Bank Holding Companies: Background and Issues for Congress

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SUMMARY

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Companies that control banks are required to be regulated and supervised by the Federal Reserve (Fed) as bank holding companies (BHCs). The BHC structure is widely used by both small community banks with simple structures and the largest, most complex financial institutions in the United States. Regulation and supervision are tailored to impose more complex, stringent requirements on large, complex BHCs than on small ones. The Fed is the "umbrella" supervisor for the entire BHC but defers to the primary regulators of the bank, securities, and insurance subsidiaries. The Fed has greater responsibility for the parent holding company and nonbank subsidiaries that do not have a primary regulator.

Currently, the key goals of BHC regulation are to maintain the separation of banking and nonfinancial commerce, limit BHCs to permissible activities, ensure that BHCs do not undermine the safety and soundness of their banking subsidiaries and prevent banks from subsidizing their affiliates, prevent mergers and acquisitions from resulting in monopolies or excessive concentration, and mitigate systemic risk posed by large BHCs.

Banks are regulated for safety and soundness and subject to supervision because of their access to the federal safety net—principally, Federal Deposit Insurance Corporation (FDIC) deposit insurance and the Fed's discount window—and the systemic risk they can pose. BHCs are not subject to the close prudential regulation that their bank subsidiaries are. BHC regulation is intended to ensure that the rest of the BHC does not gain access to the safety net and the advantages that derive from it and that the other parts of the BHC do not undermine the bank subsidiary's safety and soundness.

A number of regulatory requirements support these three goals. Various grandfathering and exceptions make each requirement less than universally applicable under all circumstances. First, BHCs must act as a "source of strength" for their bank subsidiaries. Second, BHCs with over $3 billion in assets must comply with the same Basel capital requirements as banks on a consolidated basis. Third, transactions between banks and their affiliates (including parent companies and their nonbank subsidiaries) are subject to restrictions to limit the bank subsidiaries' exposure to risks posed by affiliates and to prevent banks from subsidizing affiliates. Fourth, control rules and restrictions on management interlocks prevent a company from controlling multiple unaffiliated banks without registering as a BHC subject to Fed supervision. Fifth, a bank cannot "tie" the offer of one of its products to another product offered by the bank or another part of its BHC. Finally, the Fed determines what activities are permissible for BHCs to engage in.

Contrary to traditional notions that banking is limited to taking deposits and making loans, BHCs engage in a broad range of activities that the Fed has deemed to be closely related to or incidental to the business of banking. BHCs may have both bank and nonbank subsidiaries. In addition, BHCs that elect to become financial holding companies (FHCs) can engage in any activity that has been deemed financial in nature, allowing banks, securities firms, and insurance firms to operate under common ownership and engage in a variety of other financial activities.

Following the 2008 financial crisis, the Dodd-Frank Act (P.L. 111-203) strengthened BHC regulation. For example, it attempted to mitigate systemic risk posed by large banks through the enhanced prudential regulation (EPR) of large BHCs by the Fed. The emergency federal intervention to prevent systemic risk associated with the failure of three large banks in 2023—two of which did not have BHCs—raised questions about whether the BHC is the appropriate target for EPR.

Policy questions that Congress has grappled with ever since the Bank Holding Company Act of 1956 was enacted include how BHCs should be regulated, who should be subject to that regulation, and what activities they should be allowed to engage in.

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Introduction

An arcane legal structure called a financial holding company (FHC) determines what activities the largest banks can undertake and how those activities are arranged. FHCs are a type of bank holding company (BHC). The simplified view of the bank business model is that banks accept deposits and make loans, but in reality BHCs engage in a much broader array of financial activities. These holding companies can own multiple nonbank subsidiaries that engage in a variety of activities, including insurance and securities if they elect to (and qualify to) become FHCs. On the flip side, some large banks have chosen to avoid a holding company structure, which exempts them from enhanced prudential regulation that is intended to mitigate the systemic risk posed by large banks.

A BHC structure is used not just by large banks—there are over 3,000 BHCs. Although a BHC enables a potentially more complex organizational structure, most BHCs are relatively small organizations with simple structures—so-called community banks.

BHC regulation has evolved over time through numerous statutory and regulatory revisions. The origin of BHCs lies with efforts to circumvent regulatory barriers that no longer exist—the structure has outlived its original purpose because it has adapted to retain its usefulness, some of which is provided through statutory revisions.

Many congressional concerns about banks and proposed solutions are at root issues involving BHCs or the Bank Holding Company Act (BHC Act; 12 U.S.C. Ch. 17). As such, this report provides background on the structure, history, and regulation of BHCs, as well as an overview of current policy issues.

How Are BHCs Structured?

Commercial banks can take different legal forms. They can be standalone entities or subsidiaries of other entities. One option is for a bank to be owned by a BHC, in which case the bank is formed as a legal subsidiary of the BHC. The entity at the top of the corporate structure is referred to as the parent company or holding company (HC).

Commercial banks and BHCs are regulated at the federal level, with the former subject to different rules from the latter. Federal and state law determines how a bank and BHC are allowed to operate. For example, a bank can accept customer deposits insured by the Federal Deposit Insurance Corporation (FDIC) either in a standalone bank or within the bank subsidiary of a BHC.

In addition to bank subsidiaries, BHCs can control nonbank subsidiaries, subject to legal limitations. These structures create legal separation between subsidiaries. A BHC can have any number of bank and nonbank financial subsidiaries but must have at least one bank subsidiary. A special type of BHC called a financial holding company (FHC) is allowed to have a broader range of nonbank subsidiaries than a BHC is.[1] Most of the largest banks in the country are organized as FHCs, although they are often referred to as BHCs. Banks (whether or not they are subsidiaries of BHCs) may also have nonbank subsidiaries, as permitted by law. BHCs may control nonbank subsidiaries, but a nonbank financial firm need not be part of a BHC unless it is affiliated with a bank. A BHC may also own other BHCs, in which case it is referred to as a top tier BHC.

[1] See the section below titled "Financial Holding Companies."

Other types of banking organizations can be similarly structured but are subject to modified or unique rules.[2] A savings and loan (or thrift) holding company (THC) is one that owns savings associations, which also take FDIC insured deposits and make loans. Some large foreign banks are required to place their U.S. operations in U.S. intermediate holding companies (IHCs).

Current Data

At the end of 2023, there were 3,407 top tier BHCs that controlled 3,486 banks out of total of 4,026 banks. Most BHCs are not FHCs. There were 502 BHCs that had FHC status, of which 23 held more than $100 billion in assets and 226 held less than $1 billion in assets.[3] In addition, there were 148 top tier THCs and 10 IHCs.[4] The share of banks owned by BHCs grew from 34% in 1980 to 80% in 2012[5] to 87% in 2023.

The vast majority of large banks are controlled by BHCs. BHCs controlled 95% of all commercial banking assets at the end of 2023.[6] As shown in **Table 1**, most banking organizations with over $10 billion in assets are structured as BHCs, with about two-thirds of those BHCs registered as FHCs at the end of June 2024. The six largest firms, which each have over $1 trillion in assets, are FHCs. All banks with over $100 billion in assets have holding companies, but four banks with between $10 billion and $100 billion do not. More banks in the $100 billion to $250 billion range and $250 billion to $700 billion range were IHCs or THCs than non-FHC BHCs, pointing to the wider range of activities undertaken by the largest banking organizations, as will be discussed below.[7]

Table 1. Number of Large Banking Organizations by Type

As of June 30, 2024

Asset Size (Billions of $)	BHC That Is Not FHC	FHC	IHC	THC	Commercial Bank w/o HC
$1,000 or more	0	6	0	0	0
$250-$1,000	0	7	2	1	0
$100-$250	1	10	6	3	0
$10-$100	40	61	2	11	4
Total	41	84	10	15	4

Source: CRS calculations based on data from Federal Financial Institutions Examination Council, National Information Center, "Large Holding Companies," June 30, 2024, https://www.ffiec.gov/npw/Institution/TopHoldings; Federal Reserve, "Large Commercial Banks," June 30, 2024, https://www.federalreserve.gov/releases/lbr/20240630/default.htm.

Note: See text for acronyms.

[2] A banking organization is any entity that is a depository institution or owns one. Examples of depository institutions are commercial banks and savings associations.

[3] There were also 45 foreign banking organizations that had FHC status.

[4] Federal Reserve, *2023 Annual Report*, https://www.federalreserve.gov/publications/files/2023-annual-report.pdf.

[5] Partnership for Progress, "Bank Holding Companies and Financial Holding Companies," https://www.fedpartnership.gov/bank-life-cycle/grow-shareholder-value/bank-holding-companies.

[6] Federal Reserve, *2023 Annual Report*.

[7] In some cases, large THCs that have large nonbank operations, such as Charles Schwab, were previously BHCs. In other cases, former BHCs have "debanked" and shed their HC structure entirely.

The 50 largest BHCs had a median of 39 subsidiaries and as many as 1,258 subsidiaries in the second quarter of 2017.[8] For the 200 largest BHCs, 92% of subsidiaries were nonbank subsidiaries at the end of 2022.[9] Of the 50 largest BHCs, 27 had foreign subsidiaries in 2017 operating in as many as 69 countries, with a median of two countries.[10] The number of subsidiaries (and number of countries they operated in) at the top 50 BHCs has fallen since before the 2008 financial crisis, possibly because of post-crisis reforms that encourage organizational simplicity, such as resolution plans.[11]

Although bank subsidiaries make up a small share of total BHC subsidiaries, they hold most of the BHCs' assets. The assets of nonbank subsidiaries at BHCs have trended upward over time, rising from 10% in 1995 to 25% in 2008 before falling beginning in 2012 to 20% in 2022.[12] The share is highest for a few of the largest banks, but nonbank subsidiaries are common across BHCs, operating in 27 unique business lines, on average.[13] Nonbank subsidiaries of BHCs make up a significant share of all nonbank financial activity, holding 11% of total nonbank financial assets in 2022. In 2020, 63.5% of top 200 BHCs had specialty lenders, 68.5% had securities brokerages, 65.5% had insurance carriers or brokers, and 74% had investment funds. In 2020, BHC subsidiaries held 70.7% of all broker-dealer assets (up from 19% in 2005), 19.5% of mutual fund assets, 17.7% of nonbank lender assets, and 0.2% of insurance assets (down from 9.1% in 2010).[14]

Costs and Benefits to Forming a BHC

Most BHCs do not own multiple banks or nonbank subsidiaries that would make an HC structure obligatory. BHCs without nonbank subsidiaries weigh the financing and corporate governance benefits of the HC structure—which have somewhat eroded over time—against the additional regulatory burden it entails.[15] According to one study:

> These subsidiaries have been created for a variety of purposes: (i) for regulatory reasons, for example, because separate subsidiaries are required in each country in which the firm operates, or for particular activities; (ii) to limit taxation, for example, by shifting certain activities into lower-tax jurisdictions; (iii) to manage the regulatory burden of the firm, for example, to avoid burdensome laws or regulatory regimes; (iv) to secure or limit the position of different claimholders on the firm in the case of bankruptcy.[16]

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[8] Nicola Cetorelli and Linda S. Goldberg, "Measures of Global Bank Complexity," Federal Reserve Bank of New York, December 2014, https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412ceto.pdf.

[9] Nicola Cetorelli and Saketh Prazad, "The Nonbank Shadow of Banks," Federal Reserve Bank of New York, November 27, 2023, https://libertystreeteconomics.newyorkfed.org/2023/11/the-nonbank-shadow-of-banks/.

[10] Linda S. Goldberg and April Meehl, *Complexity in Large U.S. Banks*, Federal Reserve Bank of New York, February 26, 2019, https://dx.doi.org/10.2139/ssrn.3342464; see also Dafna Avraham et al., "A Structural View of U.S. Bank Holding Companies," Federal Reserve Bank of New York, July 2012, pp. 65-81, https://dx.doi.org/10.2139/ssrn.2118036.

[11] Goldberg and Meehl, *Complexity in Large U.S. Banks*.

[12] Assets under management by mutual funds owned by BHCs are not included in a BHC's consolidated assets. If they were, the share of assets held by nonbank subsidiaries would be almost half. Nicola Cetorelli and Saketh Prazad, *The Nonbank Footprint of Banks*, Federal Reserve Bank of New York, September 2024, https://doi.org/10.59576/sr.1118.

[13] Weighted by assets.

[14] Cetorelli and Prazad, *The Nonbank Footprint of Banks*; Nicola Cetorelli et al., *Evolution in Bank Complexity*, Federal Reserve Bank of New York, December 2014, https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412cet2.pdf.

[15] Susan Stoops Ancarrow et al., "Advantages and Disadvantages of Bank Holding Company Structure," Troutman Pepper, June 20, 2019, https://www.troutman.com/insights/advantages-and-disadvantages-of-bank-holding-company-structure.html; V. Gerard Comizio et al., "Revisiting the Bank Holding Company Structure: Do Community and Regional Banks Still Need a Bank Holding Company?," *American University Business Law Review*, vol. 5, no. 2, 2016, pp. 189-208.

[16] Avraham et al., "A Structural View of U.S. Bank Holding Companies."

Because much of the regulatory burden stems from safeguards surrounding nonbank subsidiaries, burden is lower for BHCs without nonbank subsidiaries. A BHC structure is also an advantageous way to finance a de novo (new) bank, and the regulatory burden may not be great enough to merit eliminating the BHC structure later.[17]

History

BHCs in their current form are the result of the unique historical evolution of U.S. bank regulation.[18] BHCs became prominent in the first half of the 20th century as a means to get around restrictions on a bank having multiple branches. National banks were allowed to have only one branch until 1927 (or later if not allowed in the state in which it operated). Banking across state lines was not allowed, with restrictions gradually being chipped away beginning in the 1970s until they were fully eliminated in the 1990s.[19] However, a BHC could own multiple banks, including across state lines.[20]

The Fed advocated for legislation regulating BHCs beginning in 1927.[21] Statutory restrictions were first placed on the relationship between banks that were members of the Federal Reserve system[22] and their affiliates (including their HCs) by the Glass-Steagall Act of 1933.[23] Although the banks owned by BHCs were regulated, Congress perceived a need for a complementary regulatory regime for BHCs that could address apparent regulatory inconsistencies or loopholes. For example, BHCs, unlike banks, were allowed to own nonfinancial commercial businesses. This led Congress to pass the Bank Holding Company Act of 1956. As will be discussed in the "Regulation" section, the BHC Act established restrictions on the types of businesses a BHC could own. The act defined a BHC, placed limitations on what it could do, and made the Fed the regulator of BHCs.

The history of the BHC Act and subsequent amendments has been described as a "cat and mouse" game between banks and regulators.[24] As one law review article described it, "law shapes market developments, and then, in turn, attempts to respond to such developments."[25] Over time, there were repeated changes to who was and was not subject to the BHC Act and what companies subject to the act were allowed to do. Technological progress and financial innovation created new ways to deliver financial services. Exempted institutions grew rapidly and morphed into institutions with different characteristics than they had at the time they were exempted, leading

[17] Adam J. Levitin, "Samson's Toupeé: Banking Law's Source-of-Strength Doctrine," *Yale Journal on Regulation*, vol. 41 (2024), p. 1078, https://www.yalejreg.com/wp-content/uploads/08.-Levitin-Article.-Print.pdf.

[18] Saule T. Omarova and Tahyar E. Margaret, "That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulations in the United States," *Review of Banking and Financial Law*, vol. 31 (2011-2012), https://scholarship.law.cornell.edu/facpub/1012/.

[19] Bill Medley, "Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994," Federal Reserve History, November 22, 2013, https://www.federalreservehistory.org/essays/riegle-neal-act-of-1994.

[20] Initially, the BHC Act allowed states to block interstate banking through a BHC structure.

[21] Omarova and Margaret, "That Which We Call a Bank."

[22] All federally chartered commercial banks are required to become members of the Federal Reserve system. State chartered banks have the option to become members.

[23] Mark B. Greenlee, "Historical Review of 'Umbrella Supervision' by the Board of Governors of the Federal Reserve System," *Review of Banking and Financial Law*, vol. 27 (2008), pp 406-458, https://www.clevelandfed.org/-/media/project/clevelandfedtenant/clevelandfedsite/publications/working-papers/2008/wp-0807-historical-review-of-umbrella-supervision-by-the-board-of-governors-of-the-federal-pdf.pdf.

[24] Lauren Bomberger, "The OCC FinTech Charter and the Bank Holding Company Act," *University of Miami Business Law Review*, vol. 29, no. 2 (Spring 2021), pp. 1-30.

[25] Omarova and Margaret, "That Which We Call a Bank."

Congress to reconsider who should be exempt. Gradually, legislation made more types of firms subject to Fed regulation under the BHC Act, but some remain exempt.[26]

Rising market interest rates in the 1970s, combined with interest rate restrictions on banks, caused bank customers to shift to capital markets, creating financial pressures on banks and political pressures on Congress to allow banks into new business lines. According to one study, "where to draw the line between permissible and impermissible non-banking activities of registered BHCs became the core issue in the interpretation and implementation of the BHCA."[27] Following the 1970 amendments to the BHC Act that, among other things, allowed BHCs to own subsidiaries that were closely related to the business of banking, bank regulators gradually expanded the scope of activities that BHC subsidiaries could engage in.[28] This led to the erosion of the provisions of the Glass-Steagall Act of 1933 (48 Stat. 162, Section 16, 20, 21, 32) that greatly restricted banks' participation in securities markets.[29] From 1978 to the enactment of the Gramm-Leach-Bliley Act (GLBA, P.L. 106-102) in 1999, the Office of the Comptroller of the Currency (OCC) and the Fed progressively expanded the securities activities permissible for banks and nonbank subsidiaries of BHCs.[30]

In 1998, the Fed conditionally approved a merger between Citicorp and Travelers Group that created Citigroup, the largest financial organization in the world at the time, despite the fact that Travelers had extensive securities and insurance activities that it would have to divest or modify to be in conformance with the BHC Act.[31] According to Citigroup, "Crucial to the rationale underlying the merger was the prospective repeal of the Glass-Steagall Act."[32]

GLBA officially expanded the scope of activities that a BHC could engage in—in many instances, codifying permissible activities that regulators had previously allowed—by creating FHCs that could have insurance, securities, and other financial subsidiaries and by repealing some of the Glass-Steagall restrictions on affiliations between securities companies and banks.[33] Although banks could participate in limited securities activities before GLBA, broader limitations were formally removed for the subsidiaries of FHCs. Beyond securities markets, FHCs could participate in an even broader range of nonbank activities. Most notably, GLBA removed limitations on the types of insurance underwriting and agency activities that FHCs could

[26] For example, amendments made BHCs with only one bank subject to the BHC Act, and P.L. 100-86 changed the definition of *bank* under the act from banks that engaged in both deposit taking and commercial lending to all banks with insured deposits. Joe Mahon, "Bank Holding Company Act of 1956," Federal Reserve History, November 22, 2013, https://www.federalreservehistory.org/essays/bank-holding-company-act-of-1956; Robert Mayo, "Utilizing the Bank Holding Company," Federal Reserve Bank of Chicago, July/August 1980, https://www.chicagofed.org/-/media/publications/economic-perspectives/1980/ep-jul-aug1980-part1-mayo-pdf.pdf; Lee Davison, "Banking Legislation and Regulation," in *History of the Eighties: Lessons for the Future*, vol. 1, *An Examination of the Banking Crises of the 1980s and Early 1990s* (Washington, DC: FDIC, 1997); Omarova and Margaret, "That Which We Call a Bank."

[27] Omarova and Margaret, "That Which We Call a Bank." For more information, see the section below entitled "Permissible Activities."

[28] Comizio et al., "Revisiting the Bank Holding Company Structure."

[29] The BHC Act extended Glass-Steagall affiliation restrictions to BHCs.

[30] CRS Report R41181, *Permissible Securities Activities of Commercial Banks Under the Glass-Steagall Act (GSA) and the Gramm-Leach-Bliley Act (GLBA)*, by David H. Carpenter and M. Maureen Murphy (available to congressional clients upon request); Omarova and Margaret, "That Which We Call a Bank."

[31] Federal Reserve, press release, September 23, 1998, https://www.federalreserve.gov/boarddocs/press/bhc/1998/19980923/19980923.pdf.

[32] Citigroup, "Momentous Encounter Leads to Merger," https://www.citigroup.com/global/about-us/heritage/1998/momentous-encounter-leads-to-merger.

[33] CRS Report R41181, *Permissible Securities Activities of Commercial Banks Under the Glass-Steagall Act (GSA) and the Gramm-Leach-Bliley Act (GLBA)*, by David H. Carpenter and M. Maureen Murphy (available to congressional clients upon request).

undertake—although they are similar to securities activities, regulators had already allowed some insurance activities by banks prior to GLBA.[34] GLBA embraced the idea that there are benefits to combining banking, securities, and insurance activities in one company.

The 2008 financial crisis boosted the importance of BHCs in the financial marketplace, and post-crisis reforms used BHCs as a vessel for systemic risk regulation. Before the crisis, five large securities firms—often called "investment banks," although they were not chartered as banks—dominated Wall Street.[35] In the depths of the crisis, two investment banks were taken over by BHCs, two converted to BHCs and began to take deposits (without any statutory or regulatory change), and the fifth went bankrupt. The financial crisis also saw a reduction in the number of large THCs relative to BHCs.

Following the 2008 financial crisis, the Dodd-Frank Act of 2010 (DFA, P.L. 111-203) reformed the financial system, with a number of provisions that affected BHCs. One of its major pillars was a new systemic risk regulatory regime, which was automatically applied to large BHCs but not banks.[36] The DFA also made changes to reduce differences in the regulation of BHCs and their banking subsidiaries through provisions discussed below such as the Volcker Rule and the Collins Amendment. The DFA also expanded the Fed's supervisory authority over nonbank subsidiaries.[37] Finally, the DFA shifted regulatory oversight of THCs from the Office of Thrift Supervision (which the act eliminated) to the Fed and eliminated some of the differences in how BHCs and THCs are regulated.[38]

In recent years, there has been a modest market shift away from the BHC model, notably for a handful of insurance firms seeking to avoid post-crisis banking regulations.[39] In addition, a few large (but not the largest) banks have shed their BHC structures.[40] Finally, there has been a growth in lending by nonbank financial firms, sometimes called "shadow banks."

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[34] Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*, September 2016, https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20160908a1.pdf.

[35] Some of them owned industrial loan companies or savings associations that allowed clients to hold cash balances as insured deposits.

[36] Another pillar of the DFA was a new resolution regime—called the Orderly Liquidation Authority (OLA)—for winding down systemically risky financial firms, which the FDIC has envisioned would be used for a failing BHC. OLA has never been used.

[37] The DFA required FHCs to be well capitalized and well managed and have satisfactory Community Reinvestment Act ratings. BHCs seeking interstate mergers are to be well capitalized and well managed. The DFA also increased the scope of interaffiliate restrictions and reduced the Fed's ability to grant exemptions from these restrictions. It also required BHCs to serve as a source of strength to their bank subsidiaries.

[38] CRS Report R41339, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Titles III and VI, Regulation of Depository Institutions and Depository Institution Holding Companies*, by M. Maureen Murphy (available to congressional clients upon request).

[39] Rica Dela Cruz and Kris Elaine Figuracion, "TIAA Bank Sale Agreement Follows Pattern of Insurers Divesting Depositories," S&P Capital IQ, November 29, 2022. In the years following enactment of the DFA, most insurers with BHCs or THCs divested their depository subsidiaries in order to drop their HC structure and the regulation and Fed supervision that accompanied it. Some insurers own nondepository trusts, industrial banks, and other limited purpose banks that are exempted from the BHC Act.

[40] Two state-chartered non-member banks, Bank of Ozarks and BancorpSouth, separately announced they were eliminating their HCs in 2017 in order to eliminate oversight by the Fed and the Securities and Exchange Commission (SEC). The latter is eliminated because banks, unlike nonbank subsidiaries, can offer securities up to a limit without SEC registration and mandatory disclosures. The OCC requires registration of security offerings, but the FDIC does not. Zions Bank converted its corporate structure from a BHC to a standalone bank in 2018, reportedly in order to no longer be subject to enhanced prudential regulation by the Fed. Christina Rexrode, "Zions to Challenge Its 'Big Bank' (continued...)

Regulatory Requirements

Regulatory requirements on BHCs administered by the Fed are few compared to requirements on their functionally regulated subsidiaries (primarily, bank, insurance, securities, and derivatives subsidiaries). Banks are regulated for safety and soundness and subject to supervision because they are protected by a federal backstop—principally, FDIC deposit insurance and the Fed's discount window—and the systemic risk they can pose. Regulation imposes costs on banks that are balanced by advantages they enjoy such as their access to the federal backstop. Banks are regulated the same way whether they are standalone entities or subsidiaries of BHCs.

BHCs are not subject to the close prudential regulation that their bank subsidiaries are. Instead, BHC prudential regulation is intended to ensure that other parts of the BHC do not gain access to the safety net and the advantages that derive from it and that the other parts of the BHC do not undermine the bank subsidiary's safety and soundness. Prudential safeguards for BHCs include source of strength requirements, capital requirements, and enhanced prudential regulation for large BHCs.

Currently, the key goals of BHC regulation are to:

- maintain the separation of banking and nonfinancial commerce,
- limit BHCs to permissible activities,
- ensure that BHCs do not undermine the safety and soundness of their banking subsidiaries and prevent banks from subsidizing their affiliates,
- prevent mergers and acquisitions from resulting in monopolies or excessive concentration, and
- mitigate systemic risk posed by large BHCs.

Together, rules surrounding control, affiliate restrictions, source of strength requirements, and permissible activity restrictions govern the relationship between the BHC (and its nonbank subsidiaries) and its bank subsidiaries, and they reinforce one another. Control and management interlock rules are needed to ensure that companies controlling banks are subject to BHC regulation. Permissible activity restrictions are needed to determine what banks can do and what the other subsidiaries of a BHC can do. Affiliate restrictions govern the transactions among a bank, its BHC, and the other subsidiaries. Source of strength rules make a BHC responsible for supporting the financial well-being of the bank subsidiary.

Some rules are applied to a BHC on a consolidated basis (e.g., based on all of the assets of the parent company and all of its subsidiaries), whereas others apply to the parent company. Other rules involve the relationship between the bank subsidiary and its affiliates (which include the parent company and the nonbank subsidiaries).[41]

The sections below describe in more detail some of the key regulations governing the relationships between BHCs and their banking subsidiaries.[42]

Label," *Wall Street Journal*, November 20, 2017, https://www.wsj.com/articles/zions-plans-to-challenge-its-big-bank-label-1511128273; Blake Leger, "SEC You Later: Eliminating the Bank Holding Company and Reducing SEC Oversight under Section 3(a)(2)," *North Carolina Banking Institute*, vol. 23, no. 1 (2019), pp. 253-270.

[41] The BHC Act as amended is the primary statutory basis for the regulations governing BHCs, but some important statutory requirements governing the relationship between BHCs and their banking subsidiaries are found outside of the BHC Act.

[42] For an overview of BHC regulation, see James M. Rockett and David J. Gershon, "Significant Bank Holding Company Conversion Issues," *Banking Law Journal*, vol. 126, no. 8 (September 2009), pp. 707-727.

Who Qualifies as a BHC?

Statute and regulation implement the basic principle behind the BHC Act: that a BHC is a company that owns a bank. Generally, to ensure regulatory compliance, companies that control commercial banks—and subsequently acquire (or control) any additional banks and nonbank firms—are required to seek approval from the Fed to register as BHCs and to engage in novel nonbank activities. Statute includes various exemptions and grandfathering from the BHC Act. To be approved, the company cannot also control a predominantly nonfinancial business or engage in other nonpermissible activities.

Exempt Institutions

Various entities are not considered BHCs under the BHC Act, including grandfathered institutions,[43] companies that own credit unions, and a group of deposit-taking entities that would otherwise run afoul of rules on the separation of banking and commerce—industrial loan corporations (ILCs), limited purpose credit card banks,[44] municipal deposit banks, and trust banks.[45] These exempt deposit-taking entities are not subject to consolidated supervision, but their depositories are still subject to OCC or FDIC supervision.[46] THCs are not subject to the BHC Act, but they are subject to Fed supervision (since the DFA in 2010) under a different part of the statute than the BHC Act, which has some similarities and differences from the BHC Act.[47] Certain foreign banks operating in the United States are not BHCs but are subject to BHC requirements, such as BHC or FHC rules on nonbanking activities.[48]

Criteria for Approval

The Fed must evaluate an application for a company to become a BHC, for a BHC to acquire or take control of a bank, or for a BHC to merge with another BHC on the basis of:

- its effect on market competition,
- the financial and managerial resources and future prospects of the company,
- how the company will meet the convenience and needs of the community,
- the future availability of information from the company for supervision,
- the company's anti-money laundering record,
- the effects on financial stability, and

[43] Federal Reserve, *Bank Holding Company Supervision Manual*, February 2023, §2090.7, https://www.federalreserve.gov/publications/files/bhc.pdf.

[44] These credit card banks were created to avoid state usury laws capping interest rates charged.

[45] In 2011, the Government Accountability Office (GAO) identified 57 existing institutions holding less than 1% of total assets of the banking system that were exempted from the BHC Act, excluding savings associations. Of those companies, GAO estimated that 11 were owned by companies that would meet the BHC Act definition of *commercial company*, 32 would not, and 14 could not be determined. See GAO, *Bank Holding Company Act: Characteristics and Regulation of Exempt Institutions and the Implications of Removing the Exemptions*, GAO-12-160, January 2012, https://www.gao.gov/assets/gao-12-160.pdf.

[46] GAO, *Bank Holding Company Act*.

[47] Mark B. Greenlee, "Is It Time to Unify the Regulation of Depository Institution Holding Companies? Historical Review of Differentiation and Convergence in the Regulation and Supervision of Depository Institutions, Bank Holding Companies, and Savings and Loan Holding Companies," *North Carolina Banking Institute*, vol. 25 (2021), pp. 1-102.

[48] 12 U.S.C. §3106.

- Community Reinvestment Act compliance.[49]

In addition, acquisitions cannot result in a BHC holding more than 10% of national deposits or 30% of state deposits or 10% of all financial companies' liabilities, unless the bank being acquired is in danger of default.[50]

A merger or acquisition must be approved by the Attorney General and, in some cases, the Federal Trade Commission on antitrust grounds unless the acquisition would prevent the imminent failure of a bank or BHC.[51]

Regulation sets out the approval process, including how quickly a decision should be made, expedited procedures, and public notice.[52]

For more information, see CRS In Focus IF11956, *Bank Mergers and Acquisitions*, by Marc Labonte and Andrew P. Scott.

Control Rules

Given that a bank can have multiple owners (e.g., shareholders), it is not always straightforward to identify whether any particular owner should be considered a BHC. Under the BHC Act, a BHC is a firm that controls a bank. This definition is based on whether the BHC controls 25% or more of the voting shares or a majority of the directors or trustees or has a "controlling influence" over the bank's management or policies. In 2020, the Fed issued a final rule creating a framework based on transparent quantitative metrics to determine the latter. According to the Fed, "Previously, control reviews have been situation-specific and often followed precedents that were not available to firms or to the public."[53] Under the 2020 rule, companies with less than 25% of voting shares can still be deemed to have control based on a combination of their voting shares and other factors.[54] In addition, a change in control of an existing state member bank or BHC must also be approved by the Fed.[55]

Management Interlocks

In addition to a company controlling a bank through ownership, a company could also effectively control decisionmaking at a bank through shared management. To avoid a company with shared

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[49] 12 U.S.C. §1842. Before approving an application involving a bank, the Fed must seek input from the bank's primary regulator. The statute also addresses the use of a bank stock loan by a one-bank holding company to acquire a bank. By statute, the Fed may approve an application regardless of whether it is prohibited under state law (except for laws on minimum time in business if less than five years old). Interstate mergers of BHCs are also subject to Title 12, Section 1831u, of the *U.S. Code*.

[50] 12 U.S.C. §1842; 12 U.S.C. §1852.

[51] 12 U.S.C. §1849.

[52] 12 C.F.R. §225 Subpart B.

[53] Control rules make it difficult for some types of investors, such as private equity, to invest in BHCs. When the banking industry needed to be recapitalized after the 2008 financial crisis, the Fed issued a new policy statement to make it easier and more attractive to make non-controlling equity investments, allowing, for example, limited representation on the board of directors. Ravi Desai, "Private Equity Investment in Financial Institutions and How to Avoid Becoming a Bank Holding Company," *North Carolina Banking Institute*, vol. 13, no. 1 (March 2009), pp. 385-412.

[54] Federal Reserve, "Federal Reserve Finalizes Rule to Simplify and Increase the Transparency of the Board's Rules for Determining Control of a Banking Organization," press release, January 30, 2020, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200130a.htm.

[55] 12 U.S.C. §1817(j). For more information, see Mark B. Greenlee and Brian P. Knestout, "Acquisition of Control of a State Member Bank, Bank Holding Company, or Savings and Loan Holding Company Pursuant to the Change in Bank Control Act," *Review of Banking and Financial Law*, vol. 38, no. 1 (Fall 2018), pp. 209-362.

management with a bank not registering as a BHC (or two banks with shared management registering as independent banks), statute limits management interlocks for BHCs and banks under its jurisdiction.[56] Under this rule, a bank or BHC cannot share management (including directors, executive officers, and trustees) with another bank or BHC with an office in the same geographical area that is not an affiliate or subsidiary. Large unaffiliated banking organizations cannot share management regardless of their geographical proximity. The prohibitions do not apply in some scenarios.

Permissible Activities

Unlike most types of companies, banks and BHCs by law are limited as to what types of activities they are permitted to conduct. FHCs are permitted to engage in more types of activities than BHCs are.

Commercial Activity Restrictions for BHCs

A long-standing principle of banking law is to keep banking and commerce (nonfinancial business) separate on the grounds that their intermingling could cause excessive concentration of power and conflicts of interest and expose banks to excessive risk that results in safety and soundness concerns and potentially systemic risk.[57] BHCs are not allowed to engage in nonfinancial activities (unless incidental to banking) but can own up to a 5% noncontrolling stake in a nonfinancial company, which is defined as a company where less than 85% of its revenue and assets are attributable to financial activities. Some exceptions to this rule are discussed below.

Activities Related to Banking

The BHC Act lays out a few specific cases where a BHC may own other types of companies besides banks.[58] Notably, a BHC can own a nonbank subsidiary whose activities are closely related to or incidental to the business of banking, including those closely related to managing or controlling banks.[59] Congress wanted to limit BHCs to the business of banking but reasoned that some other activities naturally fit together with banking. As time went on, banks were

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[56] 12 U.S.C. Ch. 33, promulgated through the Fed's Regulation L (12 C.F.R. §212).

[57] Kenneth Spong and Eric Robbins, "Industrial Loan Companies: A Growing Industry Sparks a Public Policy Debate," Federal Reserve Bank of Kansas City, Fourth Quarter 2007, https://www.kansascityfed.org/Economic%20Review/documents/953/2007-Industrial%20Loan%20Companies:%20A%20Growing%20Industry%20Sparks%20a%20Public%20Policy%20Debate.pdf.

[58] For example, a BHC may own up to 5% of outstanding voting shares in any company directly or through ownership of an investment company. It may own companies that provide the bank or BHC services, such as property management. It may hold or acquire shares in a fiduciary capacity. It may own shares in export trading companies up to 5% of the bank's capital. If approved by the Fed, it may own shares in companies that do no business in the United States. Some nonconforming investments are grandfathered.

[59] 12 U.S.C. §1843(c)(8). Permissible activities within (federal- or state-chartered) bank subsidiaries are separately determined primarily by the OCC, although the FDIC has permitted state-chartered banks to engage in some additional activities. For state member banks, the Fed can (but rarely does) approve activities not approved by the OCC or FDIC if there is a "clear and compelling rationale." Similar to the Fed, the OCC uses "business of banking" or "incidental to the business of banking" concepts to determine permissible activities that it has separately interpreted. See 12 C.F.R. Part 7, 12 C.F.R. Part 362, Subpart A; OCC, *Activities Permissible for National Banks and Federal Savings Associations, Cumulative*, October 2017, https://www.occ.gov/publications-and-resources/publications/banker-education/files/activities-permissible-nat-banks-fed-savings-associations.html; Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*; Board of Governors of the Federal Reserve System, "Policy Statement on Section 9(13) of the Federal Reserve Act," 88 *Federal Register* 7848, February 7, 2023, https://www.govinfo.gov/content/pkg/FR-2023-02-07/pdf/2023-02192.pdf.

successfully able to convince regulators to add to the list of activities that should be considered permissible.[60]

The list of permissible activities runs the gamut of financial and other services. It includes extending credit; servicing loans; appraising property; acting as an intermediary for commercial real estate equity financing; offering check guaranty services, collection agency services, or credit bureau services; asset management; acquiring debt in default; real estate settlement; leasing personal and real property; controlling an industrial bank, ILC, or savings association; trust, fiduciary, and custodial services; acting as an investment advisor; tax planning and preparation services; securities brokerage; securities transactions on behalf of customers; private placement services; acting as a futures commission merchant; underwriting and dealing government debt and money market instruments; foreign exchange trading; derivatives trading; transacting in bullion; management consulting; courier services for financial instruments; a number of insurance activities based on their relation to extensions of credit, or the size of the bank or town that the bank is operating in, or because it is grandfathered; equity and debt investments for community development; issuance and sale of money orders, traveler checks, or savings bonds; and financial or economic data processing.[61] BHCs and banks can control various entities that operate abroad, which are allowed to conduct a wider range of activities than domestically (if allowed in the countries they are operating in).[62]

Through financial innovation, banks develop novel activities or new variations on existing activities. A BHC and its subsidiaries cannot engage in a nonbank activity or acquire a company engaged in nonbank activities without Fed approval unless the Fed has previously approved the activity by order. Activities that were already approved by the Fed by 1999 are automatically approved under GLBA. BHCs can seek approval for other activities, which the Fed must evaluate on the basis of various criteria.[63]

The DFA added what is popularly referred to as the "Volcker Rule," named after former Fed Chair Paul Volcker.[64] The Volcker Rule is one exception to the decades-long trend of expanding the scope of permissible activities. As amended, it prohibits banks and BHCs (including FHCs) with more than $10 billion in assets from engaging in proprietary trading or having ownership interests or sponsoring hedge funds or private equity funds. The act defines *proprietary trading* as "engaging as a principal for the trading account of the banking entity … in any transaction to purchase or sell, or otherwise acquire or dispose of" securities and derivatives. Various capital

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[60] It is beyond the scope of this report but should also be noted that the OCC and state regulators have permitted federally chartered and state-chartered banks, respectively, to engage in numerous securities, derivatives, and insurance activities as well. See Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*.

[61] 12 C.F.R. §225.28. In addition, the Fed has identified (12 C.F.R. §225.126) a few activities that are not permissible for BHCs because they are not closely related to banking: the combined sale of mutual funds and insurance, underwriting life insurance not sold in connection with the company's credit transaction, real estate brokerage, land development, real estate syndication, management consulting, and property management.

[62] Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*.

[63] Under Title 12, Section 1843(j), of the *U.S. Code*, an activity can be approved if it "can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, unsound banking practices, or risk to the stability of the U.S. banking or financial system." The BHC and bank must be well capitalized, well managed, not subject to recent enforcement actions, and involved only in permitted activities. An acquisition involving nonbank activities must not exceed a certain percentage of the BHC's capital. See also 12 C.F.R. §225.26.

[64] 12 U.S.C. §1851.

markets activities, such as market making and risk-mitigating hedging, are explicitly permitted under this section—thus the Volcker Rule prohibits a specific type of securities markets activities.

Allowing banks to engage in nonbank activities has costs and benefits. The benefits of defining permissible activities expansively are that it may improve bank profitability, consumer welfare, or both. It may result in increased customer convenience, cross-industry efficiency gains, new profitable business opportunities, and improved liquidity pooling within the BHC,[65] and it may generate economies of scope and scale. Weighed against these benefits is the potential for nonbank activities to increase risks to safety and soundness and financial stability. Whether this is the case depends on whether the benefits of greater diversification—which reduces risk[66]—is outweighed by the potential for nonbanking activities to increase risk through inadequate regulation.[67] Because that risk could ultimately be borne by the taxpayer through the federal backstop, the policy question becomes whether there are societal benefits to providing nonbank services through a BHC instead of by unaffiliated nonbank financial firms—or whether firewalls between the bank subsidiaries and the rest of the BHC, such as affiliate restrictions (discussed below), are strong enough that there is no risk borne by the taxpayer.

As discussed in the next section, GLBA created FHCs to allow for participation in a more expansive set of activities than BHCs are permitted to engage in. However, the list above demonstrates that even BHCs that are not FHCs can participate in a number of insurance, securities, and derivatives activities. Generally, the benefits and risks of permissible activities discussed in this section are greater for FHCs.

Financial Holding Companies

In 1999, GLBA created FHCs as a type of BHC. FHCs are subject to the same rules and requirements as BHCs, except for the unique rules described in this section. To become and continue to operate as an FHC, a BHC and its depository subsidiaries must be well capitalized and well managed and have at least a satisfactory Community Reinvestment Act rating.[68]

FHCs are permitted to engage in a broader set of activities than BHCs are through their nonbank subsidiaries. In addition to activities permissible for BHCs, FHCs can also engage in (or acquire companies that engage in) activities that are financial in nature, incidental to a financial activity, or complementary to a financial activity so long as it does not pose a risk to safety and soundness

[65] Cetorelli and Prazad, *The Nonbank Footprint of Banks*.

[66] For example, a working paper demonstrates how a BHC with a securities trading desk and lending operations can potentially better manage interest rate risk, but greater risk taking by the trading desk could lead to losses that reduce the bank's lending and cause it to fall below its capital requirements. See Ralph Chami et al., "What's Different About Bank Holding Companies?," International Monetary Fund, August 9, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014095.

[67] Jonathan Pogach and Haluk Unal, "Banks' Nonbank Affiliations," Federal Deposit Insurance Corporation, November 2020, https://archive.fdic.gov/view/fdic/11944.

[68] 12 U.S.C. §2903; 12 U.S.C. §1843(l).

or financial stability.[69] Complementary and incidental activities can be nonfinancial in nature.[70] Statute explicitly identifies five categories of permissible activities, including securities and insurance activities, that a FHC may engage in without prior approval from the Fed (subject to limits).[71] For example, FHCs can act as securities underwriters and broker-dealers and can act as insurance underwriters and agents.[72] FHCs can seek approval from the Fed to engage in other activities.

As noted above, all of the largest U.S. banking organizations are FHCs, and several have large market shares in various securities and derivatives market activities. But despite the potential for banks to form wide-ranging financial conglomerates through FHCs, few have branched out into all areas of financial markets to form the type of "universal bank" that is common in some foreign countries and that some envisioned would emerge in the United States after GLBA with an eye to international competition. There are no longer any FHCs with over $10 billion in assets that are significantly engaged in insurance activities.[73] However, as discussed above, most large BHCs conduct a limited range of securities and insurance business lines.

Commercial Activities of FHCs

Merchant banking investments are an exception to the BHC Act's separation of banking and commerce.[74] They are permissible only for FHCs with subsidiaries that are broker-dealers, investment advisers, or affiliates underwriting insurance. In the course of underwriting, merchant banking, or investment banking, an FHC might obtain shares in a nonfinancial business.[75] Called merchant banking investments, this is allowed within limits on holding time and as a share of total capital.[76] Merchant banking investments cannot be made by the bank subsidiary and must be

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[69] These activities are not limited to BHCs. THCs and foreign banks operating in the United States can also elect to be treated as FHCs in order to engage in these activities. In addition, GLBA also allows banks to control financial subsidiaries that engage in many of the activities that FHCs may engage in. There are some exceptions on activities, such as merchant banking and insurance underwriting, that FHCs can engage in but financial subsidiaries cannot. There are restrictions on financial subsidiaries that are not placed on other bank subsidiaries, such as restrictions on transactions between a bank and its financial subsidiaries. See CRS Report R41181, *Permissible Securities Activities of Commercial Banks Under the Glass-Steagall Act (GSA) and the Gramm-Leach-Bliley Act (GLBA)*, by David H. Carpenter and M. Maureen Murphy (available to congressional clients upon request); Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*; OCC, *Comptroller's Handbook: Related Organizations*, 2004, https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/related-organizations/pub-ch-related-organizations.pdf.

[70] Omarova and Margaret, "That Which We Call a Bank."

[71] 12 U.S.C. §1843(k)(4). Under Title 15, Section 6715, of the *U.S. Code*, states cannot prevent insurers from becoming FHCs or acquiring banks.

[72] Unlike BHCs, insurance subsidiaries of FHCs can be state-regulated insurance companies that can engage in any permissible insurance activities. BHCs can engage in a limited number of insurance activities that have been deemed closely related to or incidental to the business of banking. They mostly involve insurance related to credit that the bank has provided or supervising insurance agents selling insurance on the bank's property and employees. Small, rural, or grandfathered banks are allowed to engage in a broader scope of insurance activities. (Bank subsidiaries are also allowed to engage in a narrow range of insurance activities.)

[73] Dela Cruz and Figuracion, "TIAA Bank Sale Agreement." For insurers that affiliate with banks or depositories, some own thrifts, nondepository trusts, industrial banks, and other limited purpose banks instead of forming BHCs.

[74] 12 U.S.C. §1843(k)(7).

[75] A merchant bank provides financial services for corporations or high-net-worth individuals, as opposed to the general public, and is not housed in the bank subsidiary of an FHC. Investment banks underwrite securities for companies and governments and sell them to institutional investors. For example, an FHC might manage a company's initial public offering.

[76] 12 U.S.C. §1843(n). The FHC cannot manage or operate the business and can hold the shares for up to 10-15 years, (continued...)

held separately by a portfolio company, such as a private equity fund, that is not routinely managed by the FHC.

The statutory authority for merchant banking investments is broad, and the implementing regulation defines it as "to acquire or control any amount of shares, assets or ownership interests of a company or other entity that is engaged in any activity not otherwise authorized for the financial holding company under section 4 of the Bank Holding Company Act."[77] According to one study:

> In effect, the merchant banking power serves as a catch-all authority for FHCs to invest in commercial enterprises, as long as any such investment meets [the regulatory requirements].… Even though an FHC is permitted to acquire full ownership of a purely commercial firm, the principal purpose of its investment must remain purely financial: making a profit upon subsequent resale or disposition of its ownership stake…. [T]he main justification for allowing FHCs to own or control commercial companies … is the notion of merchant banking as a fundamentally financial activity.[78]

According to the Fed, FHCs held $29 billion in merchant banking investments, and 99% of merchant banking activity was undertaken by FHCs with over $50 billion in assets as of 2016.[79]

Other activities that have been approved as complementary to finance for FHCs include trading physical commodities in spot and futures markets, energy management and tolling, and disease management and mail-order pharmacy activities. Existing FHCs' nonfinancial physical commodity market activities—including "extraction, transportation, storage, or distribution of commodities, or to process or refine commodities"—were grandfathered in.[80] The Fed proposed a rule in 2016 that would curb FHC activity in physical commodity markets but has not finalized it to date.[81] Only Goldman Sachs and Morgan Stanley were grandfathered in to continue engaging in physical commodities activities.[82] In addition, 12 FHCs, all with over $50 billion in assets, had been approved for complementary activities as of 2016.[83]

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depending on the type, but can seek extensions. Merchant banking investments are limited to 20-30% of the FHC's Tier 1 capital, depending on the type. A bank cannot cross-market products from these companies and cannot engage in the types of transactions that are covered by affiliate restrictions.

[77] 12 C.F.R. §225 Subpart J.

[78] Saule T. Omarova, "The Merchants of Wall Street: Banking, Commerce, and Commodities," *Minnesota Law Review*, vol. 98, no. 1 (November 2013), p. 274.

[79] Federal Reserve, "Federal Reserve Board Invites Public Comment on Proposed Rule That Would Strengthen Existing Requirements and Limitations on the Physical Commodity Activities of Financial Holding Companies," press release, September 23, 2016, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20160923a.htm.

[80] 12 U.S.C. §1843(o). Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*. See also Omarova, "The Merchants of Wall Street," p. 274.

[81] Grandfathered commodity activities are limited to 5% of total assets, and cross-marketing is prohibited. Other commodity activities are limited to 5% of the FHC's Tier 1 capital. Federal Reserve, "Federal Reserve Board Invites Public Comment."

[82] Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*.

[83] Federal Reserve, "Federal Reserve Board Invites Public Comment."

Source of Strength

By statute, the BHC must serve as a "source of strength" to its banking subsidiaries, defined as the ability "to provide financial assistance to [the bank subsidiaries] in the event of financial distress."[84] According to the Fed, to comply with the source of strength requirement, a BHC

> should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity and should maintain the financial flexibility and capital-raising capacity to obtain additional resources for assisting its subsidiary banks.[85]

If a BHC can provide financial resources to an undercapitalized bank subsidiary but fails to do so, the Fed will initiate an enforcement action against it.[86] However, source of strength requirements are limited for a BHC's securities and insurance subsidiaries: The SEC or a state insurance regulator, respectively, can block funds from being transferred from those subsidiaries to a bank subsidiary if it would have a material adverse effect on their financial condition.[87] By regulation, a BHC must also serve as a source of managerial strength to its banking subsidiaries.[88]

Source of strength is a long-standing principle in BHC regulation, but in the past it was mainly applied in the approval process when a BHC was acquiring a bank, not on an ongoing basis. It has been explicit in regulation since 1983 but was hard to enforce until it was made a statutory requirement by Section 616(d) of the DFA in 2010.[89] The DFA required the Fed to promulgate rules implementing this requirement, but to date the Fed has not done so.[90]

A Recent Example of Source of Strength

The 2023 liquidation of Silvergate Bank provides an example of how the source of strength doctrine works. Silvergate Capital Corporation, the parent holding company, announced a voluntary self-liquidation (as opposed to FDIC resolution) of its bank subsidiary, Silvergate Bank, that was intended to fully repay depositors. The Fed then issued an enforcement action to ensure that the parent company fulfilled its source of strength commitments by prioritizing the repayment of depositors, prohibiting capital distributions, requiring cash to be preserved,

[84] 12 U.S.C. §1831o-1.

[85] Federal Reserve, *Bank Holding Company Supervision Manual*.

[86] Federal Reserve, *Bank Holding Company Supervision Manual*, §2010.0.

[87] 12 U.S.C. §1844(g).

[88] 12 C.F.R. §225.4. The Fed described managerial strength as a board of directors at the parent company that is performing its duties and responsibilities and is well informed of the condition of its subsidiaries. See Federal Reserve, *Bank Holding Company Supervision Manual*, §2010.0.

[89] Federal Reserve, *Bank Holding Company Supervision Manual*, §2010.0; John Yanish, "Holding Companies as a 'Source of Strength,'" *Fed Notes*, July 3, 2012, https://thebhca.org/holding-companies-as-a-source-of-strength/; Levitin, "Samson's Toupeé"; William Keeton, "Bank Holding Companies, Cross-Bank Guarantees, and Source of Strength," Federal Reserve Bank of Kansas City, May/June 1990, https://www.kansascityfed.org/documents/1227/1990-Bank%20Holding%20Companies,%20Cross-Bank%20Guarantees,%20and%20Source%20of%20Strength.pdf; Paul L. Lee, "The Source-of-Strength Doctrine: Revered and Revisited—Part I," *Banking Law Journal*, October 2012, https://www.debevoise.com/-/media/files/insights/publications/2012/10/the-sourceofstrength-doctrine-revered-and-revisi__/files/view-article/fileattachment/the-sourceofstrength-doctrine-revered-and-revisi__.pdf; Paul L. Lee, "The Source-of-Strength Doctrine: Revered and Revisited—Part II," *Banking Law Journal*, November/December 2012, https://www.debevoise.com/-/media/files/insights/publications/2012/11/the-sourceofstrength-doctrine-revered-and-revisi__/files/view-article/fileattachment/lee10192012.pdf.

[90] One article argues that without implementing regulations, there is a risk that the source of strength doctrine will remain ineffective in the future, making it more likely that nonbank affiliates will expose the bank subsidiary to losses. Levitin, "Samson's Toupeé."

prohibiting the bank from taking on new brokered deposits or business, prohibiting executive golden parachutes, and other actions.[91]

The Fed argues that BHCs have an obligation to support their bank subsidiaries, because they benefit from owning banks protected by the federal backstop.[92] Source of strength reduces a BHC's incentive to take risks that can be shifted to the taxpayer if the bank fails. A criticism is that it can force a BHC to throw good money after bad by keeping a bank afloat that should fail.[93]

Bank failures in the 1980s demonstrated that without a mandatory source of strength requirement, BHCs did not contribute resources to prevent their bank subsidiaries from failing and, in some cases, made solvency problems worse (by taking on too much debt, for example). One study, conducted before source of strength requirements were in statute, found evidence that those requirements "reduce the probability of future financial distress, but distressed affiliated banks are also more likely to receive [private] capital injections, recover more quickly, and are less likely to fail over the next year."[94] But another study found that the pre-DFA source of strength requirements did not meaningfully increase FDIC recoveries from large bank failures in the financial crisis.[95] One study finds evidence that BHCs tend to rely on (and supervisors do not discourage) internal dividends from their bank subsidiaries, implying that the BHCs are taking advantage of the bank subsidiaries' access to the federal backstop, thereby weakening the bank subsidiaries. Instead of the BHC acting as a source of strength for the bank, "banks are a source of strength for the BHC."[96]

Related requirements complement source of strength requirements. The Fed may require a BHC to terminate an activity or divest control of a subsidiary if it "constitutes a serious risk to the financial safety, soundness, or stability of a subsidiary bank of the bank holding company and is inconsistent with sound banking principles."[97] To prevent a BHC from draining its bank of resources, undercapitalized banks are not allowed to make capital distributions (i.e., send profits or retained earnings) to their parent HCs without approval.[98] When a set of banks are commonly controlled (e.g., they are owned by the same BHC) and one fails, the healthy banks (but not the HC or the nonbank subsidiaries[99]) are liable for losses to the FDIC in the resolution of the failed bank.[100] Capital requirements and TLAC requirements for larger BHCs, discussed below, help ensure that a BHC has the resources to act as a source of strength. Smaller BHCs receive one exemption from source of strength rules that is discussed in the next section.

[91] Federal Reserve, "Federal Reserve Board Announces Consent Order Against Silvergate Capital Corporation and Silvergate Bank to Facilitate the Voluntary Self-Liquidation That Silvergate Announced on March 8, 2023," press release, June 1, 2023, https://www.federalreserve.gov/newsevents/pressreleases/enforcement20230601a.htm.

[92] Federal Reserve, *Bank Holding Company Supervision Manual*, §2010.0.

[93] Keeton, "Bank Holding Companies, Cross-Bank Guarantees, and Source of Strength."

[94] Adam B. Ashcraft, "Are Bank Holding Companies a Source of Strength to Their Banking Subsidiaries?," *Journal of Money, Credit and Banking*, vol. 40, no. 2-3 (March/April 2008), pp. 273-294, https://onlinelibrary.wiley.com/doi/full/10.1111/j.1538-4616.2008.00113.x.

[95] Levitin, "Samson's Toupeé."

[96] Jonathan Pogach and Haluk Unal, "The Dark-Side of Banks' Nonbank Business: Internal Dividends in Bank Holding Companies," FDIC, Feburary 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112697.

[97] 12 C.F.R. §225.4.

[98] 12 U.S.C. §1831o(f)(2)(H). Similarly, the Fed may block share buybacks that are unsafe or unsound under Title 12, Section 225.4, of the *Code of Federal Regulations*.

[99] Levitin, "Samson's Toupeé."

[100] 12 U.S.C. §1815(e).

Small Bank Holding Company Policy Statement[101]

Under the Federal Reserve Small Bank Holding Company Policy Statement, the Fed permits a BHC with under $3 billion in total assets (provided it has few nonbank activities, off-balance-sheet exposures, and SEC-registered debt and equity securities outstanding) to take on more debt than would be allowed for a larger BHC for a limited period of time in order to form a new BHC or complete a merger.[102] The Fed believes a high debt load would generally impair a BHC's ability to act as a source of strength and could drain its resources, but it created this exemption out of a recognition that small BHCs may have few other options than debt to finance acquisitions.[103] The threshold in the statement has been raised several times since it was first issued in 1980, most recently by the Economic Growth, Regulatory Relief, and Consumer Protection Act (P.L. 115-174).

The Fed has also linked some unrelated requirements to the Small Bank Holding Company threshold. A BHC with under $3 billion in assets also has streamlined reporting requirements for purchase or redemption of its own securities or acquisition of another bank or eligible nonbank firm.[104] Under corporate governance regulations, banks with more than $3 billion face additional requirements related to audit committee membership.[105] In addition, as discussed in the next section, BHCs subject to this policy statement are exempted from having to meet the same capital requirements at the holding company level that depository subsidiaries face.[106]

Capital Requirements

Banks are subject to capital requirements to prevent unforeseen losses from causing insolvency and are subject to limitations if they become undercapitalized.[107] But a BHC can also become insolvent, even if its banking subsidiary is still solvent. To ensure that the BHC remains a source of strength to its bank subsidiaries, BHCs became subject to quantitative capital requirements in 1981, and Congress explicitly allowed the bank regulators to impose capital requirements in 1983.[108]

Following the 2008 financial crisis, Congress became concerned that differences between the capital requirements faced by banks and BHCs could undermine a BHC's ability to serve as a source of strength. Section 171 of the DFA (sometimes referred to as the "Collins

[101] This section uses material from CRS Report R46779, *Over the Line: Asset Thresholds in Bank Regulation*, by Marc Labonte and David W. Perkins.

[102] 12 C.F.R. Appendix C to Part 225.

[103] Federal Reserve, *Bank Holding Company Supervision Manual*, §2090.2.

[104] 12 U.S.C. §225.4(b)(2)(iii); 12 C.F.R. §225.14(a)(1)(v)(A); 12 C.F.R. §225.23(a)(1)(iii)(A). For acquisitions, the threshold is $7.5 billion for qualifying community banks subject to the community bank leverage ratio, and the reporting requirements differ.

[105] 12 C.F.R. §363.5(b).

[106] For banks with $15 billion or less in assets at the end of 2009, the preferential capital treatment of trust preferred securities issued before May 2010 is grandfathered. "Treatment of Certain Collateralized Debt Obligations Backed Primarily by Trust Preferred Securities with Regard to Prohibitions and Restrictions on Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds," 79 *Federal Register* 5224, January 21, 2014.

[107] See CRS Report R47447, *Bank Capital Requirements: A Primer and Policy Issues*, by Andrew P. Scott and Marc Labonte.

[108] 12 U.S.C. §3907. See Robert A. Eisenbeis, "How Should Bank Holding Companies Be Regulated?," Federal Reserve Bank of Atlanta, January 1983, https://fraser.stlouisfed.org/title/economic-review-federal-reserve-bank-atlanta-884/january-1983-35029; Greenlee, "Historical Review of 'Umbrella Supervision.'"

Amendment")[109] required BHCs to be subject to capital requirements on a consolidated basis that are no lower than those faced by their bank subsidiaries and no lower than those in place at the time of enactment in 2010. This effectively raised the quality and quantity of capital that BHCs were required to hold and restricted the Fed's ability to alter capital requirements on BHCs in the future.[110] Banks subject to the Small Bank Holding Company Policy Statement—currently, qualifying BHCs with less than $3 billion in assets (see the previous section)—were exempted from the Collins Amendment. On this basis, BHCs under that asset threshold do not have to comply with Basel III (an international agreement) capital requirements on a consolidated basis, although their subsidiaries do.[111]

Because BHC capital requirements are imposed on a consolidated basis, the BHC must ensure that the sum of all capital held across subsidiaries is sufficient, but no individual nonbank subsidiary has to meet these quantitative requirements in isolation. For a BHC where the vast majority of assets are within the bank subsidiaries, the capital held by the banks is likely to suffice. Under the BHC Act, the Fed may not impose capital requirements on the securities and insurance activities of regulated securities or insurance subsidiaries, respectively, of a BHC or require those subsidiaries to provide funds or assets to their affiliated banking subsidiaries without its primary regulator's permission.

Certain capital (and other) requirements apply only to large BHCs, as discussed in the next section.

Enhanced Prudential Regulation of Large BHCs

Following the 2008 financial crisis, the DFA created an enhanced prudential regulatory (EPR) regime for large BHCs.[112] The DFA, as originally enacted, automatically subjected all BHCs and foreign banks with more than $50 billion in assets to EPR.[113] Banks without HCs are not subject to EPR.[114]

Under this regime, the Fed is required to apply a number of safety and soundness requirements to large banks that are more stringent than those applied to smaller banks. These requirements are intended to mitigate systemic risk posed by large banks:

- Stress tests and capital planning ensure that banks hold enough capital to survive a crisis. BHCs conduct their own stress tests and undergo stress tests administered by the Fed. The latter determines their capital requirements through the stress capital buffer.

[109] 12 U.S.C. §5371(b)(5)(C).

[110] For example, trust preferred securities no longer received preferential capital treatment for BHCs compared to banks. See Comizio et al., "Revisiting the Bank Holding Company Structure."

[111] The provision included other exemptions and phase-ins, and trust preferred securities issued before May 2010 by BHCs with less than $15 billion in assets were permanently grandfathered. In 2014, P.L. 113-279 carved out insurance subsidiaries from this requirement. Implemented at 12 C.F.R. §217.

[112] The DFA also envisions the regulation of designated systemically important nonbank financial firms under this regime, but that part of the regime is effectively defunct, as no firms are currently designated by the Financial Stability Oversight Council (FSOC).

[113] Some rules must be met by both the BHC and its bank subsidiaries. For the latter, the rules are implemented by the bank's primary regulator.

[114] In some cases, a bank that sheds its HC structure is still subject to EPR unless FSOC waives the requirement. To date, one bank (Zions) has done so, and FSOC waived the requirement that it remain subject to EPR. See FSOC, "Financial Stability Oversight Council Announces Final Decision to Grant Petition from ZB, N.A.," press release, September 12, 2018, https://home.treasury.gov/news/press-releases/sm478.

- Resolution plans ("living wills") submitted by large BHCs provide plans to safely wind them down in case of failure.
- Liquidity requirements (the Liquidity Coverage Ratio, Net Stable Funding Ratio, and internal liquidity stress tests) ensure that banks are sufficiently liquid if they lose access to funding markets.
- Single counterparty credit limits restrict a BHC's exposure to counterparty default.
- Risk management requirements ensure that BHCs have chief risk officers and that publicly traded banks have risk committees on their boards.
- Financial stability requirements provide for regulatory interventions that can be taken only if a BHC poses a threat to financial stability.
- Capital requirements under Basel III require large BHCs to hold more capital to potentially absorb unforeseen losses. These requirements include the supplementary leverage ratio and the global systemically important banks (G-SIB) capital surcharge.

In 2018, P.L. 115-174 created a more "tiered" and "tailored" EPR regime for banks. It exempted BHCs with assets between $50 billion and $100 billion from EPR. The Fed was given discretion to apply most individual EPR provisions to banks with between $100 billion and $250 billion in assets on a case-by-case basis if it would promote financial stability or the institutions' safety and soundness and subsequently exempted them from several EPR requirements. In 2019, the Fed implemented changes included in P.L. 115-174 through rulemaking that placed large banks into four categories based on their size and complexity and imposed progressively more stringent requirements upon them.[115] The eight domestic banks that have been designated as G-SIBs and banks with more than $250 billion in assets or $75 billion in cross-jurisdictional activity remain subject to all DFA EPR requirements on a tailored basis. BHCs with between $100 billion and $250 billion in assets not meeting other thresholds of systemic importance face the least stringent EPR requirements. The cost of administering EPR and a couple of other provisions of the DFA are financed through assessments on large BHCs.

Debate over who should be subject to EPR was revived by the failure of three banks with over $100 billion in assets in 2023, which resulted in emergency government intervention to prevent financial instability and considerable losses for the FDIC. The one failed bank that was subject to EPR, Silicon Valley Bank, had not yet been phased into most EPR requirements when it failed because of its recent rapid growth. The other two failed banks, Signature Bank and First Republic, were not subject to EPR because they were not BHCs. After the failures, there was a

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[115] In this rulemaking, the Fed also applied EPR to large THCs that are not that are not predominantly engaged in insurance or nonfinancial activities. Federal Reserve, "Federal Reserve Board Finalizes Rules That Tailor Its Regulations for Domestic and Foreign Banks to More Closely Match Their Risk Profiles," press release, October 10, 2019, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191010a.htm; Federal Reserve, "Federal Reserve Board Issues Final Rule Modifying the Annual Assessment Fees for Its Supervision and Regulation of Large Financial Companies," press release, November 19, 2020, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20201119a.htm; Federal Reserve, FDIC, OCC, "Agencies Issue Final Rule to Strengthen Resilience of Large Banks," press release, October 20, 2020, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20201020b.htm; Federal Reserve, FDIC, "Agencies Finalize Changes to Resolution Plan Requirements; Keeps Requirements for Largest Firms and Reduces Requirements for Smaller Firms," press release, October 28, 2019, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191028b.htm. For a summary of the rule, see Federal Reserve, "Requirements for Domestic and Foreign Banking Organizations," https://www.federalreserve.gov/aboutthefed/boardmeetings/files/tailoring-rule-visual-20191010.pdf.

new emphasis on applying new proposals, such as the 2023 Basel Endgame proposal,[116] to all banks with more than $100 billion in assets (including those that are not BHCs). This is in contrast to changes after the enactment of P.L. 115-174, when regulators were focused on rolling back requirements for banks in the $50 billion to $250 billion asset range.

For more information, see CRS Report R47876, *Enhanced Prudential Regulation of Large Banks*, by Marc Labonte.

Total Loss Absorbing Capacity

One Basel III EPR requirement relates directly to the relationship between the BHC and its bank subsidiaries—the *total loss absorbing capacity* (TLAC) requirement for U.S. G-SIBs and U.S. operations of foreign G-SIBs.[117] Under TLAC, G-SIBs are required to hold a minimum amount of capital and long-term debt at the HC level.[118] In addition, G-SIBs are subject to a TLAC buffer. If TLAC fell below the buffer level, the G-SIB would face restrictions on capital distributions and discretionary bonuses.[119]

TLAC is intended to make a BHC's equity and debt holders absorb losses in the event of its insolvency by writing off existing equity and converting debt to equity, a process popularly referred to as a bank "bail in," in contrast to a government "bailout." In a successful bail in, the FDIC can potentially resolve a failing bank at lower cost to the taxpayer.[120]

In August 2023, the banking regulators issued a joint proposed rule to subject both BHCs and banks[121] with $100 billion or more in assets to long-term debt requirements and clean HC requirements comparable to those that G-SIBs face under TLAC.[122] For example, eligible long-

[116] The proposal was published in the *Federal Register* on September 18, 2023. OCC, Federal Reserve, and FDIC, "Regulatory Capital Rule: Amendments Applicable to Large Banking Organizations and to Banking Organizations with Significant Trading Activity," 88 *Federal Register* 64028, September 18, 2023, https://www.govinfo.gov/content/pkg/FR-2023-09-18/pdf/2023-19200.pdf. For more information, see CRS Report R47855, *Bank Capital Requirements: Basel III Endgame*, by Marc Labonte and Andrew P. Scott.

[117] 12 C.F.R. Chapter II, Subchapter A, Part 252. Federal Reserve, "Total Loss-Absorbing Capacity, Long-Term Debt, and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies," 82 *Federal Register* 8266, January 24, 2017, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20161215a.htm.

[118] The 2017 rule requires U.S. G-SIBs to hold TLAC equal to at least 18% of risk-weighted assets and 7.5% of unweighted assets (including off-balance-sheet exposures) at the HC level. TLAC is composed of Tier 1 capital and a minimum amount of long-term debt (equal to the greater of 4.5% of unweighted assets including off-balance-sheet exposures or 6% plus the G-SIB surcharge of risk-weighted assets) issued by the HC. These concepts are described in CRS Report R47447, *Bank Capital Requirements: A Primer and Policy Issues*, by Andrew P. Scott and Marc Labonte.

[119] Capital required by TLAC is not in addition to capital required under standard capital requirements, and standard capital requirements are the same or higher than TLAC. However, TLAC capital must be issued by the HC, whereas banks must meet standard capital requirements at both the depository subsidiary level and the HC level. Some banks might have to hold more capital to meet both of these requirements simultaneously.

[120] In 2020, to reduce systemic risk from interconnectedness, a final rule discouraged Category I and II banks from investing in the TLAC of U.S. or foreign G-SIBs. Federal Reserve Board, FDIC, and OCC, "Agencies Finalize Rule to Reduce the Impact of Large Bank Failures," joint press release, October 20, 2020, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20201020a.htm.

[121] For bank subsidiaries that are part of BHCs, the long-term debt would be issued internally to the parent HC.

[122] OCC, Federal Reserve, and FDIC, "Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions," 88 *Federal Register* 64524, September 19, 2023, https://www.govinfo.gov/content/pkg/FR-2023-09-19/pdf/2023-19265.pdf. The proposal also makes technical changes to the TLAC rule. For a comparison, see Davis Polk, "Comparison of the Long-Term Debt Proposal to the Existing TLAC Rule," September 5, 2023, https://www.davispolk.com/sites/default/files/2023-09/comparison-of-LTD-proposal-and-TLAC-rule.pdf.

term debt would be unsecured, not guaranteed or enhanced, and have "plain vanilla" features. To date, the rule has not been finalized.

Affiliate Restrictions

There are statutory restrictions on transactions among banks and their affiliates, which include their parent companies and most other subsidiaries controlled by the parent companies.[123] The rules implementing affiliate restrictions are extensive, reflecting the numerous ways that affiliates could potentially pose risk to banks.

Restricted transactions include loans and credit, guarantees, investment in affiliates' securities, and derivatives transactions. The size of transactions with affiliates is limited to a percentage of the bank's capital.[124] In addition, banks cannot purchase "low quality assets" and some other types of asset purchases from affiliates. Transactions must be done on safe and sound terms and are subject to collateral requirements. Transactions with affiliates or that benefit affiliates—those listed above as well as asset sales, payments for services, and agent or broker fees—must be done on "arm's length" market terms that are not more favorable to the affiliate than would be received by an unaffiliated counterparty. Advertisements that suggest a bank is responsible for its affiliates' obligations are prohibited. Various types of relationships and transactions are exempted from the restrictions, and the bank regulators can grant exemptions that are in the public interest.

Congress enacted these restrictions in the 1930s because banks were circumventing permissible activities restrictions by setting up nonbank affiliates that they controlled and could then make loans to on preferential terms.[125] Without these restrictions, risks that are intended to be kept outside of the bank subsidiary (but permissible for nonbank subsidiaries) could effectively be shifted into it, as the bank is exposed to affiliate losses. In addition, banks could effectively subsidize affiliates by transacting on terms that are favorable to the affiliates (e.g., providing an affiliate with a below-market-rate loan). This could be problematic, as banks benefit from the federal backstop, and so subsidies to affiliates could be viewed as being underwritten by the taxpayer. According to the Fed, "A key premise of GLBA was that [affiliate restrictions] would limit the risk to depository institutions from these broader affiliations and eliminate the need for extensive prior review by the bank regulatory agencies."[126] In other words, the activities of BHCs could be expanded without putting the bank subsidiaries' solvency at risk because of affiliate restrictions. One study argues that, after GLBA's enactment:

> [S]ection 23A effectively became the principal statutory firewall protecting the depository system from subsidizing potentially risky activities of nondepository financial institutions

[123] Section 23A and B of the Federal Reserve Act (12 U.S.C. §371c; 12 U.S.C. §371c-1). The sections are implemented by the Fed for national and state member banks and by the FDIC for state non-member banks "in the same manner and to the same extent." The Fed implements Section 23A and B in Regulation W (12 C.F.R. §223). Non-member bank restrictions are found at 12 U.S.C. §1828(j). See also Federal Reserve, "Adoption of Regulation W Implementing Sections 23A and 23B of the Federal Reserve Act," January 9, 2003, https://www.federalreserve.gov/boarddocs/srletters/2003/sr0302.htm.

[124] Under the Fed's rule, derivatives transactions and intraday credit do not face this requirement, but they do face the "arm's length" requirement discussed below. See 12 C.F.R. §223.33 and Federal Reserve, "Adoption of Regulation W Implementing Sections 23A and 23B."

[125] Bernard Shull, "Banking, Commerce and Competition Under the Gramm-Leach-Bliley Act," *Antitrust Bulletin*, Spring 2002; Saule T. Omarova, "From Gramm-Leach-Bliley to Dodd-Frank: The Unfulfilled Promise of Section 23A of the Federal Reserve Act," *North Carolina Law Review*, vol. 89, no. 5 (June 2011).

[126] Federal Reserve, "Adoption of Regulation W Implementing Sections 23A and 23B."

> and, in a broader sense, safeguarding the foundational U.S. principle of separation of banking and commerce.[127]

Another study argues that one of the major benefits that BHCs enjoy is that they can still provide a meaningful amount of liquidity across subsidiaries under affiliate restrictions, and they may be partly waived in crises, when liquidity is needed most.[128] The notion that the Fed might waive these restrictions in a crisis is not hypothetical. According to another study:

> [D]uring the [2008 financial] crisis, the [Fed] effectively rendered section 23A irrelevant by repeatedly allowing depository institutions to provide financing to their affiliated securities firms, derivatives dealers, money market funds, and even automotive companies, in order to prevent potentially disastrous effects of their failure on the financial system and the broader economy.[129]

Anti-Tying Restrictions

Statute prohibits a bank from offering services (e.g., extending credit) to customers that are contingent on the customer accepting (or coerced into accepting) other nontraditional banking services offered by the bank, its parent HC, or a subsidiary of the bank or HC (formally called "tying" arrangements).[130] The statute lays out what constitutes tying and allows the Fed to make exceptions to the prohibition.[131] Because of the increased relevance of tying following GLBA, the Fed proposed guidance in 2003 to formalize its decades of legal interpretations, but it was never finalized.[132]

Congress was concerned that banks would use their market power anti-competitively through tying to gain market share in other financial markets.[133] (For that reason, restrictions apply to tying by bank subsidiaries but not tying by nonbank subsidiaries.) But if banking markets are competitive and transparent, anti-tying regulation could be needlessly burdensome, as customers would be able to seek out the best deals.

Supervision of BHCs

To ensure compliance with the BHC Act and other applicable laws, the Fed has authority to require BHCs to report information on their financial status,[134] examine them for safety and

[127] Omarova, "From Gramm-Leach-Bliley to Dodd-Frank."

[128] Cetorelli and Prazad, *The Nonbank Footprint of Banks*.

[129] Omarova, "From Gramm-Leach-Bliley to Dodd-Frank."

[130] 12 U.S.C. §1972. There are also weaker tying prohibitions under antitrust law that apply to all companies only if they have market power. See Federal Reserve System, "Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970," Proposed Guidance, 68 *Federal Register* 168, August 29, 2003, p. 52,024, https://www.federalregister.gov/documents/2003/08/29/03-22091/anti-tying-restrictions-of-section-106-of-the-bank-holding-company-act-amendments-of-1970.

[131] Exceptions are found in Title 12, Section 225.7, of the *Code of Federal Regulations*.

[132] Federal Reserve System, "Anti-Tying Restrictions"; Douglas Landy and Chanté Eliaszadeh, "Tying Deposit Insurance Reform to Reform of the Tying of Deposits," White and Case, October 3, 2023, https://www.whitecase.com/insight-alert/tying-deposit-insurance-reform-reform-tying-deposits.

[133] Federal Reserve System, "Anti-Tying Restrictions"; Richard K. Kim, "The Federal Reserve's Proposed Interpretation Regarding the Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970," *North Carolina Banking Institute*, vol. 8 (2004), pp. 1-20; David R. Kinman, "Tying: Enhancing Competition Through the Bank Holding Company," *North Carolina Banking Institute*, vol. 8 (2004), pp. 215-246.

[134] Under the BHC Act, the Fed can require BHCs to report on their financial condition and compliance with the BHC (continued...)

soundness,[135] and enforce the law when BHCs are found to be deficient—by issuing cease-and-desist orders and money penalties, for example.[136] As discussed above, a BHC must seek approval from the Fed in order to begin operations, acquire a bank or nonbank business, engage in a nonbank activity, or a take a variety of other actions.

The Fed is often described as the "umbrella" supervisor of BHCs, meaning it supervises on a consolidated and comprehensive basis and coordinates supervision across the entire HC.[137] The Fed is the primary supervisor of the parent HC and nonbank subsidiaries without a primary regulator. The Fed defers to the primary regulator of the bank subsidiaries of a BHC, which has the same primary regulator (the OCC, FDIC, or Fed, depending on its legal status) as it would if it were a standalone entity.[138] By statute, the Fed also defers to the primary (also called functional) regulator of nonbank subsidiaries, such as the SEC, Commodity Futures Trading Commission, and state insurance regulators, where one exists.[139] The Fed has authority to examine a BHC and its subsidiaries for safety and soundness and financial stability but has little authority over subsidiaries with primary regulators and is required to coordinate with them and use their existing examination reports when possible.[140]

A nonbank subsidiary is supervised by the Fed only if does not have a primary regulator—but that does not mean it is subject to the bank regulatory regime.[141] According to the Fed:

> The Federal Reserve's supervision of nonbank subsidiaries under the BHC Act is primarily directed toward, and focused on, ensuring that the nonbank subsidiary does not present

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Act but should defer to other regulatory reports and audited financial statements if possible. BHCs file regulatory reports in the FR-Y series. A BHC report details the condition and activities of the consolidated entity, the parent HC, and the nonbank subsidiaries. These reports vary in length and complexity based on the complexity of the BHC. Some reports are made public. Report forms and instructions can be found at https://www.federalreserve.gov/apps/reportingforms.

[135] One focus of supervision is whether BHCs have adequate internal policies, processes, and procedures to effectively manage risks. The Fed relies on continuous monitoring activities, discovery reviews, and testing to supervise BHCs. Federal Reserve, *Bank Holding Company Supervision Manual*.

[136] The Fed monitors legal compliance of the parent HC and subsidiaries without primary regulators for law under its jurisdiction. The Fed can terminate a nonbank activity or control of a nonbank subsidiary that poses a safety and soundness risk to bank subsidiaries. According to the Fed, "the Federal Reserve may take enforcement action against a functionally regulated subsidiary of an FHC, but only when such action is necessary to prevent or redress an unsafe or unsound practice or breach of fiduciary duty that poses a material risk either to the financial safety, soundness or stability of an affiliated depository institution, or to the domestic or international payments system." Federal Reserve, "Framework for Financial Holding Company Supervision," August 15, 2000, https://www.federalreserve.gov/boarddocs/srletters/2000/SR0013.HTM.

[137] Greenlee, "Historical Review of 'Umbrella Supervision.'"

[138] When the banking subsidiaries of a BHC are state member banks regulated by the Fed, supervision is "fully integrated." When the subsidiary is not a state member bank, supervision is focused on the HC and nonbank subsidiaries, and the Fed relies on reports of examination from the primary regulator to conduct consolidated supervision. See Federal Reserve, "Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organizations," revised October 1, 2020, https://www.federalreserve.gov/boarddocs/srletters/2008/sr0809.htm.

[139] Greenlee, "Historical Review of 'Umbrella Supervision.'"

[140] The Fed defers to the primary regulators of both banks and nonbank subsidiaries but may examine them for compliance with the BHC Act and has "back-up" examination authority if it needs to determine whether a nonbank subsidiary poses a risk to the bank subsidiary (12 U.S.C. §1844). Federal Reserve, *Bank Holding Company Supervision Manual*, §1050.1.1.2. The FDIC may also examine BHCs and bank affiliates for insurance purposes (12 U.S.C. §1820(b)(3)).

[141] An activity that is permissible for banking subsidiaries and performed in a nonbank subsidiary should be examined in the same way and subject to the same standards as if it were performed in the banking subsidiary (12 U.S.C. §1831c).

> material financial, legal, or reputational risks to affiliated depository institutions or to the BHC's … ability to support these depository institutions.[142]

A determination of whether onsite examination of a nonbank subsidiary without a primary regulator is required is based on various risk metrics and is mandatory for certain types of activities.[143]

According to the Fed, the rationale for BHC supervision is that

> [f]inancial trouble in one part of an organization can spread rapidly to other parts of the organization; moreover, large BHCs increasingly operate and manage their businesses on an integrated basis across corporate boundaries. Risks that cross legal entities or that are managed on a consolidated basis cannot be monitored properly through supervision directed at any one of the legal entity subsidiaries within the overall organization.[144]

In practice, the umbrella regulator role emerged after BHC failures in the 1970s.[145] The Fed was granted formal authority to be the umbrella regulator in 1983, with GLBA and the DFA expanding that authority and delineating the current arrangement between regulators and subsidiaries.[146]

Tailored Supervision

Both supervision and reporting requirements are tiered and tailored, with extra scrutiny applied to large, complex institutions. According to the Fed:

> The Federal Reserve's supervisory objectives are the same for all BHCs…. However, the type and amount of information and scope and extent of Federal Reserve supervisory and examination work that is necessary to understand, supervise, and develop an assessment of an individual BHC … varies. Federal Reserve supervisory activities are tailored for each organization based on a variety of factors, including the organization's legal entity and regulatory structure; the risks posed by the organization's specific activities and systems; and the potential effect of weaknesses in control functions on the organization, its subsidiary depository institutions, or key financial markets.[147]

To that end, the Fed categorizes institutions under its jurisdiction into one of five supervisory portfolios: four based on size and complexity and a fifth for THCs with commercial and insurance activities.[148] Notably, state member banks under the Fed's jurisdiction and BHCs are grouped together to ensure consistent supervisory priorities, although they are subject to different rating systems.

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142 Federal Reserve, *Bank Holding Company Supervision Manual*.

143 Federal Reserve, "Supplemental Guidance for the Inspection of Nonbank Subsidiaries of Bank Holding Companies," April 13, 1993, https://www.federalreserve.gov/boarddocs/srletters/1993/SR9319.HTM.

144 Federal Reserve, "Consolidated Supervision of Bank Holding Companies."

145 Eisenbeis, "How Should Bank Holding Companies Be Regulated?"

146 Greenlee, "Historical Review of 'Umbrella Supervision.'"

147 Federal Reserve, "Consolidated Supervision of Bank Holding Companies."

148 The five portfolios are (1) the Large Institution Supervision Coordinating Committee for the eight G-SIBs, (2) the Large and Foreign Banking Organizations portfolio for other U.S. banks with over $100 billion in assets and all foreign banking organizations, (3) the Regional Banking Organizations (RBO) portfolio for banks with between $10 billion and $100 billion in assets, (4) the Community Banking Organizations (CBO) portfolio for banks with less than $10 billion in assets, and (5) the Insurance and Commercial Savings and Loan Holding Companies portfolio. The latter is a special supervisory framework for BHCs or THCs that have insurance or commercial activities over a certain threshold. Currently, there are only THCs that meet this criterion. See Federal Reserve, "Framework for the Supervision of Insurance Organizations," https://www.federalreserve.gov/supervisionreg/srletters/SR2208a1.pdf.

The Fed created the current supervisory portfolios in 2012 to better supervise compliance with post-crisis reforms, creating a consolidated supervisory framework for financial institutions with over (currently) $100 billion in assets—called large banking organizations (LBOs)—that would be supervised for safety and soundness and systemic risk, as those banks are subject to EPR (discussed above).[149] According to Fed Vice Chair for Supervision Michael Barr, LBOs

> are supervised by larger teams that engage with the bank on an ongoing basis. As compared to [smaller banks], [LBOs] are subject to a greater number of targeted exams, as well as horizontal (cross-bank) exams…. In addition, banks in the [Large and Foreign Banking Organization] portfolio are subject to a supervision framework with higher supervisory standards, including heightened standards for capital, liquidity, and governance.[150]

BHCs are assigned numerical ratings at the completion of exams. Large BHCs are rated for capital planning, liquidity, and internal controls.[151] Small BHCs are rated for risk management, financial condition, and their impact on their bank subsidiaries.[152] Poor ratings result in informal or formal enforcement actions that require problems to be remedied. The frequency and location of exams for smaller BHCs is tailored to "reduce staffing and burden on firms deemed low risk and to enhance supervision of high-risk firms."[153] According to the Fed, "Supervision of a noncomplex BHC over a small bank is normally not burdensome."[154]

Policy Options

BHC regulation has evolved to serve other policy goals, allowing the business model of BHCs to evolve. The primary original reason to form a BHC—to circumvent size and geographical limits on banks—no longer exists. The BHC Act was motivated by concerns that the rapid growth of

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[149] Federal Reserve, "Consolidated Supervision Framework for Large Financial Institutions," December 17, 2012, https://www.federalreserve.gov/supervisionreg/srletters/sr1217.htm.

[150] Barr's prepared testimony can be found at https://www.banking.senate.gov/imo/media/doc/Barr%20Testimony%203-28-231.pdf.

[151] In 2019, the Fed created a new large financial institution (LFI) rating system for BHCs, THCs (that are not in portfolio #5), and IHCs with over $100 billion in assets. The LFI system has three components—capital planning and positions, liquidity risk management and positions, and governance and controls. Federal Reserve, "Large Financial Institution (LFI) Rating System," February 26, 2019, https://www.federalreserve.gov/supervisionreg/srletters/sr1903.htm.

[152] BHCs in the RBO and CBO portfolios are subject to the RFI/C(D) rating system. For banks with $10 billion to $100 billion in assets, examiners rate them at least annually in the categories of Risk Management, Financial Condition, and Impact of the HC and nonbank subsidiaries on the bank subsidiaries. The BHC is assigned a composite rating (C) for each component of RFI, and the D rating "generally mirrors the primary regulator's assessment of the subsidiary depository institution(s)." For a noncomplex BHC with less than $10 billion in assets, examiners assign it only a composite and risk management rating based on its depository's rating. Federal Reserve, "Supervisory Rating System for Holding Companies with Total Consolidated Assets Less Than $100 Billion," February 26, 2019, https://www.federalreserve.gov/supervisionreg/srletters/sr1904.htm.

[153] Federal Reserve, "Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organizations." BHCs with between $3 billion and $10 billion in assets are subject to onsite examinations at least annually if they are complex and offsite exams every other year if they are not. Exams are more frequent if the BHC's rating is not satisfactory. For a bank with less than $3 billion in assets, exams are offsite and coupled with the bank subsidiary's exam if complex, whereas a noncomplex bank is not examined if the bank subsidiary's rating is satisfactory. Federal Reserve, "Inspection Frequency and Scope Expectations for Bank Holding Companies and Savings and Loan Holding Companies That Are Community Banking Organizations," December 16, 2022, https://www.federalreserve.gov/supervisionreg/srletters/sr1321.htm.

[154] Partnership for Progress, "Bank Holding Companies and Financial Holding Companies," https://www.fedpartnership.gov/bank-life-cycle/grow-shareholder-value/bank-holding-companies.

Transamerica in the west was a threat to size and geographic limits.[155] Subsequent changes to BHC policy have enabled BHCs to operate nationwide with trillions of dollars in assets. The near total separation of banking from securities (under the Glass-Steagall Act) and insurance in the 1930s was gradually whittled down by regulators until the GLBA formalized a regulatory model where banks, securities firms, and insurance firms could affiliate within the same FHC.

Banks pose unique policy challenges: They are vulnerable to deposit runs that could destabilize the financial system to the detriment of the real economy. To reduce the likelihood of runs, deposit insurance and the Fed's discount window form a federal backstop that exposes taxpayers to potential losses when banks fail. As a result, banks are one of the few industries regulated for financial safety and soundness.

In the absence of regulation, BHCs could potentially undermine their bank subsidiaries' safety and soundness. To that end, BHCs are subject to source of strength requirements, bank subsidiaries face restrictions on transactions with their HCs and other subsidiaries, and both banks and BHCs are subject to permissible activity restrictions. Following the 2008 financial crisis, the largest BHCs have also been subject to EPR.

In seeking to optimize BHC regulation, Congress can adjust requirements, as it has done continually since the BHC Act was enacted in 1956. Since then, Congress has grappled with reoccurring questions: Who should be subject to BHC regulation? What activities should they be allowed to engage in? How should BHCs be regulated? In the current environment, broad options to consider include the following:

Who Should Be Subject to BHC Regulation?

- Congress could consider making more or fewer types of companies and investors subject to BHC regulation. These proposals can be divided into two broad categories:
  - First, Congress could change when BHC rules apply through changes in control rules and management interlock restrictions. For example, some of the largest asset managers (mainly through passive fund holdings, such as index mutual funds and exchange-traded funds) now frequently own more than 10% of BHCs but have typically received exemptions from change in control rules by entering into passivity commitments.[156]
  - Second, Congress could change what entities are exempt or grandfathered from the BHC Act.[157] For example, THCs play a similar role in financial markets to BHCs but are subject to a parallel, but statutorily separate, Fed

[155] Omarova and Margaret, "That Which We Call a Bank." The authors argue that the original BHC Act and major subsequent amendments were all targeted at including or excluding one specific company from the act.

[156] The FDIC has issued a proposed rule to reconsider these exemptions for FDIC-regulated banks, including those that are part of BHCs, and has sent letters to the asset managers Blackrock and Vanguard seeking proof that they were operating as passive investors through their funds' holdings of banks. Currently, the FDIC defers to the Fed's control decision involving BHCs, so this could potentially give the FDIC a novel role in BHC control decisions and could potentially lead to decisions that are at odds with the Fed. See FDIC, "Regulations Implementing the Change in Bank Control Act," Proposed Rule, 89 *Federal Register* 67002-67009, August 19, 2024, https://www.govinfo.gov/content/pkg/FR-2024-08-19/pdf/2024-18187.pdf; Katanga Johnson and Silla Brush, "FDIC Takes Harder Look at BlackRock, Vanguard Stakes in Banks," *BGov*, August 8, 2024.

[157] Congress has also occasionally placed a temporary moratorium on the new formation of exempt entities, most recently in Section 603 of the DFA, which placed a three-year moratorium on the approval of new ILCs, credit card banks, and trust banks.

regulatory regime.[158] In addition, deposit-taking firms such as ILCs and limited purpose credit card banks are not subject to the BHC Act and do not have the Fed as an umbrella regulator.[159]

- Relatedly, Congress could consider whether any BHC regulations should apply to other types of financial firms. For example, Fed umbrella regulation and EPR does not apply to banks without BHCs or nonbank financial firms unless they are designated by FSOC as systemically important financial institutions—currently none is designated. Two large banks without BHCs, First Republic and Signature Bank, failed in 2023.

What Activities Should be Permissible?

- Congress could consider expanding or contracting permissible activities for banks, BHCs, FHCs, or some combination of the three. For example, Congress could consider to what extent these organizations should be involved in crypto markets. As another example, some Members of Congress have long sponsored bills to "restore Glass-Steagall," which would limit banks' and BHCs' securities activities.
- Congress could also consider unifying (and codifying) the three related but unique sets of permissible activities that the three bank regulators have independently laid out for the banks and BHCs under their jurisdictions.[160] Alternatively, Congress could consider whether certain activities are more appropriate within a BHC but outside of a banking subsidiary.
- Congress could consider whether to make it more or less attractive to form FHCs that couple banks with insurance firms, securities firms, or both. For example, there remains only one THC (United Services Automobile Association) and no BHCs with over $10 billion in assets that are significantly engaged in insurance activities.[161] Congress could consider whether the expanded set of activities that are financial in nature should be permissible only for nonbank subsidiaries of FHCs or also for financial subsidiaries of banks regardless of FHC status, as is the case currently for most activities.
- Congress could consider strengthening or weakening the separation of commerce and banking. For FHCs, it could do so by restricting or expanding approved activities that are complementary in nature to financial activities,[162] grandfathered

[158] Greenlee, "Is It Time to Unify the Regulation of Depository Institution Holding Companies?"

[159] Congress could also consider making banks without insured deposits subject to the BHC Act. For example, one law review article argues it would be in policymakers' interest to extend the definition of *bank* under BHCs to capture financial technology ("fintech") marketplace lenders—at least those that are granted OCC fintech charters. Bomberger, "The OCC FinTech Charter and the Bank Holding Company Act."

[160] For banks under their jurisdictions, the Fed and FDIC base their permissible activities list on the OCC's but may add additional activities. For BHCs, the Fed has created a separate list. Comizio et al., "Revisiting the Bank Holding Company Structure."

[161] Dela Cruz and Figuracion, "TIAA Bank Sale Agreement." In the years following enactment of the DFA, most insurers with BHCs or THCs divested their depository subsidiaries in order to drop their HC structure and the Fed regulation and supervision that accompanied it. Some insurers own nondepository trusts, industrial banks, and other limited purpose banks that are exempt from the BHC Act.

[162] Financial subsidiaries are also allowed to engage in approved complementary activities.

nonfinancial activities (such as physical commodities),[163] and permissible activities involving commercial investments (such as merchant banking investments). Congress could also consider repealing or expanding the ILC exemption from the BHC Act.[164]

How Should BHCs Be Regulated?

- Congress could consider strengthening or loosening safeguards between a bank subsidiary and the rest of the BHC, such as restrictions on affiliate transactions and source of strength rules.[165] In doing so, Congress could consider whether current requirements adequately firewall the federal safety net from the nonbank subsidiaries or whether regulators are likely to extend the safety net explicitly or implicitly by allowing bank subsidiaries to provide assistance to nonbank subsidiaries in a financial crisis.
- Congress could consider whether to regulate BHCs more or less like their bank subsidiaries. For example, Congress could consider whether capital requirements on BHCs should be more tailored or whether exemptions from those requirements should be expanded or scaled back. Now that the same bank capital requirements apply to BHCs on a consolidated basis, some securities market activities have implications for the FHC's capital requirements that a securities firm that is not part of a FHC would not face.
- Congress could also consider whether to strengthen or weaken the Fed's limited supervisory powers over the parent company and its nonbank subsidiaries for those with and without primary functional regulators.
- In light of the 2023 large bank failures, Congress could consider whether EPR is successfully mitigating "too big to fail" (or too complex to fail or too interconnected to fail), whether the large banks subject to EPR are those that are too big to fail, and whether EPR is appropriately tailored to address systemic risk.[166]
- Congress could also consider whether merger policy under the BHC Act is appropriately safeguarding competition and restricting concentration given that the Fed has rarely denied merger applications since 2009 (although some applications have been withdrawn, and mergers can be approved on condition of branch divestiture and other concessions to maintain competition).[167]

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[163] One study argues that physical commodity activities increase the systemic risk posed by the most systemically important banks. Omarova, "The Merchants of Wall Street." Concerns have also been raised that physical commodity activities are too complex to regulate. For example, an environmental disaster linked to these activities potentially poses reputational risk and financial liability. See Federal Reserve, "Federal Reserve Board Invites Public Comment."

[164] In a 2016 report to Congress, the Fed recommended that Congress repeal merchant banking authority for FHCs, repeal the authority for grandfathered FHCs to engage in commodities activities, and repeal ILC exemptions from regulation under the BHC Act and other regulations. Federal Reserve, FDIC, OCC, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*.

[165] For example, source of strength requirements would be more effective if the BHC were liable for any capital shortfall in its bank subsidiary. Levitin, "Samson's Toupeé."

[166] For more information, see CRS In Focus IF12755, *"Too Big to Fail" Financial Institutions: Policy Issues*, by Marc Labonte.

[167] See Federal Reserve, "Semiannual Reports on Banking Applications Activity," https://www.federalreserve.gov/publications/semiannual-report-on-banking-applications-activity.htm.

  - Congress could also consider whether organic growth should be limited when it negatively affects competition or concentration. Any such benefits may be weighed against the fact that limiting organic growth would disincentivize success.[168]
- In light of the Fed's failure after several years to propose a statutorily required rule on source of strength or finalize proposed rules on physical commodities and tying, Congress could consider whether legislation is needed to clarify these issues. More recent proposals on capital (Basel Endgame) and long-term debt requirements affecting BHCs have also received congressional scrutiny.

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Disclaimer

[168] These considerations can be waived when the acquisition involves a failing bank.