

THE BANKING LAW JOURNAL

VOLUME 129

NUMBER 2

FEBRUARY 2012

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POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

SAVINGS AND LOAN HOLDING COMPANIES AFTER THE DODD-FRANK ACT: AN ENDANGERED SPECIES? – PART I

PAUL L. LEE

This is the first part of a two-part article analyzing the principal provisions of the Dodd-Frank Act that affect savings and loan holding companies. Part I discusses the provisions of the Dodd-Frank Act that may have unintended consequences for savings and loan holding companies, particularly grandfathered unitary savings and loan holding companies. It also suggests certain actions that might be taken by the federal regulators to mitigate these unintended consequences. Part II, which will appear in a subsequent issue, discusses the initial actions that the Federal Reserve Board has taken in its new role as regulator and supervisor of savings and loan holding companies.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) touches virtually all aspects of the U.S. financial system with consequences both intended and unintended. Commentators have emphasized in particular the many instances of unintended consequences flowing from the Dodd-Frank Act.¹ Even in those instances where first-order consequences may have been intended by the legislative drafters, it is likely that second- and third-order consequences were not fully understood by the drafters. In at least a few instances, however, the drafters appear to have recognized that their grasp of the second- and third-

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order consequences was incomplete and have provided for the possibility of adjustments to certain of the newly prescribed regulatory regimes.

The Dodd-Frank Act provisions that affect savings and loan holding companies fall into the category of provisions whose second- and third-order consequences were only partially understood by the drafters. This article analyzes the principal provisions of the Dodd-Frank Act that affect savings and loan holding companies and identifies terms in these provisions that may provide the federal regulators with the flexibility to mitigate some of the unintended second- and third-order consequences of these provisions. The focus of this article is principally on provisions relating to a special subspecies of savings and loan holding companies, grandfathered unitary savings and loan holding companies.² The survival of the grandfathered unitary savings and loan company subspecies, and perhaps even the savings and loan holding company species, may be in jeopardy if the federal regulators do not use the flexibility provided to them to mitigate the potential unintended consequences of certain Dodd-Frank Act provisions.

A TAXONOMY OF DEPOSITORY INSTITUTION HOLDING COMPANIES

Savings and loan holding companies hold an unusual place in the U.S. financial regulatory regime. They are entities that have evolved in a special environment at least through the time of the passage of the Dodd-Frank Act.³ The laws of regulation like the laws of nature, however, provide no assurance of the survival of a species. Sudden and significant environmental change typically signals the decline of a species and the Dodd-Frank Act is nothing if not a far-reaching environmental change for many categories of financial institutions. Savings and loan holding companies are one of the species, and grandfathered unitary savings and loan holding companies one of the subspecies, of financial institutions that will experience significant environmental change based on the cumulative effects of various Dodd-Frank Act provisions. As the implications of the Dodd-Frank Act for savings and loan holding companies have become clearer, a number of companies have announced plans to sell, dispose, or otherwise restructure their savings association subsidiary in order to terminate their savings and loan holding company status.⁴

Pursuing the analogy in the title of this article, it may be said that at the time of the enactment of the Dodd-Frank Act, the depository institution holding company genus was comprised of three species: (i) bank holding companies regulated under the Bank Holding Company Act of 1956 (the “BHCA”);⁵ (ii) savings and loan holding companies regulated under the Home Owners’ Loan Act (“HOLA”);⁶ and (iii) holding companies that own or control certain other types of depository institution, such as “trust and fiduciary only” banks, credit card banks and industrial loan companies, that are exempt from the definition of the term “bank” in the BHCA.⁷ The Dodd-Frank Act itself added a fourth species to the genus: a company controlling a “trust and fiduciary only” savings association. By virtue of an amendment made by the Dodd-Frank Act, a company that controls such a “trust and fiduciary only” savings association is now excluded from the definition of “savings and loan holding company” under HOLA.⁸

Bank holding companies have as a matter of statutory requirement and regulatory preference been the most comprehensively regulated species of depository holding company. Savings and loan holding companies, particularly grandfathered unitary savings and loan holding companies, have been subject to less comprehensive regulation or supervision at the holding company level although the savings association subsidiary of a savings and loan holding company has generally been subject to comprehensive regulation comparable to that applicable to a bank. Holding companies of an exempt depository institution have historically not been subject to any regulation or supervision at the holding company level. Certain savings and loan holding companies and other holding companies with exempt depository institutions have been characterized by commentators as being part of the shadow banking system, a term loosely (and in some minds pejoratively) applied to financial companies that are not subject to comprehensive regulation and supervision under laws such as the BHCA.⁹ Concerns about the unregulated or lightly regulated shadow banking system came to the fore during the debate over financial regulatory reform. These concerns ultimately extended not only to financial firms that owned a savings association or other type of depository institution subsidiary that was exempt from the definition of “bank” in the BHCA, but also to financial firms that did not own a depository institution subsidiary of any type.

REGULATION OF SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS

The Dodd-Frank Act attempts to address the concerns with the unregulated or lightly regulated shadow banking system in several of its provisions. Title I of the Dodd-Frank Act creates a new systemic risk regulatory regime covering both the banking sector and the so-called shadow banking sector. As part of the new systemic risk regulatory regime, the Dodd-Frank Act permits large nonbank financial companies to be designated as systemically important financial companies and on the basis of that designation made subject to comprehensive supervision by the Board of Governors of the Federal Reserve System (the “Board”).¹⁰ This new regime for systemically important financial companies was recommended by the Treasury in its 2009 white paper, *Financial Regulatory Reform, a New Foundation: Rebuilding Financial Supervision and Regulation* (the “Treasury White Paper”).¹¹ The Treasury White Paper posited that the failures of Bear Stearns, Lehman Brothers, and American International Group were attributable at least in part to these institutions being “ineffectively supervised and regulated” and as a result having insufficient capital and liquidity buffers. The Treasury White Paper further noted that these particular firms owned insured depository institution subsidiaries, but were able to avoid the more rigorous regulatory regime applicable to bank holding companies because of the exempt status of their depository institution subsidiaries.¹²

The Treasury White Paper included a recommendation to address the regulation of systemically important financial companies. It proposed that a systemically important nonbank financial firm should be subject to consolidated supervision and regulation by the Board regardless of whether the firm owned an insured depository institution subsidiary.¹³ The provisions of Title I of the Dodd-Frank Act implement this basic recommendation from the Treasury White Paper. Section 113 authorizes the Financial Stability Oversight Council (the “Council”) based on a broad set of criteria to designate a nonbank financial company as a systemically important financial company that should be subject to comprehensive supervision by the Board. The term “nonbank financial company” is defined in Title I to mean (with certain exclusions) a company that is “predominantly engaged in financial activities.”¹⁴

This definition applies to a company engaged in “financial activities” whether or not it owns an insured depository institution. Section 165 requires the Board to implement enhanced prudential standards for nonbank financial companies that are designated by the Council as well as for bank holding companies with \$50 billion or more in consolidated assets.¹⁵ These enhanced prudential standards include risk-based capital and leverage requirements, liquidity requirements, overall risk management requirements, concentration limits, credit exposure report requirements, and resolution plan requirements. For designated nonbank financial companies, the new regime will entail Board supervision potentially of the entire corporate entity.

These enhanced prudential standards will present significant challenges for the bank holding companies with \$50 billion or more in consolidated assets even though as part of their birthright these companies have always been subject to a comprehensive regulatory and supervisory regime applied by the Board under the BHCA. These enhanced prudential standards, and the overarching system of consolidated supervision that they represent, will present even greater challenges for the nonbank financial companies designated by the Council. These nonbank financial companies will face an entirely new operating environment as they become subject to consolidated supervision by the Board. In recognition of the challenges that the new environment will present, the Dodd-Frank Act contains certain provisions for adapting the new regime to nonbank financial companies. The first set of provisions provide for the establishment of an intermediate holding company by a designated nonbank financial company, an important design element in the architecture of the Dodd-Frank Act. The first reference to the establishment of an intermediate holding company comes in Section 113(c), which provides the Council with authority to subject a company that as a result of “evasion” does not meet the percentage tests in the definition of “predominantly engaged in financial activities” to consolidated supervision by the Board.¹⁶ Section 113(c)(3) provides that such a company may establish an intermediate holding company. The purpose of the establishment of an intermediate holding company is to facilitate the regulation and supervision of the financial activities within the entity and to eliminate the need for the regulatory and supervisory regime to encompass the nonfinancial activities of the nonbank financial company. Section 113(c)(3) appears to represent an instance in

which the legislative drafters identified a second-order consequence (namely, the application of prudential standards designed for financial activities to nonfinancial activities) and sought to address the second-order consequence by providing a means (even if not complete) to mitigate the consequence. Section 113(c) constitutes an initial marker of the statutory intent in the Dodd-Frank Act to limit the unintended consequences of a provision.

Section 113(c)(3) provides that an intermediate holding company will be subject to supervision by the Board and to the prudential standards imposed by Title I as if the intermediate holding company were a nonbank financial company designated by the Council.¹⁷ The implication of this provision is that the controlling entities above the intermediate holding company (and other affiliates outside the intermediate holding company structure) will not be subject to the prudential standards otherwise applicable to a designated nonbank financial company. This provision seeks to address the concern with the difficulty and inefficiency of applying prudential standards specifically designed for financial activities to nonfinancial activities conducted by the designated nonbank financial company. This implication is confirmed by the language of Section 113(c)(6), which provides that the nonfinancial activities of the company shall not be subject to supervision by the Board or to the prudential standards of the Board.¹⁸ Thus neither the activity restrictions of the BHCA nor the prudential and supervisory provisions of the BHCA (subject to certain exceptions discussed below) would apply to any company that controls the intermediate holding company. The general prudential and supervisory requirements of the BHCA as well as the enhanced prudential requirements added by the Dodd-Frank Act would apply to the intermediate holding company.

Although initially referenced in the anti-evasion provisions of Section 113(c), the intermediate holding company design element has a much broader application as reflected in other provisions in the Dodd-Frank Act. Section 167(b) provides for the possible use of an intermediate holding company with respect to any nonbank financial company designated by the Council.¹⁹ Section 167(b)(1)(A) provides that the Board may require a designated nonbank financial company that engages in nonfinancial activities to establish and conduct all or a portion of its activities that are financial in nature or incidental thereto (other than “internal financial activities”) in or through

an intermediate holding company. Section 167(b)(1)(B) further provides that the Board *shall* require a nonbank financial company to establish such an intermediate holding company *if* the Board makes a determination that the establishment of an intermediate holding company is necessary: (i) to appropriately supervise the activities that are financial in nature or incidental thereto; *or* (ii) to ensure that the supervision by the Board does not extend to the commercial activities of the nonbank financial company. While there is a mandatory element to Section 167(b)(1)(B), it is not self-executing. It relies on a determination to be made by the Board. It provides that the Board shall require the use of an intermediate holding company but only if the Board makes a determination that it is necessary to meet one of two stated objectives in Section 167(b)(1)(B). The language of Section 167(b)(1)(B) does not expressly commit this determination to the Board's discretion. It would appear then that to meet the second statutory purpose, namely, to ensure that the Board's supervision does not extend to the commercial activities of the nonbank financial company, it would be likely that the Board would have to require the interposition of an intermediate holding company.

Section 167(b) provides the key elements of the intermediate holding company structure. First, to demarcate the scope of the activities required to be conducted in an intermediate holding company, Section 167(b)(2) provides that the financial activities subject to regulation under Section 167 do not include "internal financial activities," such as internal treasury, investment and employee benefit functions.²⁰ Second, Section 167(b)(3) provides that any company that directly or indirectly controls an intermediate holding company must serve as a source of strength to the intermediate holding company. As discussed below, in its other provisions the Dodd-Frank Act gives a clear statutory basis for the Board's historical interpretation of the source-of-strength doctrine as applicable to bank holding companies, and extends the doctrine to other holding companies of insured depository institutions. The source-of-strength requirement in Section 167(b)(3) applies even if the intermediate holding company does not own or control an insured depository institution. Third, Section 167(b)(4) provides that the Board may require reports from any company that controls an intermediate holding company solely for purposes of ensuring compliance with the provisions of Section 167, including the source-of-strength requirement. Fourth,

Section 167(b)(5) provides that the Board may enforce the provisions of subsection (b) of Section 167 applicable to any company that controls an intermediate holding company through the use of the enforcement mechanisms under Section 8 of the Federal Deposit Insurance Act (the “FDIA”). Section 167(c) provides that the Board shall promulgate regulations to establish the criteria for determining whether to require a nonbank financial company to establish an intermediate holding company. In addition, these regulations may establish restrictions on transactions between an intermediate holding company and its affiliates as necessary to prevent unsafe and unsound practices between the intermediate holding company or any of its subsidiaries with its parent company or affiliates that are not subsidiaries of the intermediate holding company.

Section 113 and Section 167 provide a critical element in the Title I supervisory regime that is expressly designed to permit and facilitate the prudential regulation of the financial activity components of designated nonbank financial companies while avoiding the supervision or regulation of the nonfinancial activity components. As discussed further below, this same design element is also incorporated into the Dodd-Frank Act provisions for the supervision and regulation of grandfathered unitary savings and loan holding companies.

Further evidence of the legislative intent to tailor the new supervisory regime in Title I for nonbank financial companies can be found in Sections 115 and 165. Section 115(a)(1) provides that the Council may make recommendations to the Board on the establishment and “refinement” of prudential standards applicable to designated nonbank financial companies and large interconnected bank holding companies (*i.e.*, those with consolidated assets of \$50 billion or more).²¹ Section 115(a)(2) provides that the Council may also make recommendations to differentiate among companies either on an individual basis or by category, taking into account their capital structures, riskiness, complexity, financial activities, size and other risk-related factors. Section 115(b)(3)(A) provides that in making its recommendations on prudential standards the Council *shall* take into account differences among nonbank financial companies based on the factors listed in Section 113(a) as well as other factors such as the nonfinancial activities and affiliations of the company and whether the company owns an insured depository institu-

tion. Section 115(b)(3)(C) also provides that the Council *shall* “adapt its recommendations as appropriate in light of any predominant line of business of such company, including assets under management or other activities for which particular standards may not be appropriate.” The language of Section 115(a) does not require the Council to make recommendations to the Board on prudential standards. The language of Section 115(b)(3), however, provides that if the Council undertakes to make any recommendation on prudential standards, the Council must take into account the various factors referenced in Section 115(b).

Section 165(b)(3), which directs the Board to adopt enhanced prudential standards, generally parallels the provisions of Section 115.²² It is in one respect, however, more prescriptive than Section 115 by providing that the Board in implementing prudential standards for nonbank financial companies must take into account the same factors as those listed in Section 115(b). The provisions of Section 115(b)(3) and Section 165(b)(3) reflect a clear legislative intent that the Council should consider the diversity of the business characteristics of nonbank financial companies in framing any recommendations to the Board and that the Board must in any event take the business characteristics of nonbank financial companies into account when it prescribes any prudential standards. This is another marker of the legislative intent to address the consequences of applying prudential standards designed in the first instance for banking entities to other types of financial entities. The legislative directive in Section 165(b)(3) to recognize differences even among financial activities supplements the legislative authority to tailor the application of Title I to nonbank financial companies through the use of intermediate holding companies. Thus, it may be appropriate and even necessary for the Board to differentiate among intermediate holding companies based on the nature and mix of financial activities and the predominant line of financial activities of the intermediate holding company.

STUDY OF EXEMPTIONS FROM THE BHCA AND MORATORIUM

The provisions of Title I of the Dodd-Frank Act are designed in part to address the concerns with the unregulated or lightly regulated nature of systemically important nonbank financial institutions. The provisions of

Title VI are designed in part to address the concerns with the unregulated or lightly regulated nature of depository holding companies, such as unitary savings and loan holding companies and other holding companies owning exempt insured depository institutions, without regard to the systemic importance of the entity. Section 603(b) of the Dodd-Frank Act calls for a study by the Comptroller General (to be completed by January 21, 2012) to determine whether it is necessary “in order to strengthen the safety and soundness of financial institutions or the stability of the financial system” to eliminate the exemptions from the BHCA for entities that own or control a “trust and fiduciary only” bank, credit card bank, industrial loan company, or savings association (*i.e.*, a federally chartered savings bank or savings and loan association or a state chartered savings and loan association).²³ The elimination of these exemptions would presumably subject savings and loan holding companies and other entities owning or controlling an exempt insured depository institution to the activity restrictions (save for any possible grandfathering provisions) and the other regulatory and supervisory requirements of the BHCA. In connection with the study of the exemption from the BHCA for companies that control a savings association, the U.S. Government Accountability Office (the “GAO”) is directed to consider the adequacy of the federal bank regulatory framework applicable to the exempt institution, including limitations on affiliate transactions and cross-marketing, and the framework applicable to the holding company and other affiliates of the exempt institution.²⁴ Anticipating the significant second- and third-order consequences of eliminating the exemption from the BHCA, Section 603(b)(2)(B) also requires the GAO to evaluate the potential consequences of subjecting savings and loan holding companies to the requirements of the BHCA, including with respect to the availability and allocation of credit, the safe and sound operation of such entities, the stability of the financial system and the economy, and the impact on the types of activities in which savings associations and savings and loan holding companies may engage.²⁵

As a companion to the study provision, Section 603(a) of the Dodd-Frank Act imposes a three-year moratorium on creating, or allowing a change of control over, any “trust and fiduciary only” bank, credit card bank or industrial bank by a commercial firm.²⁶ The combined purpose of the three-year moratorium and the study is apparently to provide sufficient time to

study the merits of continuing or modifying the current exemptions for these entities from the BHCA without prompting anticipatory and opportunistic action in the interim. The provisions of Section 603(a) and (b) grew out of the recommendations of the Treasury White Paper. The Treasury White Paper included three inter-related recommendations for the regulation of depository institution holding companies.²⁷ The first recommendation was that all companies that own an insured depository institution, no matter what its charter form, should be subject to consolidated prudential supervision and regulation by the Board and to the activity restrictions of the BHCA. The second recommendation was that the policy of separating banking from commerce (which is reflected in the BHCA, but not in HOLA at least as to grandfathered unitary savings and loan holding companies) should be reaffirmed and “strengthened” (presumably meaning, be extended to savings and loan holding companies and other depository institution holding companies). The third recommendation was that the “loopholes” in the BHCA for thrifts, industrial loan companies, credit card banks, limited purpose trust companies and grandfathered “nonbank” banks should be closed. As a related matter, the Treasury White Paper also recommended that the federal thrift charter itself be eliminated. The Treasury White Paper noted that by owning thrifts or other exempt insured depository institutions, Bear Stearns, Lehman Brothers, AIG, and other insurance companies, finance companies, and commercial companies were able to obtain access to the federal safety net (apparently meaning, access to federal deposit insurance and to the Federal Reserve discount window) while avoiding the activity restrictions and more stringent consolidated supervision and regulation under the BHCA.²⁸ The Treasury White Paper asserted that by avoiding the application of the BHCA, these companies were able to evade effective consolidated supervision. The Treasury White Paper also observed that these companies were able to build up excessive balance sheet leverage and off-balance-sheet risks with insufficient capital buffers because of their weak supervisory regime. The Treasury White Paper further asserted that by avoiding the application of the BHCA, these companies were able to evade the longstanding federal policy of separating banking from commerce. The recommendation of the Treasury White Paper was that all companies owning an insured depository institution should be made subject to the full scope of BHCA, but be given five years to

conform to the activity restrictions in the BHCA.²⁹ With respect to savings and loan holding companies in particular, the Treasury White Paper noted that while the Board imposed leverage and risk-based capital requirements on bank holding companies, the Office of Thrift Supervision (the “OTS”) did not impose any capital requirements on savings and loan holding companies, such as AIG.³⁰ As an overall matter, the Treasury White Paper observed that the intensity of supervision of bank holding companies by the Board exceeded that applied by the OTS to savings and loan holding companies.

These themes from the Treasury White Paper were echoed in the testimony of many of the federal regulators during the hearing process leading to the passage of the Dodd-Frank Act. For example, Board Governor Daniel Tarullo testified early in the legislative process on the need for robust holding company regulation.³¹ He affirmed the longstanding Board view that the loopholes in the BHCA for industrial loan companies and savings associations should be eliminated. He noted that prior to the crisis, a number of large financial companies, including Lehman Brothers, Merrill Lynch, Goldman Sachs, Morgan Stanley, GMAC and General Electric, enjoyed the advantage of ownership of industrial loan companies without consolidated supervision under the BHCA.³² As a general matter, he concluded that the experience from the financial crisis reinforced the value of holding company supervision in addition to and distinct from supervision of the depository institution.³³

The Comptroller of the Currency John Dugan also testified generally in favor of the Treasury’s proposals.³⁴ On the one hand, he noted that thrift holding companies, unlike bank holding companies, were not subject to consolidated regulation, including consolidated capital requirements.³⁵ He observed that the difference in approach to the regulation of bank holding companies and thrift holding companies created arbitrage opportunities for companies. On the other hand, he suggested that industrial loan companies had not been a source of the same kind of problems as thrift holding companies and that it might be appropriate to continue the exemption for small industrial loan companies.³⁶

Congress ultimately did not adopt the Treasury proposals to eliminate the federal thrift charter and the various exemptions from the BHCA, substituting instead the study and moratorium provisions. The GAO study required

by the Dodd-Frank Act provides the opportunity for input and comment from a wide range of sources.³⁷ One self-contained source of input for this Dodd-Frank Act study is the Dodd-Frank Act itself, particularly its provisions that effect explicit or implicit changes in the regulation and supervision of savings and loan holding companies. These changes discussed in detail below are directly relevant to the determination of the adequacy of the bank regulatory framework applicable to savings and loan holding companies.

AMENDMENTS TO THE BHCA, HOLA AND THE FDIA

Title VI of the Dodd-Frank Act, entitled the “Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010,” contains various amendments and additions to the BHCA and the HOLA that affect the regulation and supervision of holding companies. Section 616 of the Dodd-Frank Act contains provisions of broad applicability to holding companies of insured depository institutions. Section 616(a) by amendment to the BHCA confirms the longstanding Board position that it may impose capital requirements on bank holding companies by regulation or order.³⁸ Section 616(b) by amendment to HOLA provides the same authority to the Board as successor to the OTS as the banking agency responsible for the supervision of savings and loan holding companies.³⁹ As discussed further below, the amendment to these provisions of HOLA confirms the authority of the Board to impose capital requirements on savings and loan holding companies as part of an overall consolidated supervisory program. Of similar importance, Section 616(d) amends the FDIA to codify, and expand the application of, the source-of-strength doctrine that the Board has historically asserted with respect to bank holding companies.⁴⁰ The amendment to the FDIA provides that the appropriate federal banking agency, *i.e.*, the Board, shall require a bank holding company or a savings and loan holding company to serve as a source of financial strength for any subsidiary of the holding company that is a depository institution.⁴¹ For an insured depository institution that is not a subsidiary of a bank holding company or a savings and loan holding company, the appropriate federal banking agency for the insured depository institution must require any company that directly or indirectly controls the insured depository institution to serve as a

source of financial strength for the depository institution.⁴² The appropriate federal banking agencies are directed to issue joint rules to carry out this section by July 21, 2012. This amendment creates symmetry between the treatment of bank holding companies and savings and loan holding companies with respect to the support requirements for their depository subsidiaries.

The supervisory regime for savings and loan holding companies will also be affected by another provision in the Dodd-Frank that seeks to strengthen the capital requirements generally applicable to bank holding companies and savings and loan holding companies. Section 171 of the Dodd-Frank Act, added by the so-called Collins Amendment, requires the federal banking agencies to establish minimum leverage and risk-based capital requirements on a consolidated basis for bank holding companies, savings and loan holding companies, and designated nonbank financial companies, that are not less than or quantitatively lower than the leverage and risk-based capital requirements applicable to insured depository institutions as in effect on July 21, 2010.⁴³ The effect of Section 171 is both to impose the pre-existing and in certain respects more stringent leverage and risk-based capital rules applicable to insured depository institutions on bank holding companies, savings and loan holding companies, and designated nonbank financial companies, and to establish the insured depository institution leverage and risk-based capital rules as in effect on July 21, 2010, as a floor for future leverage and risk-based capital rules for bank holding companies, savings and loan holding companies, and designated nonbank financial companies. The effects of these new requirements are mitigated by certain exclusions and phase-in periods. For savings and loan holding companies, the effective date of these provisions is generally postponed until July 21, 2015.⁴⁴ In an initial proposal to provide for implementation of the requirements of Section 171, the federal banking agencies sought to preserve the flexibility to address the application of risk-based capital requirements to entities such as designated nonbank financial companies and savings and loan holding companies that had not previously been subject to bank-like consolidated capital requirements.⁴⁵ The federal banking agencies noted that such entities might present different exposure types and risks than those contemplated when the bank risk-based capital requirements were developed. As an example, the federal banking agencies cited exposures by insurance companies that would automatically default to a

100 percent risk weight because the bank risk-based capital requirements do not make provision for such nonbanking exposures.⁴⁶ In adopting the final rule, the federal banking agencies included a provision to preserve the flexibility to assign lower risk weights to such assets.⁴⁷ The implications of Section 171 and other possible capital requirements for savings and loan holding companies are discussed in further detail in Part II of this article.

The provisions of Title VI of the Dodd-Frank Act make other changes to HOLA that are intended to conform various revisions in HOLA to those in the BHCA. Paralleling similar amendments to the BHCA, Section 604(g) amends HOLA to provide that the Board as successor to the OTS shall to the fullest extent possible use (i) reports and other supervisory information that the savings and loan holding company or any subsidiary has been required to provide to other federal or state regulatory agencies, (ii) externally audited financial statements, or (iii) information that is otherwise required to be reported publicly.⁴⁸ The purpose of this amendment is to minimize the reporting requirements and burden on savings and loan holding companies in recognition of the fact that savings and loan holding companies or other entities within the corporate entity may also be subject to other statutory or regulatory reporting requirements. Paralleling similar amendments to the BHCA, Section 604(h) amends HOLA to provide the authority of the Board to examine a savings and loan holding company and each subsidiary, including a functionally regulated subsidiary such as an insurance company subsidiary or a broker-dealer subsidiary.⁴⁹ The amendment provides that the Board will provide reasonable notice to, and consult with, the appropriate federal or state regulatory agency for any functionally regulated subsidiary of a savings and loan holding company before commencing the examination and will to the fullest extent possible avoid duplication of examination activities, reporting requirements and requests for information. The amendments made by Section 604 to the BHCA and HOLA create comparable reporting and examination authority with respect to bank holding companies and savings and loan holding companies.

Section 604(i) makes an additional amendment to HOLA to conform it to the BHCA. Section 604(i) amends the definition of the term “savings and loan holding company” to exclude a company that controls a saving association that functions solely in a trust or fiduciary capacity as described in

Section 2(c)(2)(D) of the BHCA.⁵⁰ This amendment provides an exception from HOLA for a “trust and fiduciary only” savings association paralleling the exception for such entities from the BHCA. The addition of this exception in HOLA presumably reflects a congressional judgment that the existing exclusion in the BHCA should be retained.⁵¹ A grandfathered unitary savings and loan holding company now has the option to restructure its savings association subsidiary into a “trust and fiduciary only” savings association to avoid the heightened regulatory and supervisory regime applicable to savings and loan holding companies under the other Dodd-Frank Act provisions.⁵² The use of this new exception may be particularly attractive to some savings and loan holding companies because it will also exempt the company and its affiliates from the prohibitions contained in the Volcker Rule, which are discussed below.

Section 605 amends the FDIA to create a new examination and enforcement regime for nondepository institution subsidiaries of depository holding companies, defined to include both bank holding companies and savings and loan holding companies. Section 605 provides that (except for certain examination authority now reserved to the Consumer Financial Protection Bureau) the Board shall examine the activities of a nondepository institution subsidiary (other than a functionally regulated subsidiary or a subsidiary of a depository institution) of a depository holding company that are permissible for the insured depository institution subsidiaries of the depository holding company “in the same manner, subject to the same standards, and with the same frequency” as if the activities were conducted in the lead depository institution of the holding company.⁵³ The legislative history of this provision credits Comptroller of the Currency Dugan with the observation that nondepository subsidiaries of bank holding companies were not subject to the same examination process as depository institution subsidiaries engaged in the same activities, resulting in uneven standards being applied to the same activities.⁵⁴ In his testimony before the Senate Committee on Banking, Housing and Urban Affairs, Comptroller Dugan cited as one example the fact that bank subsidiaries were held to more rigorous underwriting and consumer protection standards by the Board than nonbank affiliates of the same holding company.⁵⁵ Section 605 provides for a more rigorous examination (and potential enforcement) regime equally applicable to bank holding

companies and savings and loan holding companies.

Section 606 makes corresponding amendments to the BHCA and HOLA to implement the requirement that financial holding companies under the BHCA and savings and loan holding companies (other than grandfathered unitary savings and loan holding companies) under HOLA must meet the well-capitalized and well-managed test to engage in the full range of otherwise permissible financial activities.⁵⁶ In a similar vein, Section 622 adds a new provision to the BHCA that applies equally to bank holding companies and savings and loan holding companies, as well as certain other companies. The new provision in the BHCA provides that a “financial company,” which is defined to include a bank holding company, a savings and loan holding company, a company that controls an insured depository institution, and a designated nonbank financial company, may not merge or consolidate with or acquire control of another company if the consolidated liabilities of the acquiring financial company would exceed 10 percent of the aggregate consolidated liabilities of all financial companies.⁵⁷

Each of these amendments made to HOLA or to the FDIA should be relevant to any determination of the adequacy of the regulatory framework applicable to savings and loan holding companies. In addition to these amendments to HOLA and the FDIA made by Title VI, in any determination of the adequacy of the regulatory framework applicable to savings and loan holding companies, it would also be necessary to consider the accession of the Board to the role of supervisor of these companies as effected by Title III of the Dodd-Frank Act. This important change is discussed in detail in Part II of this article.

The amendments to HOLA made by the Dodd-Frank Act provisions discussed above are intended to conform HOLA to the BHCA in various respects. Title VI of the Dodd-Frank Act also makes an amendment to HOLA that is intended to recognize the important difference between bank holding companies and one particular subset of savings and loan holding companies, grandfathered unitary savings and loan holding companies. Incorporating the same approach as reflected in Section 167, Section 626 of the Dodd-Frank Acts adds a new Section 10A to HOLA, which provides for the use of an intermediate holding company with respect to a grandfathered unitary savings and loan holding company.⁵⁸ Section 10A generally parallels the

provisions of Section 167(b).⁵⁹ Like Section 167(b), Section 10A provides that if a grandfathered unitary savings and loan holding company engages in activities other than financial activities, the Board may require the company to establish an intermediate holding company to conduct all or a portion of its financial activities (other than internal financial activities) and shall require the company to establish such an intermediate holding company if the Board determines that the establishment is necessary to appropriately supervise the activities of the company that are financial activities or to ensure that supervision by the Board does not extend to the activities that are not financial activities.⁶⁰ Like Section 167(b), Section 10A provides that a grandfathered unitary savings and loan holding company that directly or indirectly controls an intermediate holding company must serve as a source of strength to the intermediate holding company.⁶¹ Section 10A also provides that the Board may examine and require reports from the grandfathered unitary savings and loan holding company solely for the purposes of ensuring compliance with Section 10A, including assessing the ability of the company to serve as a source of strength to the intermediary holding company.⁶² Section 10A, like Section 167(b), provides that the Board may enforce compliance with the provisions of Section 10A applicable to any company that controls an intermediate holding company through the use of the enforcement mechanisms under Section 8 of the FDIA.⁶³ Finally, Section 10A provides that the Board shall promulgate regulations to establish the criteria for determining whether to require a grandfathered unitary savings and loan holding company to establish an intermediate holding company.⁶⁴ The Board has not as yet initiated any rulemaking process for the use of intermediate holding companies.

Section 10A has been added to HOLA in express recognition of the fact that a grandfathered unitary savings and loan holding company may engage under HOLA in any activity, whether or not financial in nature.⁶⁵ Concerns similar to those applicable to nonbank financial companies under Section 167 would arise with respect to the imposition of capital or other prudential requirements on a grandfathered unitary savings and loan company. The structural expedient of establishing an intermediate holding company may thus be as compelling in the context of grandfathered unitary savings and loan companies engaged in commercial activities as in the context of designated nonbank financial companies. Indeed, the need for the use of an in-

intermediate holding company may be greater in the context of grandfathered unitary savings and loan holding companies because there is no limit on the proportion of their activities that may be commercial. A nonbank financial company will only be subject to possible designation under Section 113 if its commercial revenues represent less than 15 percent of its consolidated gross revenues or if its commercial assets represent less than 15 percent of its consolidated assets. There is a significantly greater scope for commercial activities in a grandfathered unitary savings and loan holding company than in a nonbank financial company as the latter term is defined in the Dodd-Frank Act. The use of an intermediate holding company will presumably be most beneficial and practicable for a grandfathered unitary savings and loan holding company that is predominantly engaged in commercial activities. It may be less beneficial or practicable for use by a grandfathered unitary savings and loan company that is predominantly engaged in financial activities (such as insurance activities or asset management activities) with only a relatively small element of commercial or nonfinancial activities.

Title VI includes one other provision that is of particular importance to the business operations of bank holding companies and savings and loan holding companies alike. This is the so-called Volcker Rule, codified in Section 619 of the Dodd-Frank Act. The Volcker Rule prohibits a “banking entity” subject to certain exceptions from engaging in “proprietary trading” or acquiring or retaining any equity or other ownership interest in or “sponsoring” a “hedge fund” or “private equity fund,” as each of these terms is specifically defined in the Volcker Rule.⁶⁶ The critical term “banking entity” is defined in the Volcker Rule to mean any insured depository institution (as defined in Section 3 of the FDIA), any company that controls an insured depository institution (or that is treated as a bank holding company for purposes of Section 8 of the International Banking Act of 1978), and any affiliate of any such entity.⁶⁷ Because the defined term includes the holding company of any insured depository institution, it applies to a savings and loan holding company and the holding company of any other insured depository institution (with exception of a “trust and fiduciary only” bank or a “trust and fiduciary only” savings association) as well as to all affiliates of the entity.⁶⁸ The effect of the prohibitions contained in the Volcker Rule may well prompt certain savings and loan holding companies and other holding

companies of exempt insured depository institutions to consider the sale or disposition of an insured depository institution subsidiary, particularly if the subsidiary is relatively small and not key to the future business strategy of the holding company, or the restructuring of an insured depository institution into a “trust and fiduciary only” bank or savings association if that is feasible as a business matter.⁶⁹

The restrictions imposed by the Volcker Rule will in any event enter into the overall calculus of the incremental costs (and lost revenues) that attach to savings and loan holding company status under the Dodd-Frank Act. The costs and lost revenues attributable to the Volcker Rule have already attracted substantial market attention.⁷⁰ The federal regulators initiated their proposed rulemaking process on the Volcker Rule in November 2011 with public comments due to the regulators in February 2012.⁷¹ The final metes and bounds of the Volcker Rule will not be known until the rulemaking process is completed later in 2012. Further action by savings and loan holding companies may come after the rulemaking process is completed.

NOTES

¹ See, e.g., DAVID SKEEL, *THE NEW FINANCIAL DEAL, UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES* (2011).

² Pub. L. No. 111-203, § 626(a), 124 Stat. 1376, 1638 (to be codified at 12 U.S.C. § 1467b) (defining a “grandfathered unitary savings and loan holding company” to mean “a company described in” Section 10(c)(9)(C) of the Home Owners’ Loan Act). Section 10(c)(9)(C) of the Home Owners’ Loan Act describes a company that was a savings and loan holding company on May 4, 1999 (or became a savings and loan holding company pursuant to an application pending on or before May 4, 1999) and that continues to control not fewer than one savings association that it controlled on May 4, 1999, or that it acquired pursuant to an application pending on or before that date, or the successor to such savings association, and such savings association qualifies as a “qualified thrift lender” as defined in § 10(m) of the Home Owners’ Loan Act. Grandfathered unitary savings and loan holding companies are not subject to the activity restrictions under the Home Owners’ Loan Act.

³ For a discussion of the regulatory evolution of savings and loan holding companies, see Office of Thrift Supervision, *Holding Companies and the Thrift Industry* (Jan. 1998), available at www.ots.treas.gov/_files/48032.pdf, and Office of Thrift Supervision, *Historical Framework for Regulation of Activities of Unitary Savings and*

Loan Holding Companies, *available at* http://www.ots.treas.gov/_filed48035.html.

⁴ See, e.g., Tim Zawacki, *Lincoln logs out of banking, joining a growing list of insurers*, SNL FINANCIAL, Oct. 10, 2011, *available at* <http://www.snl.com/InteractiveX/Article.aspx?id=13415623> (reporting that Lincoln National Corp. has disclosed a plan to dissolve its thrift subsidiary, following similar actions by AllState Corp., The Hartford, and Guardian Life of America).

⁵ 12 U.S.C. §§ 1841 *et seq.*

⁶ 12 U.S.C. § 1467a. See also 12 U.S.C. § 1842(c)(2)(B) and (j) (exempting a “savings association” from the definition of “bank” for purposes of the BHCA).

⁷ 12 U.S.C. § 1842(c)(2)(D), (F) and (H) (exempting a “trust and fiduciary only” bank, a credit card bank, and an industrial loan company from the definition of “bank” for purposes of the BHCA).

⁸ Pub. L. No. 111-203, § 604(i), 124 Stat. 1604 (to be codified at 12 U.S.C. § 1467a(1)(D)(ii)).

⁹ See Zoltan Pozsar *et al.*, Federal Reserve Bank of New York Staff Report No. 458, *Shadow Banking* (July 2010). See also FINANCIAL CRISIS INQUIRY COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, ch. 2: SHADOW BANKING (2011) and Financial Stability Board, *Shadow Banking: Strengthening Oversight and Regulation* (Oct. 27, 2011), *available at* www.financialstabilityboard.org/publications/r_111027a.pdf.

¹⁰ Pub. L. No. 111-203, § 113, 124 Stat. at 1398-1402 (to be codified at 12 U.S.C. § 5323).

¹¹ U.S. DEPT. OF TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (June 2009) [hereinafter TREASURY WHITE PAPER].

¹² *Id.* at 21-22 & 34-36. The TREASURY WHITE PAPER does not, however, suggest that the ownership of these depository institution subsidiaries caused or even contributed to the financial difficulties encountered by the parent entity.

¹³ *Id.* at 21-22.

¹⁴ Pub. L. No. 111-203, § 102(a)(4)(B) defines a “U.S. nonbank financial company” as a company (other than a bank holding company and certain other specified entities) that is incorporated or organized under the laws of the United States or any state and is predominantly engaged in financial activities as defined in § 102(a)(6). Section 102(a)(6) in turn provides that a company is predominantly engaged in financial activities if:

(A) the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature (as defined in section 4(k) of the [BHCA]) and, if applicable, from the ownership or control of one or more insured depository institutions, represents 85 percent or more of the consolidated annual

gross revenues of the company; or (B) the consolidated assets of the company and all of its subsidiaries related to activities that are financial in nature (as defined in section 4(k) of the [BHCA]) and, if applicable, related to the ownership or control of one or more insured depository institutions, represents 85 percent or more of the consolidated assets of the company.

A savings and loan holding company that meets either of these percentage tests would be a “nonbank financial company” and thus potentially subject to designation by the Council as a systemically important financial institution under § 113.

¹⁵ Pub. L. No. 111-203, § 165, 124 Stat. at 1423-32 (to be codified at 12 U.S.C. § 5365). Bank holding companies with consolidated assets of \$50 billion or more are formulaically subject to enhanced supervision under § 165. Savings and loan holding companies with consolidated assets of \$50 billion or more are not formulaically subject to enhanced supervision under § 165, but as noted above a specific savings and loan holding company could be made subject to enhanced supervision under § 165 if it is designated as a nonbank financial company by the Council under § 113.

¹⁶ *Id.*, § 113(c), 124 Stat. at 1399-1401 (to be codified at 12 U.S.C. § 5323(c)).

¹⁷ *Id.*, § 113(c)(3), 124 Stat. at 1400 (to be codified at 12 U.S.C. § 5323(c)(3)).

¹⁸ *Id.*, § 113(c)(6), 124 Stat. at 1400-01 (to be codified at 12 U.S.C. § 5323(c)(6)).

This point is further confirmed by the language of § 167(a), which provides that nothing in Subtitle C of Title I should be construed to require a nonbank financial company supervised by the Board or a company that controls such a company to conform its activities to the requirements of § 4 of the BHCA.

¹⁹ *Id.*, § 167(b), 124 Stat. at 1433 (to be codified at 12 U.S.C. § 5367(b)).

²⁰ Section 167(b)(2) further provides that with respect to any internal financial activity engaged in for the company or an affiliate and a non-affiliate of such company during the year prior to the date of enactment of the Dodd-Frank Act, the company may continue to engage in that activity as long as at least 2/3's of the assets or 2/3's of the revenues generated from the activity are from or attributable to the company or an affiliate. The Board may review this exception to determine whether it presents an undue risk to the company or to U.S. financial stability.

²¹ *Id.*, § 115(a)(1), 124 Stat. at 1403 (to be codified at 12 U.S.C. § 5325(a)(1)).

²² *Id.*, § 165(b)(3), 124 Stat. at 1424-25 (to be codified at 12 U.S.C. § 5365(b)(3)).

²³ *Id.*, § 603(b), 124 Stat. at 1598-99 (to be codified at 12 U.S.C. § 1815 note).

²⁴ *Id.*

²⁵ *Id.* As noted above, under HOLA grandfathered unitary savings and loan holding companies are not subject to restrictions on the activities in which they may engage. Other savings and loan holding companies are subject to restrictions on their activities. See 12 U.S.C. § 1467a(c)(1), (2) & (3). In general, savings and loan holding companies may engage in any activity that is financial in nature as

defined in 12 U.S.C. § 1843(k)(4) as well as certain other activities such as real estate development and real estate management that are not encompassed by § 1843(k)(4). Some sense for the range of activities in which savings and loan holding companies engage may be gleaned from another GAO report, *Financial Market Regulation: Agencies Engaged in Consolidated Supervision Can Strengthen Performance Measurement and Collaboration*, GAO-07-154 (March 2007). That report indicated that as of December 31, 2006 there were 476 thrift holding companies with primary business lines as follows: 382 banking, 37 insurance, 13 securities, 31 other financial, and 13 commercial.

²⁶ *Id.*, § 603(a), 124 Stat. at 1597-98 (to be codified at 12 U.S.C. § 1815 note).

²⁷ TREASURY WHITE PAPER at 34.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 35.

³¹ *Strengthening and Streamlining Prudential Bank Supervision: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 11-12 (Aug. 4, 2009) [hereinafter *Hearing on Prudential Bank Supervision*] (statement of Daniel K. Tarullo, member, Board of Governors of the Federal Reserve System), available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=0656fee8-e81c-4081-b99b-7a7c1571fb4d.

³² *Id.*

³³ *Id.* at 6.

³⁴ *Hearing on Prudential Bank Supervision*, *supra* note 31 (statement of John C. Dugan, Comptroller of the Currency), available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=eb5bdf3c-c8ff-4ff8-8be0-d6093436c267.

³⁵ *Id.* at 7-8. *But see Hearing on Prudential Bank Supervision*, *supra* note 31 (statement of John E. Bowman, acting director, OTS), available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=0656fee8-e81c-4081-b99b-7a7c1571fb4d. Acting Director Bowman disputed the proposition that the OTS did not impose capital requirements on savings and loan holding companies. He noted that although the capital requirements were not contained in OTS regulations, the OTS determined capital adequacy of holding companies on a case-by-case basis.

³⁶ *Id.*

³⁷ A draft of this article was provided to the staff of the GAO as part of the study.

³⁸ Pub. L. No. 111-203, § 616(a), 124 Stat. at 1615 (to be codified at 12 U.S.C. § 1844(b)).

³⁹ *Id.*, § 616(b), 124 Stat. at 1615 (to be codified at 12 U.S.C. § 1467a(g)(1)).

⁴⁰ *Id.*, § 616(d), 124 Stat. at 1616 (to be codified at 12 U.S.C. § 1831o-1).

⁴¹ *Id.*, § 616(d), 124 Stat. at 1616 (to be codified at 12 U.S.C. § 1831o-1(a)).

⁴² *Id.*, § 616(d), 124 Stat. at 1616 (to be codified at 12 U.S.C. § 1831o-1(b)).

⁴³ *Id.*, § 171, 124 Stat. at 1435-38 (to be codified at 12 U.S.C. § 5371).

⁴⁴ *Id.*, § 171(b)(4)(D), 124 Stat. at 1437 (to be codified at 12 U.S.C. § 5371(b)(4)(D)).

⁴⁵ See Risk-Based Capital Standards: Advanced Capital Adequacy Framework – Basel II; Establishment of a Risk-Based Capital Floor, 75 Fed. Reg. 82,317 (Dec. 30, 2010) (to be codified at 12 C.F.R. pt. 208, App. A, 12 C.F.R. pt. 225, App. G).

⁴⁶ *Id.* at 82,320 (noting that “there are some material exposures of insurance companies that, while not riskless, would be assigned to a 100 percent risk weight category because they are not explicitly assigned to a lower risk weight category. An automatic assignment to the 100 percent risk weight category without consideration of an exposure’s economic substance could overstate the risk of the exposure and produce uneconomic capital requirements for a covered institution”).

⁴⁷ See Risk-Based Capital Standards: Advanced Capital Adequacy Framework – Basel II; Establishment of a Risk-Based Capital Floor, 76 Fed. Reg. 37,620, 37,626 (June 28, 2011) (to be codified at 12 C.F.R. pt. 208, App. A).

⁴⁸ *Id.*, § 604(g), 124 Stat. at 1602 (to be codified at 12 U.S.C. § 1467a(b)(2)).

⁴⁹ *Id.*, § 604(h), 124 Stat. at 1602-03 (to be codified at 12 U.S.C. § 1462). The amendment also imports into HOLA the definition of the term “functionally regulated subsidiary” from the BHCA.

⁵⁰ *Id.*, § 604(i), 124 Stat. at 1604 (to be codified at 12 U.S.C. § 1467a(a)(1)(D)(ii)).

⁵¹ As noted above, § 603(b) calls for a study by the GAO to determine whether the exceptions under § 2 of the BHCA, including the exception for a “trust and fiduciary only” bank, should be eliminated. The addition of a comparable exception to HOLA by the Dodd-Frank Act would suggest that Congress does not favor the elimination of that exception.

⁵² If a grandfathered unitary savings and loan holding company chose to restructure the operations of its savings association to qualify for this exception, it would presumably lose its grandfathered status under HOLA and could not thereafter re-engage in a broader set of activities in its saving association subsidiary without terminating its nonfinancial activities throughout the holding company.

⁵³ Pub. L. No. 111-203, § 605, 124 Stat. at 1604-07 (to be codified at 12 U.S.C. § 1831c). The term “lead depository institution” is defined by cross-reference to the definition of that term in § 2(o)(8) of the BHCA.

⁵⁴ See S. Rep. No. 111-176, at 85 (2010).

⁵⁵ *Hearing on Prudential Bank Supervision, supra* note 34, at 16.

⁵⁶ Pub. L. No. 111-203, § 606, 124 Stat. at 1607 (to be codified at 12 U.S.C.

§ 1843(l)(1) and 12 U.S.C. § 1467a(c)(2)).

⁵⁷ Pub. L. No. 111-203, § 622, 124 Stat. at 1632-34 (to be codified at 12 U.S.C. § 1852).

⁵⁸ *Id.*, § 626, 124 Stat. at 1638-40 (to be codified at 12 U.S.C. § 1467b). Section 604(i) also amends HOLA to exclude from the definition of “savings and loan holding company” a grandfathered unitary savings and loan holding company that establishes an intermediate holding company pursuant to § 10A. *Id.*, § 604(i), 124 Stat. at 1604 (to be codified at 12 U.S.C. § 1467a(a)(1)(D)(ii)).

⁵⁹ Section 10A, however, does define the term “financial activities” differently than the term is defined in Title I. Section 102(a)(6) of the Dodd-Frank Act defines “financial activities” as activities that are financial in nature as defined in § 4(k) of the BHCA. Section 10A(a)(1) defines the term “financial activities” to include not only activities that are financial in nature as defined in § 4(k) of the BHCA, but also certain other activities such as real estate development and management that are otherwise permissible to savings and loan holding companies under § 10(c)(2) of HOLA.

⁶⁰ § 626, 124 Stat. at 1638-40 (to be codified at 12 U.S.C. § 1467b(b)(1)).

⁶¹ *Id.* (to be codified at 12 U.S.C. § 1467b(b)(3)).

⁶² *Id.* (to be codified at 12 U.S.C. § 1467b(b)(4)).

⁶³ *Id.* (to be codified at 12 U.S.C. § 1467b(b)(5)).

⁶⁴ *Id.* (to be codified at 12 U.S.C. § 1467b(c)(1)).

⁶⁵ *Id.* (to be codified at 12 U.S.C. § 1467b(d)(1)). This subsection expressly states that nothing in § 10A shall be construed to require a grandfathered unitary savings and loan holding company to conform its activities to the permissible activities under HOLA.

⁶⁶ *Id.*, § 619, 124 Stat. at 1620-31 (to be codified at 12 U.S.C. § 1851).

⁶⁷ *Id.*, § 619(h)(1), 124 Stat. at 1629 (to be codified at 12 U.S.C. § 1851(h)(1)).

⁶⁸ *Id.*

⁶⁹ It is unlikely that the establishment of an intermediate holding company under § 626 would insulate the other affiliates (which are also “banking entities” within the meaning of the Volcker Rule) from the restrictions of the Volcker Rule.

⁷⁰ See, e.g., Silla Brush, *Volcker Rule Will Cost Banks \$1 Billion, U.S. Government Says*, BLOOMBERG (Oct. 28, 2011, 12:01 AM), available at <http://www.bloomberg.com/news/2011-10-28/volcker-rule-to-cost-banks-1b-u-s-government.html> (discussing an analysis conducted by the staff of the Office of the Comptroller of the Currency that estimated the aggregate compliance costs and costs of capital deductions potentially required by the Volcker Rule for the U.S. banking industry). The estimates of lost revenues resulting from the Volcker Rule run much higher. See, e.g., Scott Patterson, *Volcker Rule: Boon or Bane? It Depends Which Side of the Street You're*

On, WALL ST. J., Jan. 3, 2012, at R4 (big U.S. banks may have revenues trimmed by \$2 billion a year because of Volcker Rule). *See also* INSTITUTE OF INTERNATIONAL FINANCE, THE CUMULATIVE IMPACT ON THE GLOBAL ECONOMY OF CHANGES IN THE FINANCIAL REGULATORY FRAMEWORK 23 (Sept. 2011) (noting that the Volcker Rule will dampen bank earnings, possibly in the range of \$3.5 – \$4 billion a year).

⁷¹ *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (proposed rule) (Nov. 7, 2011).