

Client Update

Revisiting Dodd-Frank's \$50 Billion Asset Threshold Gains Momentum

Legislation with bipartisan support is pending in both houses of the U.S. Congress to revise the \$50 billion asset threshold in the Dodd-Frank Act that triggers application of enhanced prudential standards for U.S. and foreign bank holding companies (“BHCs”).¹ Although broader legislative changes to the Dodd-Frank Act appear unlikely at this juncture, revisions to the Dodd-Frank Act’s \$50 billion threshold appear to have positive momentum both in Congress and with the administration. In fact, the Trump administration has signaled repeated support for revising the threshold, while leaving the details of how to do so to Congress.² If the Dodd-Frank threshold is revised, the federal banking agencies separately may feel compelled to revisit a range of other regulations and guidance that, even though not required by statute, have used the \$50 billion asset line to trigger more stringent standards.

REMOVING THE BRIGHT LINE \$50 BILLION ASSET THRESHOLD

Identical bills in the House and Senate would replace the \$50 billion asset threshold in section 165 of the Dodd-Frank Act, which triggers application of enhanced prudential standards for U.S. and foreign BHCs, with the following three-pronged, factor-based approach for subjecting BHCs to enhanced prudential standards.³

¹ Dodd-Frank Act, Public Law 111-203, 124 Stat. 1376 (2010).

² U.S. Dep’t of Treasury, A Financial System That Creates Economic Opportunity: Banks and Credit Unions, 12 (June 12, 2017) (“Treasury recommends that Congress amend the \$50 billion threshold under Section 165 of Dodd-Frank for the application of enhanced prudential standards to more appropriately tailor these standards to the risk profile of bank holding companies.”). This recommendation would appear to accommodate either the factor-based approach discussed below or raising the asset threshold to a higher number. More recently, National Economic Council Director Gary Cohn emphasized the administration’s support for revising the threshold. Peter Schroeder, *Congress in talks to provide regulatory relief to smaller banks: Cohn*, Reuters (Oct. 16, 2017), <https://www.reuters.com/article/us-usa-banks-cohn/congress-in-talks-to-provide-regulatory-relief-to-smaller-banks-cohn-idUSKBN1CL2A0> (“Cohn said he would favor any level above \$200 billion, or altering the threshold so that instead of an asset level, banks are evaluated based on the risk levels of their activity and regulated accordingly.”).

³ Dodd-Frank Act § 165 (12 U.S.C. § 5365). The bills make a number of conforming changes to the Dodd-Frank Act as well.

- G-SIBs automatically designated. U.S. BHCs designated as global systemically important bank holding companies (“G-SIBs”) under the Federal Reserve Board’s (the “FRB”) regulations automatically would be subject to enhanced prudential standards.⁴
- Individual BHC designations. A BHC that is not a G-SIB would be subject to enhanced prudential standards if the FRB were to determine that either material financial distress at the BHC, or the nature, scope, size, scale, concentration, interconnectedness, or mix of activities engaged in by the BHC, could pose a threat to the financial stability of the United States. These two standards track the tests used for designation of nonbank financial companies by the Financial Stability Oversight Council (the “FSOC”).⁵ In determining whether a BHC meets the designation standard, the FRB would be required to consider an institution’s size, interconnectedness, substitutability, global cross-jurisdictional activity, and complexity, which are the five factors comprising the indicator-based measurement approach established by the Basel Committee on Banking Supervision for determining systemic importance.⁶
- Designations by category. In addition, the FRB could adopt regulations that subject a category of BHCs to enhanced prudential standards (rather than using an individual designation process). The FSOC would be required to approve the metrics used by the FRB in establishing any such regulation.

Further, the FRB would be charged with ensuring that enhanced prudential standards are tailored to the risks presented by an individual BHC or category of BHCs. BHCs that are similarly situated with respect to the factors listed above would be required to be treated similarly for purposes of any enhanced supervision or prudential standards applied under the revised section 165.

Finally, the FRB would be required to solicit feedback from the FSOC on the process for identifying BHCs subject to enhanced prudential standards and on the application of such process to specific BHCs. The FRB would be required to publish on its website a list of BHCs subject to enhanced prudential standards.

The House and Senate bills are at different procedural points in the legislative process. In the House, the bill, which was originally introduced by Representative Blaine Luetkemeyer (R-Mo-3) in July, has garnered 63 co-sponsors from both sides of the aisle and was passed by the Financial Services Committee on October 12, 2017 by a vote of 47 to 12, representing a significant

⁴ 12 C.F.R § 217.402 (U.S. G-SIB designations).

⁵ Dodd-Frank Act § 113(a)(1) (12 U.S.C. § 5323).

⁶ Basel Committee on Banking Supervision, Global Systemically Important Banks: Updated Assessment Methodology and Additional Loss Absorbency Requirement, 5 (July 3, 2013).

bipartisan majority.⁷ On the other side of Capitol Hill, Senators David Perdue (R-Ga) and Claire McCaskill (D-Mo) introduced identical legislation in late September, but that bill has not yet passed a committee.⁸

REGIONAL BANKING BUSINESS MODELS WOULD BE OBVIOUS BENEFICIARIES

The most obvious beneficiaries of any legislation that revises the \$50 billion asset threshold would be BHCs with a regional banking business model. For example, U.S. BHCs with noncomplex banking operations but total consolidated assets of \$50 billion or more would seem to be clear beneficiaries of the proposed approach discussed above. It is not clear how the FRB would treat foreign banks with total consolidated assets of \$50 billion or more that currently are subject to enhanced prudential standards (including the U.S. intermediate holding company requirement), but there would seem to be logic to treating foreign banks in the same way as U.S. counterparts with a similar business model. How the FRB ultimately differentiates among various foreign bank business models clearly will be an important issue going forward.

CONCLUSION

In our view, there are several reasons to believe that this legislation provides a rare opportunity for bipartisan action to revise the Dodd-Frank Act.

- Rep. Luetkemeyer's bill has been percolating through the legislative process for multiple years, with similar legislation having been introduced by Rep. Luetkemeyer in 2015 and 2016.⁹ In fact, Rep. Luetkemeyer's bill passed the House in 2016.¹⁰
- Under prior iterations of the legislation, however, the FSOC would have been responsible for designating non-G-SIBs as subject to enhanced prudential standards. On the other hand, the current legislation provides a more limited role for the FSOC: approving the FRB's proposed metrics for establishing categories of BHCs subject to enhanced prudential standards and consulting with the FRB on the designation process. The FRB retains authority to make the ultimate determinations, a construct that we believe would be favored by both the FRB and the FSOC (thus removing one potential roadblock to the legislation moving forward).

⁷ Systemic Risk Designation Improvement Act of 2017, H.R. 3312, 115th Cong. (2017).

⁸ Systemic Risk Designation Improvement Act of 2017, S. 1893, 115th Cong. (2017).

⁹ See, *Examining the Designation and Regulation of Bank Holding Company SIFIs: Hearing Before the H. Subcomm. on Financial Institutions and Consumer Credit*, Comm. on Financial Services, 114th Cong. 55 (2015) (Statement of Satish M. Kini), <https://www.debevoise.com/news/2015/07/satish-m-kini-testifies-on-dodd-frank-reform>.

¹⁰ Systemic Risk Designation Improvement Act of 2016, H.R. 6392 (2015).

- Moreover, there is widespread recognition that the current \$50 billion asset threshold needs revision, either through raising the threshold number or using a factor-based approach. For example, FRB Chair Yellen recently said that “[t]here are some things that Congress could also do to help” the FRB further “tailor regulations to the risk posed by different kinds of banking organizations.”¹¹ This expression of support for revision follows prior comments by Chair Yellen, including that “an approach that is based on business model or factors is also a workable approach from our point of view.”¹² Senior Trump administration officials also have expressed support for revising the threshold, either by raising the threshold or using a factor-based approach.

Finally, it is important to note that even if the statutory threshold is revised, this action will not automatically eliminate the \$50 billion threshold in the variety of contexts in which it has come to be used. In fact, since the enactment of the Dodd-Frank Act, the \$50 billion asset line has been used in a range of regulations and guidance issued by the federal banking regulators even though not mandated by statute (such as, for example, the Volcker Rule, the Office of the Comptroller of the Currency’s “heightened standards” and the FRB’s comprehensive capital analysis and review program). Revising that regulatory progeny would require separate action.

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Please do not hesitate to contact us with any questions.

¹¹ Janet L. Yellen, Chair, Board of Governors of the Federal Reserve System, Remarks at the Federal Open Market Committee Press Conference, 17 (Sept. 20, 2017), <https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20170920.pdf>.

¹² *Monetary Policy and the State of the Company: Hearing Before the H. Comm. on Financial Services*, 115th Cong. (2017) (Statement of Janet L. Yellen), <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=402098>.

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