Systemic Regulation of Large Bank Holding Companies Under the Dodd-Frank Act

By Thomas P. Vartanian and Gordon L. Miller

The federal financial regulatory agencies have significant authority to adopt regulations to implement Dodd-Frank.

One of the most prominent features of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") is the creation of the Financial Stability Oversight Council (FSOC).[1] The formation of the FSOC is the centerpiece of an attempt by the government to regain regulatory oversight of a financial services industry that has outgrown the traditional banking regulatory structure. The FSOC is headed by the Secretary of the Department of the Treasury ("Secretary") and brings together federal and state financial regulatory agencies and authorities to, among other things, (1) identify and address systemic risks to the stability of the U.S. financial system; (2) promote market discipline by eliminating expectations that the government will shield shareholders, creditors or counterparties from losses in the event of an institution's failure; (3) designate nonbanking financial companies that are determined to be significant to U.S. financial stability ("Designated Nonbanks") to be placed under an enhanced supervisory regime; and (4) make recommendations to the Board of Governors of the Federal Reserve System ("the Board") regarding heightened capital requirements and other prudential standards to be imposed by the Board on Designated Nonbanks and large, interconnected bank holding companies ("Large BHCs").[2]

Large BHCs and Designated Nonbanks (together, "Systemically Significant Institutions") are the focus of the FSOC's activities. Because Large BHCs in the aggregate hold a substantial portion of the total assets of all U.S. depository organizations, the enhanced prudential supervision imposed on Large BHCs will have a significant impact on the entire U.S. banking industry and the U.S. economy.[3] Congress has delegated significant authority to the federal financial regulatory agencies to adopt regulations to implement Dodd-Frank, such as what are likely to be complex new requirements regarding the creation of living wills and the imposition of the Federal Deposit Insurance Corporation (FDIC) receiverships. The ultimate impact of Dodd-Frank will not be known until those regulations are adopted and take effect, which in some cases will not occur for several years.

What Entities Are Covered?

Large BHCs include all bank holding companies that have total consolidated assets of more than $50 billion.[4] If a Large BHC were to divest itself of its bank subsidiaries or to convert its bank subsidiaries to savings and loan associations or to another type of insured depository institution that is not a "bank" under the Bank Holding Company Act (BHCA), it would no longer be a bank holding company or a Large BHC.[5] However, a divestiture or conversion may not relieve a Large BHC from heightened su-

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pervision. If a bank holding company had more than $50 billion of total consolidated assets as of January 1, 2010 (*i.e.*, it was a Large BHC as of that date), and received assistance under the Emergency Economic Stabilization Act of 2008 (*i.e.*, it received funds from the Department of the Treasury under the Troubled Asset Relief Program), and ceases at any time to be a bank holding company, it will not be a Large BHC but will automatically continue to be regulated as a Designated Nonbank.[6] On the other hand, a Large BHC that decreases in asset size to not more than $50 billion at any time after January 1, 2010, will continue to be regulated as a bank holding company but presumably will not be subject to enhanced supervision as a Systemically Significant Institution.[7]

Scope of Coverage

A Large BHC or a Designated Nonbank is subject to both mandatory and discretionary prudential standards to be adopted by the Board pursuant to the recommendation of the FSOC or on its own initiative. The Board may differentiate among companies on an individual basis or by category based on such factors as capital structure, complexity and the riskiness of a company's activities.[8]

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Mandatory Prudential Standards

Capital Requirements

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The Board, subject to recommendations by the FSOC, is required to adopt stricter risk-based capital standards and leverage requirements for Systemically Significant Institutions than would apply to a bank holding company or a Designated Nonbank that did not present similar risks to the financial stability of the United States.[9]

Dodd-Frank provides limited guidance as to the specifics of such heightened requirements.[10] For example, it is left to the discretion of the FSOC and the Board whether to recommend or adopt, respectively, uniform or graduated standards or requirements. However, Section 171 of Dodd-Frank, known as the Collins Amendment, sets the floor for any requirements to be adopted. The Collins Amendment directs the Board to adopt risk-based and leverage capital requirements for all bank holding companies and savings and loan holding companies that are at least as strict as those that apply to insured depository institutions, subject to certain grandfathering and transition provisions.[11] The risk-based and leverage capital requirements for Large BHCs must exceed those requirements. The Board may choose not to apply the heightened capital standards to a particular institution if it determines, in consultation with the FSOC, that such requirements are not appropriate for the institution because of its activities or structure.[12] However, if the Board grants a waiver, it must apply other standards to the institution that result in similarly strict risk controls.[13]

The heightened capital standards also will reflect the recently announced capital requirements adopted by the Basel Committee on Banking Supervision (BCBS), a consortium of central bankers and banking supervisors from 27 leading nations, including the United States.[14] To be implemented in stages, the BCBS recommendations are intended to increase the quality, quantity and international consistency of capital; to strengthen liquidity standards; to discourage excess leverage; and to reduce procyclicality in regulatory requirements.[15] The minimum ratio of Tier 1 capital to risk-weighted assets for banking organizations under the BCBS recommendations is to be six percent as of January 1, 2015, compared to a minimum requirement of four percent to be adequately capitalized and of six percent to be well capitalized under current Board guidelines.[16] The minimum ratio of total capital to risk-weighted assets under the BCBS recommendations is to be eight percent as of January 1, 2013, compared to a minimum requirement of eight percent to be adequately capitalized and 10 percent to be well capitalized under current Board guidelines.[17] The minimum ratio of Tier 1 capital to total assets, or the leverage ratio, under the BCBS recommendations is to be three percent, phased in during an observation period beginning January 1, 2012, with a final standard to be put in place on January 1, 2018.[18] U.S. bank holding companies (other than the strongest bank holding companies) are currently expected generally to maintain a minimum leverage ratio of four percent.[19] Systemically important financial institutions are expected, under the BCBS rec-

ommendations, to hold loss-absorbing capital in excess of the minimum requirements.[20]

Perhaps of greater significance for Large BHCs are the BCBS recommendations regarding the ratio of common equity to risk-weighted assets, since common equity is a narrower category of capital than Tier 1 capital and is not a standard that was generally applied by U.S. federal banking regulatory agencies prior to the current period of financial distress. The common equity to risk-weighted assets ratio is to be 4.5 percent as of January 1, 2015, and is to be supplemented by a capital conservation buffer of 2.5 percent as of January 1, 2019, representing a total common equity to risk-weighted assets ratio of 7.0 percent.[21] The 2.5-percent capital conservation buffer also will serve as a supplemental capital requirement for the other BCBS-recommended capital requirements. Thus, at the time the capital conservation buffer is to be fully implemented on January 1, 2019, the minimum Tier 1 capital to risk-weighted assets requirement will be 8.5 percent, the minimum total capital to risk-weighted assets requirement will be 10.5 percent, and the minimum leverage ratio will be 5.5 percent.

The requirement to prepare a living will raises numerous issues for any institution required to prepare one.

The Secretary has stated that larger U.S. banks and bank holding companies, as a result in part of the "stress tests" that were conducted on the 19 largest U.S. depository organizations in spring 2009, are in a relatively strong position internationally with regard to capital and should be able to meet the BCBS recommendations through the retention of future earnings, rather than by raising additional capital or shrinking assets.[22] In contrast, industry observers suggest that certain large foreign banking organizations may be required to raise tens of billions of dollars by issuing capital, shedding assets or reducing lending and, in the alternative, may need to seek to consolidate with other organizations.[23] Other U.S. banks and bank holding companies that are less well capitalized may need to do the same, but those that lack access to capital markets may be required to focus on conserving capital and reducing assets, which may provide a competitive advantage to better-capitalized competitors, including Large BHCs.

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Several important features of the BCBS recommendations must still be clarified. First and foremost, the U.S. banking agencies must decide whether to apply the recommendations to all U.S. depository organizations or to a select group. Second, the capital conservation buffer is to be accumulated during periods of economic expansion and may be drawn down during economic contractions, but the method of identifying periods of expansion and contraction is not addressed.[24] Third, the BCBS recommendations also require that dividends and other capital distributions and executive compensation be increasingly restricted as the buffer declines.[25] Depending on how quickly and severely these restrictions are imposed, the capital conservation buffer may as a practical matter become a full-time requirement of well-capitalized and well-managed banking organizations that wish to avoid all operating restrictions. Fourth, a separate "countercyclical buffer," equal to up to 2.5 percent of risk-weighted assets, consisting of common equity or other fully loss-absorbing capital, also is provided for in the BCBS recommendations, to be adopted based on "national circumstances."[26] This buffer is intended to function as an extension of the capital conservation buffer, but the BCBS also has indicated that it may be used to dampen credit growth. The BCBS has provided little guidance regarding how or when a countercyclical buffer should be imposed or cancelled. If it were applied on an industry-wide rather than a company-specific basis, it would appear to be primarily a tool of monetary policy.[27]

Credit Concentration

The FSOC is directed to recommend, and the Board is directed to adopt, credit concentration limits applicable to Large BHCs and, with certain exceptions, to Designated Nonbanks that will limit exposure by a company to any unaffiliated company to not more than 25 percent of the Large BHC's or Designated Nonbank's capital and surplus.[28] In addition, the Board is directed to require Large BHCs and Designated Nonbanks to report periodically on the nature and extent of their credit exposure to other Systemically Significant Institutions and on the credit

exposure of other Systemically Significant Institutions to them.[29] The new credit concentration limits will act in effect as a less restrictive extension of the loan-to-one-borrower limits that apply to unsecured extensions of credit by depository institutions under the National Bank Act and similar state laws.[30] The limits on national banks are subject to qualifications and are further refined by extensive regulations, and it remains to be seen whether the Board will adopt similar standards for Large BHCs.[31]

Living Wills

The Board is directed, subject to FSOC recommendations, to require Systemically Significant Institutions to report periodically to the FSOC, the Board, and the FDIC on their plans for rapid and orderly resolution in the event of their material financial distress or failure.[32] Such plans, often referred to as living wills, must (1) describe an institution's ownership structure, assets, liabilities and contractual obligations; (2) identify cross-guarantees and major counterparties; (3) set forth a process for tracing collateral; (4) describe how any insured depository institution that it may own is protected from risks posed by its nonbank subsidiaries; and (5) include any other information that the Board and the FDIC may jointly require.[33]

If the Board and the FDIC jointly determine that a resolution plan is not credible or would not facilitate the reorganization in bankruptcy of the institution that filed it, they may require the institution to resubmit its plan.[34] If the resubmitted plan is not credible, they may jointly impose more stringent capital, leverage or liquidity requirements on the institution or restrict the growth, operations or activities of the institution or any of its subsidiaries until a credible plan is submitted.[35] If an institution does not submit a credible plan within two years, the Board and the FDIC, in consultation with the FSOC, may jointly order the institution to divest assets or operations in order to facilitate an orderly resolution.[36]

The requirement to prepare a living will raises numerous issues for any institution required to prepare one. Creating the management structures, information technology and management information systems, funding arrangements, business relationships, staffing and administrative support to facilitate the rapid and orderly resolution of a Systemically Significant Institution may require the institution to balkanize its operations and to some extent negate the economic benefits of doing business as a single firm in terms of planning, coordination, efficiency and profitability. Devising a living will also may require management to make choices regarding the relative importance to the organization of various business units, business relationships and creditors, and those choices may create conflicts of interests for the individuals called on to develop or approve a living will. For example, if an individual served as the director of a Large BHC and a partially owned subsidiary, how should that individual reconcile his or her duties to shareholders, creditors, business partners and customers of the parent company with his or her corresponding duties at the subsidiary level? What would be his or her liability for deliberately planning to prefer one group and disadvantage another? Based on such real or potential conflicts, who should participate in the planning? How would directors' and officers' insurance or fidelity bond coverage apply?

Further complicating the process is the sheer difficulty of devising a feasible plan that is most likely to be implemented during a period of severe financial distress, in which the most basic assumptions underlying the plan may not be valid.[37] For diverse or internationally active institutions, with operations subject to multiple functional regulators or located in several jurisdictions, the level of cooperation among the relevant regulators and jurisdictions may limit the institution's flexibility in planning for its dissolution.[38] Such uncertainty may also be of concern to the investors and creditors of a Large BHC, further increasing its cost of doing business. Finally, and perhaps most significantly, the FDIC, which will review all living wills, also will serve as the receiver for any Large BHC or Designated Nonbank that may be ordered to be liquidated under Title II of Dodd-Frank.[39] It remains to be seen to what extent the FDIC will consider its own requirements as a potential receiver, as compared to business considerations of an operating organization, when evaluating submitted plans.[40]

Early Remediation

Related in some respects to the living will requirements, the Board, in consultation with the FSOC

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and the FDIC, is required to establish steps for early remediation of a Large BHC or Designated Nonbank in financial distress in order to minimize the probability of the institution becoming insolvent and the potential harm that such insolvency may cause to the financial stability of the United States.[41] The Board must define how the financial condition of an institution is to be measured for this purpose and must establish appropriate remedial measures, including raising capital, management changes and asset sales, that increase in stringency as the financial condition of an institution worsens.[42] Pursuant to this authority, the Board may adopt prompt corrective action measures similar to those that the federal banking agencies apply to undercapitalized depository institutions under Section 38 of the Federal Deposit Insurance Act.[43] It remains to be seen whether the remedial measures set out by the Board in its regulations also include steps that would support an institution's orderly resolution by the FDIC, such as requiring a troubled institution to assemble certain information or implement certain contingency plans.

Risk Management

Dodd-Frank establishes general risk management requirements for publicly traded bank holding companies with total consolidated assets of $10 billion or more and for publicly traded Designated Nonbanks.[44] All such companies must establish a risk committee with responsibility for enterprisewide risk management, and the risk committee must include at least one risk management expert with appropriate financial institution experience and the number of independent directors that the Board determines to be appropriate.[45]

Stress Tests

The Board must conduct annual stress tests of all Large BHCs and Designated Nonbanks regarding the sufficiency of their capital to absorb losses in adverse economic conditions.[46] The stress tests will presumably be designed, administered and evaluated in a manner similar to the stress tests conducted by the Board in spring 2009.[47] In addition, each institution must conduct its own semiannual stress tests, using standards and methodologies to be established by its primary financial regulatory agency, and must report the results to the agency and the Board.[48] The Board is directed to publish a summary of the results of the annual stress tests that it performs, and all Large BHCs and Designated Nonbanks must update their living wills based on the results of those tests.[49]

Discretionary Prudential Standards

Contingent Capital

The FSOC must consider the feasibility, structure, costs and benefits of requiring Systemically Significant Institutions to issue contingent capital, which is a debt instrument that may be converted to equity under certain circumstances in order to be used to absorb an institution's losses. After submitting its report, the FSOC may make recommendations to the Board, and the Board may issue regulations, requiring contingent capital.[50] No guidance is provided in Dodd-Frank regarding the terms of such instruments, such as conversion triggers or conversion mechanisms or the appropriate amount of contingent capital to be issued. It also is not clear whether contingent capital would be part of or in addition to any countercyclical buffer that may be required pursuant to the BCBS recommendations.

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Short-Term Debt

The FSOC and the Board may each consider the risks that overreliance on short-term debt may pose for companies and for the stability of the U.S. financial system, and the Board may set limits on the amount of short-term debt that a Systemically Significant Institution may accumulate, measured as a percentage of capital and surplus or by any other method it considers appropriate.[51] The Board may grant exemptions from any limits it sets.[52] The BCBS recommendations address short-term debt by providing for a liquidity coverage ratio, but that ratio will not be introduced until January 1, 2015.[53]

Public Disclosure

The FSOC may recommend and the Board may prescribe periodic public disclosures that Systemically Significant Institutions must make in order to support market evaluation of their risk profile, capital adequacy and risk management capabilities.[54] The implementing regulations must address the content and frequency of any public disclosures that are required.

Grave Threat

While the term "grave threat" is not defined in Dodd-Frank, if the FSOC determines that a Systemically Significant Institution poses a grave threat to U.S. financial stability and that limiting the institution's use of leverage is necessary to mitigate such risk, the Board may limit the institution's debt-to-equity ratio to an amount not to exceed 15 to 1.[55] In making a determination, the FSOC shall consider the statutory factors for the selection of a Designated Nonbank set forth in Section 113(a) and (b) and any other risk-related factors that the FSOC deems to be appropriate.[56] The Board also shall adopt regulations that establish timelines and procedures for an institution's compliance with any limit that is imposed.[57]

Separately, if the Board determines that a Systemically Significant Institution poses a grave threat to U.S. financial stability, it may, with the approval of two-thirds of the FSOC, restrict the institution's activities. For this purpose, the Board may propose to the FSOC that an activity be terminated or, as a last resort, that assets be sold or transferred to a nonaffiliate.[58] The Board must provide an institution with prior written notice and an opportunity for a hearing before any action is taken against the institution.[59]

Additional Standards

The Board, on its own or pursuant to a recommendation made by the FSOC, may adopt any other prudential standard for Systemically Significant Institutions that it determines to be appropriate.[60]

Supplementary Standards

In addition to the mandatory and discretionary prudential standards discussed above, Title I of Dodd-Frank authorizes the FSOC and the Board to impose certain additional requirements on Large BHCs and Designated Nonbanks.

Reporting

The Board or the FSOC may require Large BHCs, Designated Nonbanks and their subsidiaries to submit certified reports regarding their financial condition; risk-monitoring systems; transactions with any subsidiary insured depository institution; and the potential, under adverse circumstances, for their activities and operations to disrupt financial markets or affect overall U.S. financial stability.[61] To the extent possible, the Board and the FSOC must rely for this purpose on reports filed by an institution with its other state, federal or foreign financial regulatory agencies.[62] In addition to reviewing submitted reports, the Board may examine a Systemically Significant Institution and any of its subsidiaries in order to investigate any matters covered by the reports submitted.[63]

Acquisition Approval Requirements

A Systemically Significant Institution generally may not acquire direct or indirect ownership or control of any voting shares of any company (other than an insured depository institution) that has total consolidated assets of $10 billion or more and is engaged in activities described in Section 4(k) of the BHCA without providing prior written notice to the Board.[64] By contrast, a qualified financial holding company that is not a Large BHC and any nondepository subsidiary of such company may acquire the shares or control of a company engaged exclusively in Section 4(k) activities without prior notice.[65] In addition to the statutory standards for the review of an application by a financial holding company, the Board shall consider whether the proposed acquisition by a Systemically Significant Institution would result in greater or more concentrated risks to global or U.S. financial stability or to the U.S. economy.[66]

Exemptions

The Board, on behalf of and in consultation with the FSOC, is required to adopt regulations establishing criteria for exempting certain types or classes of nonbank financial companies from supervision by the

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Board.[67] Dodd-Frank does not indicate what types or classes of companies shall be exempt or the scope of any exemptions that are established. While Dodd-Frank states that exemptions are to be provided to certain companies, the exemption criteria may still be addressed or be related to specific investments, assets, activities or business relationships.

Management Interlocks

Dodd-Frank provides that a Designated Nonbank is subject to the Depository Institutions Management Interlocks Act ("Interlocks Act") as if it were a bank holding company.[68] In general, and subject to several exceptions, the Interlocks Act prohibits a management official of a depository organization (which includes a bank holding company) from serving simultaneously as a management official of an unaffiliated depository organization located within the same geographic area or, subject to certain asset-size tests, anywhere in the United States.[69]

General Standards

In addition to the provisions discussed above that are applicable to Large BHCs, Designated Nonbanks or other larger institutions, Dodd-Frank authorizes the FSOC to make more general recommendations to the primary federal financial regulatory agencies and to state insurance authorities with regard to a financial activity or practice.[70] The FSOC may propose new or heightened standards and safeguards for a financial activity or practice if it determines that some feature of such activity or practice could create or increase the risk of a significant liquidity, credit or other problem spreading among financial institutions, financial markets, or low-income, minority or underserved communities.[70] The FSOC's recommendation may prescribe how an activity or practice is to be conducted or prohibit an activity or practice altogether.[71] The FSOC must take into account the cost of its proposal on long-term economic growth and must consult with the primary federal financial regulatory agencies and the state insurance authorities, as well as provide notice and opportunity for comment to the public.[72] An agency or authority may choose to follow the FSOC's recommendation, adopt a similar standard deemed acceptable by the FSOC or decline to follow a recommendation and issue a written statement of the reasons for its decision.[73]

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A New Chapter in Financial Regulation

The regulation of financial stability begins a new chapter in financial regulation in this country. In that regard, there are many issues that will need to be addressed. Will the FSOC function effectively? Comprising various financial regulatory agencies responsible for oversight of various constituencies within the financial services industry, can the agencies come to agreement? Can the FSOC govern its own members? How much government involvement will the FSOC inject into the regulation of nonbanking financial entities and the economy? How will it affect the competitiveness of U.S. financial companies in the global economy? How will the role of the Treasury as a policy-making arm of the administration affect its views and its role on the FSOC? These are all important, game-changing questions that will affect every American.

Endnotes

1. The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) (July 21, 2010). All citations herein to Dodd-Frank are to sections of the Public Law.
2. Sections 111, 112(a) and 113(a) and (b). The FSOC comprises 10 voting members—the Secretary, the heads of the Board, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency, the National Credit Union Administration, the Bureau of Consumer Financial Protection, the Federal Housing Finance Agency, the Securities and Exchange Commission and the Commodity Futures Trading Commission—and an independent member, appointed by the President with the advice and consent of the Senate, with insurance expertise. Section 111(b). The FSOC also includes five nonvoting members, comprising the heads of the Office of Financial Research and the Federal Insurance Office, both of which are created under Dodd-Frank, and representatives of state banking, insurance and securities regulatory authorities.
3. As of June 30, 2010, 36 bank holding companies each had more than $50 billion of total consolidated assets and held in the aggregate approximately $14 trillion of consolidated assets. National Information Center, available at *www.ffiec.gov/nicpubweb/nicweb/nichome.aspx.*
4. Sections 115(a) and 165(a). The FSOC has no authority to grant blanket exceptions. However, the FSOC may provide significant relief by recommending a higher asset threshold

for certain supervisory standards. Sections 115(a)(2)(B) and 165(a)(2)(B). The FSOC also may differentiate among companies on an individual basis or by category with regard to any heightened standards that it may recommend, taking into account such factors as capital structure, complexity and the riskiness of a company's activities. Section 115(a)(2)(A).

[5] *See* 12 USC §1841(c)(2)(B), (D), (F) and (H).

[6] Section 117. A Designated Nonbank is a company predominantly engaged in financial activities, the material financial distress or activities of which pose a threat to U.S. financial stability. Sections 102(a)(4) and (6) and 113(a)(1) and (b)(1). In making that determination, the FSOC is required to take into consideration a company's use of leverage; off-balance-sheet exposures; transactions and other relationships with Systemically Significant Institutions; role as a source of credit and liquidity; role as an asset manager; existing regulatory status; the size and nature of its financial assets, activities and liabilities; and any other risk-related factors deemed appropriate. Section 113(a)(2) and (b)(2). A former bank holding company subject to enhanced supervision under Section 117 may petition the FSOC for relief, which requires the affirmative vote of two-thirds of the voting members then serving, including the Secretary. The FSOC's decision is to be based on the same factors that it considers when selecting a Designated Nonbank. Section 117(c).

[7] Dodd-Frank does not address the treatment of bank holding companies that decrease in asset size or subsequently increase in size and regain Large BHC status or when or how often their asset size is to be measured.

[8] Section 165(a)(2).

[9] Section 165(a)(1) and (b)(1)(A)(i).

[10] Section 165(k)(1) requires that the off-balance-sheet activities of a company be taken into account when computing capital for purposes of meeting capital requirements. "Off-balance-sheet activities" are defined as an existing liability that is not on balance sheet but may become so upon the happening of some future event. Section 165(k)(3). Such activities include direct credit substitutes in which a bank substitutes its own credit for a third party, including standby letters of credit.

[11] Section 171(b). The generally applicable risk-based and leverage capital requirements for insured depository institutions are the minimum capital requirements under regulations implementing the prompt corrective action provisions of Section 38 of the Federal Deposit Insurance Act (12 USC §1831*o*) as in effect from time to time or at the time Dodd-Frank was enacted, whichever are higher. *Id.*

[12] Section 165(b)(1)(A)(i).

[13] *Id.*

[14] The recommendations of the BCBS were presented to heads of state at a meeting of the Group of 20 leading nations in South Korea in November 2010. *See* Press Release, "Group of Governors and Heads of Supervision Announces Higher Global Minimum Capital Standards" (Sept. 12, 2010), available at *www.bis.org/press/p100912.htm* ("BCBS Press Release"). The U.S. federal banking agencies have endorsed these recommendations. *See* Joint Press Release, "U.S. Banking Agencies Express Support for Basel Agreement" (Sept. 12, 2010), available at *www.federalreserve.gov/newsevents/press/bcreg/20100912a.htm* ("Joint Press Release").

[15] Joint Press Release.

[16] BCBS Press Release; 12 CFR §225.2(r) and Appendix A, Attachment II.

[17] *Id.*

[18] BCBS Press Release.

[19] 12 CFR Part 225, Appendix D(II). Bank holding companies are expected to maintain capital ratios well above the minimum requirements if they are experiencing or anticipating significant growth or if they are subject to supervisory, financial, operational or managerial weaknesses. Board of Governors of the Federal Reserve System, *Bank Holding Company Supervision Manual* ¶4060.4.1.2 (July 2010).

[20] BCBS Press Release.

[21] *Id.*

[22] Press Release TG-867, "Treasury Secretary Timothy F. Geithner Written Testimony, House Financial Services Committee" (Sept. 22, 2010). As of June 30, 2010, the four largest U.S. bank holding companies (Bank of America, Citigroup, JPMorgan Chase and Wells Fargo) had common equity to risk-weighted asset ratios of 8.0 percent, 9.7 percent, 9.6 percent and 7.6 percent, respectively. Quarterly Reports on Form 10-Q for the quarter ended June 30, 2010.

[23] *See* David Enrich and Dave Cimilluca, *Basel Rules Unlikely to Force Capital Raising*, Wall St. J. (Sept. 14, 2010); Sakari Suorinen and Gilbert Kreijger, *Basel Eases Capital Fears, Top Banks in Spotlight*, Reuters News Service (Sept. 13, 2010).

[24] BCBS Press Release.

[25] *Id.*

[26] *Id.*

[27] If both the capital conservation buffer and the countercyclical buffer were in place, the minimum ratio of Tier 1 capital to risk-weighted assets would be 11 percent, and the minimum ratio of total capital to risk-weighted assets would be 13 percent.

[28] Section 165(e)(1) and (2).

[29] Section 115(d)(2).

[30] 12 USC §84.

[31] *Id.*; *see* 12 CFR Part 32.

[32] Section 115(d)(1).

[33] Section 165(d)(1).

[34] Section 165(d)(4).

[35] Section 165(d)(5)(A).

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[36] Section 165(d)(5)(B).

[37] *See* Barbara A. Rehm, *Dodd-Frank Act's Curious Bequest: The Living Will*, Am. Banker (Sept. 23, 2010).

[38] *See* Joe Adler, *Bankers Press FDIC for Flexibility, Clarity in Wind-Down Plans*, Am. Banker (Sept. 20, 2010).

[39] P.L. 111-203, Tit. II, "Orderly Liquidation Authority."

[40] Separately, the FDIC has published a notice of proposed rulemaking regarding a requirement for insured depository institutions with more than $10 billion of assets that are subsidiaries of holding companies with more than $100 billion of assets to prepare contingent resolution plans. The plans would be required to demonstrate the insured depository institution's ability to be separated from its parent organization and to be wound down or resolved in an orderly fashion. The proposed rule describes the minimum components of a contingent resolution plan, including a description of material impediments to an orderly resolution and credible steps to eliminate or mitigate those impediments and of the means to isolate the insured depository institution, preserve its franchise value, minimize systemic impacts on the financial system and maximize recovery by shareholders. 75 FR 27464 (May 17, 2010).

[41] Section 166(a) and (b).

[42] Section 166(c).

[43] 12 USC §1831*o*.

[44] Section 165(h)(1) and (2)(A). The Board also may require smaller publicly traded bank holding companies to establish a risk committee as the Board may determine to be necessary or appropriate to promote sound risk management practices. Section 165(h)(2)(B).

[45] Section 165(h)(3).

[46] Section 165(i)(1)(A).

[47] For a discussion of the stress tests, *see* Speech by Governor Daniel K. Tarullo, "Lessons from the Crisis Stress Tests" (Mar. 26, 2010), available at *www.federalreserve.gov/newsevents/speech/tarullo20100326a.htm.*

[48] Section 165(i)(2). Other financial companies that have total consolidated assets of more than $10 billion and are regulated by a primary federal financial regulatory agency must conduct their own stress tests on an annual basis. Section 165(i)(2)(A).

[49] Section 165(i)(1)(B).

[50] Sections 115(c)(3) and 165(c).

[51] Sections 115(g) and 165(g).

[52] Section 165(g)(6).

[53] BCBS Press Release.

[54] Sections 115(f) and 165(f).

[55] Section 165(j)(1).

[56] Section 165(j)(2).

[57] Section 165(j)(3).

[58] Section 121(a).

[59] Section 121(b). No guidance is provided with regard to what may constitute a grave threat to the financial stability of the United States or with regard to the condition of the institution. There also is no provision authorizing the Board to take expedited or emergency action, although this would appear to be appropriate when facing a grave threat.

[60] Section 165(b)(1)(B)(iv).

[61] Sections 116(a) and 161(a).

[62] Section 116(b).

[63] Section 161(b).

[64] Section 163(b)(1); 12 USC §1843(k). In general, the activities described in Section 4(k) are activities that are permissible for a financial holding company. Prior written notice is not required to acquire the shares of a company that may be acquired by a bank holding company under Section 4(c) of the BHCA or that is engaged in underwriting, dealing in or making a market in securities. Section 163(b)(2).

[65] 12 CFR §225.85(a)(1).

[66] Section 163(b)(4).

[67] Section 170.

[68] Section 164. *See* 12 USC §3201 *et seq*.

[69] 12 USC §3201 *et seq*.

[70] Section 120(a). This authority is in addition to the authority of the FSOC to make recommendations to the Board concerning prudential standards and disclosure requirements for Systemically Significant Institutions that are more stringent than those applicable to other bank holding companies and nonbank financial companies that do not present similar risks to the financial stability of the United States. Section 115(a)(1).

[71] Section 120(b)(2)(B).

[72] Section 120(b)(1) and (2)(A).

[73] Section 120(c)(2). The FSOC must report to the Congress on any recommendations it makes under this section and the implementation thereof, which may focus congressional attention on any dissenting agency or authority. Section 120(d).

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