 (June 5, 1997).
135. *See* OCC Corporate Decision #97-112 (Dec. 30, 1997).
136. *See* 12 U.S.C. § 1467a(o); 12 C.F.R. § 239.8(d).