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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

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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

MARK B. GREENLEE*

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I. INTRODUCTION

The federal legislation governing bank holding companies (“BHCs”) and savings and loan holding companies (“SLHCs”) share several public policy objectives. The Bank Holding Company Act of 1956 (“BHCA”) and Savings and Loan Holding Company Amendments of 1967 (“SLHCA”) both sought to preserve competition, prevent undue concentration, and separate banking from commerce. In subsequent legislation, Congress brought further parity to the regulation of BHCs and SLHCs related to affiliations with securities firms, transactions with

1. Key terms and acronyms are defined when first used in this article and are collected in Appendix A.
4. See infra Sections IV.B.5. and IV.C.1.
affiliates, permissible activities, separation of banking and commerce, and capital requirements. The convergence in the regulation of BHCs and SLHCs raises the question: Is it time to unify the regulation of depository institution holding companies (“DIHCs”)? This article answers that question in the affirmative based upon its historical review of divergence and convergence in the regulation of DIHCs, as well as the benefits of a unified statutory scheme for the regulation of DIHCs.

During the twentieth century, the ownership of depository institutions became concentrated in DIHCs. At the beginning of the twentieth century, it appears that no companies controlled depository institutions. However, companies began to acquire banks in the first decade of the century. By 1929, twenty-eight banking groups controlled 511 banks in the United States. In the early 1930s, Congressional concerns about “group banking” led to limited regulation of what are now called “bank holding companies” or “BHCs”. At the same time, Congress prohibited bank affiliations with securities firms. In 1956, Congressional concerns about further increases in the number of companies controlling banks led to comprehensive regulation of BHCs—defined as a company controlling two or more banks. In 1959, Congressional concerns about companies beginning to acquire control of savings associations led to enactment of legislation prohibiting the formation of new holding companies controlling more than one savings

5. See infra Section IV.C.
association. In 1968, Congressional concerns about further increases in the number of SLHCs, which were defined as a company controlling one or more savings associations, led to comprehensive regulation of SLHCs. Holding companies began to acquire a large number of banks and savings associations in the 1960s and 1970s.

This article focuses on differentiation and convergence in the regulation and supervision of DIHCs from the early years of the twentieth century to the present. Part II reviews the current regulatory framework for depository institutions and DIHCs. Part III summarizes areas of differentiation and convergence in the regulation of depository institutions. Part IV highlights areas of differentiation and convergence

12. Spence Act, Pub. L. No. 86-374, 73 Stat. 691 (1959); H. REP. No. 86-679, at 1–4 (1959); SEN. REP. No. 86-810, at 1–5 (1959). In 1957, only two companies were known to control a savings association. Id. at 4.


14. Savings and Loan Holding Company Amendments of 1967: Hearings on H.R. 1322, H.R. 8696, and H.R. 12025 Before the Subcomm. on Domestic Fin. of the H. Comm. on Banking and Currency, 90th Cong 10 (1967) (statement of John E. Horne, Chairman, Fed. Home Loan Bank Bd.) (“At the end of 1959, there were 44 holding companies controlling 93 associations, which possessed 7.2 percent of the assets of all insured associations. By the end of 1966 [all] of those figures had increased very substantially; there were 98 holding companies controlling 134 associations representing 12.5 percent of the whole industry.”); FED. RESERVE BD., THE BANK HOLDING COMPANY MOVEMENT TO 1978: A COMPENDIUM (1978), at 56, 62, 63 (“In 1956 there were only 117 unregulated one-bank holding companies, with total deposits of $11.6 billion. By 1965, there were 550 one-bank holding companies, but the major banks had not yet converted to that status. In 1956-59, 53 one-bank holding companies were formed, but in 1960-66 there were 291 formations. From 1966 to June 1968, 201 more one-bank holding companies were formed, and from June 1968 to the end of 1970, 690 more were created. . . . By the end of 1976, bank holding companies were operating in all fifty states and the District of Columbia. Just over one-quarter -- 25.8 percent -- of all banks were owned by bank holding companies; one-bank holding companies owned 10.2 percent of all banks; and multibank holding companies, 15.6 percent. By the end of 1976, 66.1 percent of all commercial bank deposits were held by subsidiaries of bank holding companies. Multibank holding companies held 34.2 percent of total deposits and one-bank holding companies, 31.9 percent.”).

15. While credit unions are depository institutions, this article only addresses credit unions in a cursory manner because it focuses on depository institution holding companies. Credit union membership rules preclude control of a credit union by a holding company by limiting each member to one vote at member meetings. See, e.g., 12 U.S.C. § 1760 (2018) (“Irrespective of the number of shares held, no member shall have more than one vote.”). If a credit union finds a holding company useful for execution of its business plan, the credit union converts to a stock bank or thrift with a mutual holding company. James Wilcox, Credit Unions, Conversions, and Capital, FED. RES. BANK S.F. ECON. LETTER, No, 2007-16, at 1–2 (June 22, 2007); see also 12 U.S.C. §§ 1467a(o), 1785(b).

16. See infra Part II.

17. See infra Part III.
in the regulation of DIHCs. Part V describes the areas of differentiation and convergence in the supervision of DIHCs. Part VI recommends that Congress unify regulation of all holding companies controlling a depository institution insured by the Federal Deposit Insurance Corporation (“FDIC”) under one statute of uniform application. In short, it is time to unify the regulation of DIHCs.

II. CURRENT REGULATORY FRAMEWORK

The current statutory framework for depository institutions and DIHCs developed in a patchwork manner, often in response to crises, from the beginning of the twentieth century to the present.

A. Regulators

The allocation of regulatory responsibility for depository institutions and DIHCs is based on the type of charter of the depository institution. The Board of Governors of the Federal Reserve System (“FRB”) regulates BHCs, SLHCs, and state member banks. The Office of the Comptroller of the Currency (“OCC”) regulates national banks, federal savings banks, and federal savings associations. The FDIC regulates state nonmember banks, industrial loan companies, (“ILCs”), state-chartered savings banks, and state-chartered savings associations, and cooperative banks. 12 U.S.C. § 1820(b). A state nonmember bank is a state-chartered bank that does not elect to become a member of the Federal Reserve System. The parent holding company of a state savings bank or cooperative bank that makes an election pursuant to section 10(l) of The Home Owners’ Loan Act (“HOLA”) to be treated as a savings association is not regulated as a BHC but as an SLHC. 12 U.S.C. § 1467a(l). ILCs are subject to FDIC regulation if they obtain FDIC insurance. See e.g., CAL. FIN. CODE § 18521.5(b) (2019); CLO. REV. STAT. § 11-10.5-106(2)(a) (2019); NEV. REV. STAT. § 677.247(a) (2019); UTAH CODE ANN. § 7-8-3(4) (2019).
associations. The National Credit Union Administration (“NCUA”) regulates federally insured credit unions chartered by the NCUA and state-chartered credit unions insured by the National Credit Union Share Insurance Fund. State-chartered institutions, whether a bank, thrift, credit union, or industrial loan company, are regulated by their chartering state. Most states also regulate the BHCs and SLHCs that control, or propose to acquire control of, a depository institution in the state.

B. Forms of Ownership

Depository institutions and DIHCs are organized in stock or mutual form. Stock institutions are owned by stockholders that usually operate as for-profit organizations. Mutual institutions are “owned” by the institution’s members, which are the depositors of the institution itself or of a subsidiary. Mutual institutions are non-profit organizations that benefit their members through dividends and access to services. Historically, thrift institutions strongly favored the mutual form of ownership. However, depository institutions generally moved away from mutual forms of ownership in the later part of the twentieth century to raise low-cost capital and attract and retain qualified personnel.


26. See, e.g., CAL. FIN. CODE §§ 500(a), 1000(a) (2019); N.Y. BANKING LAW § 14.1(k)–(o) (2019); OHIO REV. CODE ANN. §§ 1113.01, 1121.10 (West 2019).


28. 1 KENNETH M. LAPINE ET AL., BANKING LAW §§ 1.05[1], 1.05[2], 1.05[3] (Matthew Bender & Co., Inc., 2021); 3 LAPINE ET AL., supra § 69.02.


31. Conversion of Savings and Loan Associations from Mutual to Stock Form: Hearings on S. 3132 and S. 3234 before Subcommittee on Financial Institutions of the S. Comm. on Banking, Housing and Urban Affairs, 93rd Cong. 121 (1974) (statement of Thomas R. Bomar, Chr., FHLBB) (practically all savings and loan associations organized as mutual associations in 1933 and only 12% of all savings associations organized as stock associations as of 1974).

32. See generally Peter B. Saba & Robert B. Robbins, Savings and Loan Associations – Mutual to Stock Conversions Under the Revised Regulations, 17 AKRON L. REV. 413, 416 (1984). In 1983, there were 3,126 savings associations of which 2,404 (77%) were mutual
C. **Charters**

Depository institutions obtain special types of charters issued by federal and state regulatory agencies empowering them to accept deposits. This is a unique authority not available to other types of entities. The agencies establish requirements for the issuance of a charter, such as organizer qualifications, management expertise, capital adequacy, and business plan sufficiency.33 Within the current regulatory framework, the OCC issues charters for national banks, federal savings banks, and federal savings and loan associations,34 while state agencies issue charters for banks, state savings banks, state savings associations, and ILCs.35


34. 12 U.S.C. §§ 21 (national bank), 1464(a) (federal savings bank and federal savings association); see also 12 C.F.R. § 5.20.
regulatory agencies.\textsuperscript{38} All BHCs and SLHCs are required to register with the FRB.\textsuperscript{39} To register as an SLHC rather than a BHC, the holding company must not control a bank, and any savings association subsidiary must be a “qualified thrift lender” (“QTL”).\textsuperscript{40}

If a depository institution wishes to convert from one type of charter to another, the institution must obtain the prior approval of the regulatory agency of the resulting institution.\textsuperscript{41} For example, if a savings association subsidiary of SLHC plans to convert to a national bank, the approval of the OCC is required. In addition, the prior approval of the FRB is required for the holding company of the proposed bank to become a BHC.\textsuperscript{42}

\textbf{D. Deposit Insurance}

Deposit insurance was established to restore and maintain confidence in the banking system.\textsuperscript{43} In 1933, federal deposit insurance became available for bank deposits through the FDIC.\textsuperscript{44} Federal deposit
insurance became available for thrift deposits in 1934 through the Federal Savings and Loan Insurance Corporation (“FSLIC”). Currently, bank and thrift deposits are insured up to $250,000 per depositor, per institution, and per ownership category by the deposit insurance fund administered by the FDIC.

E. Regulation

Depository institutions and DIHCs are subject to regulations that govern their operations. The federal laws and implementing regulations specifically applicable to depository institutions and DIHCs include those applicable to governance, capital, deposits, reserves, branching, lending, margin stock loans, interbank liabilities, investments, permissible activities, management interlocks, insider and affiliate transactions, privacy and data security, anti-money laundering;

51. 12 U.S.C. § 36 (national banks); § 321 (state member banks).
52. Id. § 84; 12 C.F.R. § 32.3.
55. 12 U.S.C. § 24(7); § 1464(c) (national bank and federal savings association investments).
56. See, e.g., id. § 24(7), 92 (national banks); § 1843(c)(8), (k) (BHCs); § 1464 (federal savings associations); § 1467a(c) (SLHCs).
community reinvestment,\textsuperscript{61} unfair, deceptive, or abusive acts or practices,\textsuperscript{62} and consumer protection.\textsuperscript{63} Many of these laws and regulations are addressed below with a focus on the differentiation and convergence in the regulation of financial institutions.

\textbf{F. Supervisory Tools}

Federal and state banking regulators use a number of supervisory tools to assess and monitor the condition of financial institutions under their jurisdiction; address violations of law, rule, and regulation; and correct unsafe and unsound practices. First, banking regulators require financial institutions to submit a variety of reports.\textsuperscript{64} Second, banking regulators conduct examinations or inspections of financial institutions under their jurisdiction, as well as assess or monitor the financial condition of those institutions through visitations, reviews, off-site surveillance, and collection of information from other regulators.\textsuperscript{65} Third, banking regulators take enforcement action against institutions under their jurisdiction.\textsuperscript{66} Fourth, banking regulators act upon the


\textsuperscript{64} See infra Section V.C.

\textsuperscript{65} See infra Section V.A.

\textsuperscript{66} See infra Section V.E.
applications filed by institutions to acquire control of depository institutions and applications for an institution to engage in banking and nonbanking activities. Finally, the federal banking agencies conduct stress tests and engage in other forward-looking activities related to capital, liquidity, and resolution planning to maintain the safety and soundness of financial institutions and the stability of the financial system.

G. Receivership

The federal or state agency that chartered the depository institution is authorized to close a depository institution under its jurisdiction for sufficient cause, such as the inability to pay its deposits or debts. The National Bank Act ("NB Act") requires the OCC to appoint the FDIC as receiver for a failed national bank. The FRB is authorized to appoint the FDIC as receiver of a state member bank. State laws permit the state banking regulators to appoint the FDIC or another receiver.

In practice, the FDIC is almost always appointed as receiver of depository institutions. If appointed as a receiver, the FDIC liquidates the assets of the institution and distributes deposits to depositors up to the insured amount or the FDIC transfers the assets and liabilities to a third party or parties. If an institution’s insured deposits are purchased and liability is assumed by a third party, the depositors will access their deposits through the acquiring institution. The depositors are subject to risk of loss for uninsured deposits unless the acquirer assumes liability for all deposits.

67. See infra Section V.D.
68. See infra Section V.B.5.
73. Id. at 17.
III. DIFFERENTIATION AND CONVERGENCE IN THE REGULATION OF DEPOSITORY INSTITUTIONS

A. Differentiation

During the first half of the twentieth century, federal and state regulators chartered many types of depository institutions, including banks, savings associations, credit unions, and ILCs. These depository institutions served separate segments of the financial services market. Banks offered deposit accounts to businesses and made commercial loans.\(^{74}\) Savings associations offered savings accounts to individuals and entered into share accumulation contracts or made home mortgage loans to individuals.\(^{75}\) Credit unions opened share accounts and made loans to members.\(^{76}\) ILCs issued investment certificates and made small loans to low- and moderate-income workers.\(^ {77}\) This differentiation in activities flowed from variation in (1) public policy of the early 1930s; (2) availability of institution powers under various charters; (3) eligibility for banking system membership; (4) geographic limitations on branching; (5) restraints on deposit interest rates, affiliations, affiliate transactions, insider loans, and tying the availability of products to obtaining other products; (6) accounting rules and tax treatment; and (7) institution policies.

1. Public Policy of the Early 1930s

First, differentiation in the regulation of depository institutions arose from the federal public policy objectives in the early 1930s. A wave

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74. EVANS CLARK, FINANCING THE CONSUMER 5–6 (1931); ROLF NUGENT, CONSUMER CREDIT AND ECONOMIC STABILITY 59 (1939); LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 283–84 (1999).


of bank failures, home foreclosures, and unemployment followed the stock market crash of 1929.\textsuperscript{78} Congress addressed the perceived reasons for the crash\textsuperscript{79} with legislation that separated commercial banking from investment banking, insured deposits, and encouraged and maintained home ownership. When Congress enacted the Banking Act of 1933 ("1933 Act") it included four sections that separated commercial banking from investment banking, commonly known as the "Glass-Steagall Act."\textsuperscript{80} Congress also sought to restore confidence in the banking system through federal government insurance of deposits.\textsuperscript{81} In addition, Congress sought to encourage and maintain home ownership through creation of the Federal Home Loan Bank System, authorization of federal

\textsuperscript{78} 1935 FRB ANN. REP. 134, 176 (stating that 2,113 banks placed in liquidation or receivership in 1933, 14.55\% of all banks operating the United States as of June 30, 1933); Table DC1255-1270, Mortgage Foreclosures and Delinquencies: 1926-1979, in \textsc{Historical Statistics of the United States} (Susan B. Carter et al. ed., 2006) (252,400 foreclosures on nonfarm real estate in 1933; 13\% of mortgaged nonfarm real estate); 5 FHLBB ANN. REP. 4 (1938) (stating that urban foreclosures climbed to nearly 1,000 per day in 1933); Table Ba470-477, Labor Force, Employment, and Unemployment, 1890-1990, in \textsc{Historical Statistics of the United States} (Susan B. Carter et al. ed., 2006) (31.71\% of civilian private nonfarm labor force unemployed in 1932).

\textsuperscript{79} Congress believed that bank failures resulted from bank involvement in securities underwriting and stock speculation. \textit{See e.g.,} 75 CONG. REC. 9906 (1932) (statement of Sen. Walcott) ("The excessive use of bank credit in making loans for the purpose of stock speculation . . . was generally admitted before the panic of 1929, and almost universally accepted since that time, to have been one of the sources of major difficulty . . . ."); 77 CONG. REC. 3835 (1933) (statement of Rep. Steagall) ("Bank deposits and credit resources were funneled into the speculative centers of the country for investment in stocks operation and in market speculation."); 77 CONG. REC. 3907 (1933) (statement of Rep. Kopplemann) ("One of the chief causes of this depression has been the diversion of depositors’ money into the speculative markets of Wall Street. Instead of keeping the money for the use of the legitimate needs of commerce and agriculture, money has been lent to gamblers to use in buying stocks on margin.").

\textsuperscript{80} Banking Act of 1933, Pub. L. No. 73-66, §§ 16, 20, 21, 32, 48 Stat. 162, 185, 188, 189, 194. The Banking Act of 1935 amended section 16 to permit a bank to purchase stocks for the account of its customers; clarified that section 21 would not prevent a deposit taking company from engaging in the securities underwriting and dealing activities permitted by section 16; and amended section 32 to make it consistent with section 20 and to prevent a securities company and bank from having any employee (not only any officer) in common. Pub. L. No. 74-305, §§ 303–308, 49 Stat. 684, 707, 709 (1935).

\textsuperscript{81} Banking Act of 1933 § 8(d), (y), 48 Stat. at 168, 179 (adding § 12B to FR Act temporarily establishing the FDIC and deposit insurance fund); 77 CONG. REC. 3837 (1933); \textit{see also} Banking Act of 1935 sec. 101, § 12B, 49 Stat. at 684 (amending § 12B to FR Act, permanently establishing the FDIC and the FDIC deposit insurance fund); National Housing Act of 1934, Pub. L. No. 73-479, § 403(a), 48 Stat. 1246, 1257 (1934) (establishing the Federal Savings and Loan Insurance Corporation).
charters for savings and loan associations, and provision for federal home mortgage insurance.\textsuperscript{82}

2. Institution Powers

Second, differentiation in the regulation of depository institutions arose from the powers available to the type of institution. Historically, state-chartered banks were authorized to make loans secured by real property.\textsuperscript{83} National banks lacked the legal authority to make loans secured by real property. However, national banks obtained the authority to make loans secured by farm land in 1913, and loans secured by first lien upon improved real estate in 1927.\textsuperscript{84} Historically, savings associations were limited to accepting time deposits, making residential loans, and investing in government securities.\textsuperscript{85} However, federal savings associations had broader authority than banks to engage in certain


\textsuperscript{83} SAMUEL A. WELLDON, NATIONAL MONETARY COMMISSION, DIGEST OF STATE BANKING STATUTES, S. Doc. No. 61-353, at 40–43 tbl. A (1910) (showing that only eleven states restricted real estate lending by state-chartered banks).


activities, such as insurance agency and real estate development. Still, banks possessed authority not held by savings associations to accept demand deposits, make commercial loans, invest in securities other than government securities, and offer trust services.

3. Banking System Membership

Third, differentiation in the regulation of depository institutions arose from banking system membership. In 1913, the Federal Reserve Act ("FR Act") required national banks to become members of the Federal Reserve System ("FR System") and permitted state banks to become members. Building and loan associations and mutual savings banks were not eligible for membership in the FR System. Later, amendments to the FR Act authorized ILCs and mutual savings banks to become members of the FR System. In 1932, the Federal Home Loan Bank Act ("FHLBA") allowed all building and loan associations, savings and loan associations, cooperative banks, homestead associations, and savings banks to become members of the Federal Home Loan Bank System ("FHLB System"). Later, the Home Owners’ Loan Act of 1933 ("HOLA") required federal savings and loan associations chartered by the Federal Home Loan Bank Board ("FHLBB") to become members of the FHLB System. Membership allowed members to borrow from and obtain services from their respective system.

87. National Bank Act § 8, 13 Stat. at 101 (authorizing national associations to receive deposits, loan money on personal security); Federal Reserve Act § 11(k), 38 Stat. at 262 (authorizing the FRB to permit national banks to provide trust services); McFadden Act § 16, 44 Stat. at 1232 (authorizing national associations to make loans secured by first lien upon improved real estate).
89. Informal Rulings of the Board, 1 FED. RES. BULL. 211, 212 (1915) (stating that building and loan associations were ineligible for system membership); Informal Rulings of the Federal Reserve Board, 3 FED. RES. BULL. 949, 950 (1917) (stating that mutual savings banks were ineligible for system membership).
Fourth, differentiation in the regulation of depository institutions arose from branching rights. At the beginning of the twentieth century, the banking system consisted almost entirely of unit banks—-independent banks with one office that served a local community. The geographic reach of individual state and national banks was very limited. State laws generally prohibited a state-chartered bank from opening branch offices. However, states began to expand the authority of state-chartered banks to branches, first within the city of a bank’s existing office, then within an expanded geographic area, and then state-wide. The NB Act did not explicitly authorize national banks to establish branch offices. However, in 1927, the McFadden Act authorized a

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94. Fed. Reserve Comm. on Branch, Grp., and Chain Banking, Branch Banking in the United States 1 (1931) (“Following the passage of the National Bank Act of 1863, . . . public policy became committed to the unit banking system.”); John M. Chapman, Concentration of Banking: The Changing Structure and Control of Banking in the United States 6 (1934) (“The individual bank was a local affair devoted largely to the interests of its immediate community.”); Palmer T. Hogenson, The Economics of Group Banking 1 (1955) (“Independent unit banking is the more familiar pattern of banking in this country in which an individual bank unit has but one office . . . .

95. Fed. Reserve Comm. on Branch, Grp., and Chain Banking, supra note 94, at 1 (“In 1900, according to the best information available, there were only 119 branches in existence.”).


97. Digest of State Laws Relating to Branch Banking, supra note 96, at 258 (10 states permitted branch banking within a limited area and 9 states permitted state-wide branch banking); Changes in State Laws Relating to Branch Banking, supra note 96, at 455 (14 states permitted branch banking with a limited area and 9 states permitted state-wide branch banking).

98. Because the NB Act did not authorize branch offices, national banks were generally viewed as prohibited from opening branch offices. In 1911, the U.S. Attorney General found that a national bank was restricted to carrying on general banking business to one office or banking house in the place designated in its certificate of organization. Lowry National Bank of Atlanta, GA—Establishment of Branch Office, 29 Op. Att’y Gen. 81, 98 (1911). In 1923, the U.S. Attorney General found that a national bank had the power to open offices at places other than its banking house to perform routine services, such as the collection of deposits and cashing of checks, within the city or place designated in its organization certificate. Power of National Banking Associations to Establish Offices, 34 Op. Att’y Gen. 1, 5 (1923). In 1924, the U.S. Supreme Court sustained a challenge to a national bank opening branches in Missouri under a state statute. First National Bank v. Missouri, 263 U.S. 640, 657–60 (1924).
national bank to establish branches in the city in which it was located if permitted by state banks in the same state.\textsuperscript{99}

During most of the twentieth century, the branching rights of federal savings and loan associations were slightly more favorable than the branching rights of banks. As enacted in 1933, HOLA provided the FHLBB with exclusive authority to provide for the organization, incorporation, examination, operation, and regulation of federal savings and loan associations.\textsuperscript{100} Therefore, the states did not have the authority to limit branch locations of federal savings and loan associations.\textsuperscript{101} As the twentieth century progressed, the FHLBB issued policy statements expanding the ability of federal savings associations to establish branches.\textsuperscript{102} In 1996, Congress authorized federal savings associations

\textsuperscript{99} Pub. L. No. 69-639, § 7(c), 44 Stat. 1224, 1228 (1927) (codified as amended at 12 U.S.C. § 36(f) (2018)). The McFadden Act defined a branch as any place of business at which “deposits are received or checks paid, or money lent.” Id. § 7(f), 44 Stat. at 1229 (codified as amended at 12 U.S.C. § 36(j)). The Banking Act of 1933 further expanded the authority of national banks to branch within a state to the same extent state law permitted state banks to branch within such state establish branches anywhere in the state in which the national bank was situated to the extent the “law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition” authorized State banks to establish branches, “subject to the restrictions as to location imposed by the law of the State on State banks.” Pub. L. No. 73-66, § 23, 48 Stat. 162, 189 (1933).


\textsuperscript{101} The FHLBB’s authority was confirmed in later court cases. California v. Coast Fed. Sav. & Loan Ass’n, 98 F. Supp. 311, 316 (S.D. Cal. 1951) (“No provision is made for sharing the Board’s delegated authority with state regulatory or supervisory agencies.”) In 1982, the U.S. Supreme Court concluded that “Congress gave the [FHLBB] plenary authority to issue regulations governing federal savings and loans . . . .” Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 450 U.S. 141, 160 (1982). The FHLBB promulgated regulations governing “the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.” Id. at 145 (citing Coast Fed. Sav. & Loan Ass’n, 98 F. Supp. at 316).

\textsuperscript{102} Branching by Federal Savings Associations, 12 C.F.R. § 556.5(b), (d) (1993) (allowing federal savings associations to branch interstate, subject only to the limitations of federal law); Establishment of Branch Offices, 12 C.F.R. § 556.5(a)(3) (1982) (permitting interstate acquisition to prevent the failure of an institution or minimize risk or cost to the insurance fund); Establishment of Federal Savings and Loan Associations and Branch Office and Mobile Facilities of Such institutions, 12 C.F.R. § 556.5(b)(2)–(3) (1973) (stating the general policy against establishing a branch other than in a federal association’s home state); Establishment of Branch Offices, 12 C.F.R. § 556.5(a)(2) (1968) (limiting branches to locations permitted by state law or practice); see also Conference of State Bank Supervisors v. Office of Thrift Supervision, 792 F.2d 837 (D.D.C. 1992) (upholding OTS rule allowing national savings association to branch interstate subject only to federal law); JULIE L.
to branch across state lines if they qualified as a domestic building and loan association or as a qualified thrift lender. 103

5. Restraints on Activities

Fifth, differentiation in the regulation of depository institutions arose from the varying restraints on activities based on the type of institution. For many years, thrifts were not subject to many of the prohibitions, restrictions, and limitations on activities applicable to banks. For instance, while the federal government regulated deposit interest rates paid by banks from the 1930s to the 1980s, 104 the federal government did not regulate the rates paid by savings and loan associations until 1966. 105 Other examples of lighter regulation of thrifts include affiliations with securities firms, 106 restrictions on loans to insiders, 107 and limitations on transactions with affiliates. 108


6. Accounting Rules and Tax Treatment

Sixth, differentiation in the regulation of depository institutions arose from differences in accounting rules and tax treatment of banks and thrifts. For most of the twentieth century, thrifts enjoyed more favorable accounting rules and federal income tax treatment than banks.109 While banks became subject to federal income tax in 1913,110 thrifts were exempt from federal income taxation until 1952.111 Even then, Congress provided thrifts with preferential tax treatment of reserves for bad debts.112 In addition, the FHLBB applied more lenient accounting principles to thrifts related to capital, goodwill, and losses than applied to banks during the 1980s.113

7. Institution Policy

Finally, differentiation in the regulation of depository institutions arose from depository institution policy. In the first two decades of the twentieth century, bank policy generally limited activities to the acceptance of demand deposits from and extension of demand loans to business customers.114 Banks did not usually accept deposits from lower


110. Underwood Tariff Act, Pub. L. No. 63-16, Sec. II., A., 38 Stat. 114, 166 (1913) (imposing income tax on every citizen and business, trade, or profession carried on in the United States, but providing exemptions for mutual savings banks, building and loan associations, and cooperative banks).


112. Id. § 313(e), 65 Stat. at 490.


114. Demand deposits are deposits that may be withdrawn at any time without prior notice of withdrawal to the depository institution. A demand deposit is “payable as a matter of legal right on demand.” Pauline B. Heller, Handbook of Federal Bank Holding Company Law 5–6 (1976). A demand loan does not have a fixed repayment schedule or maturity date. The borrower can make payments at any time without penalty. The lender may call for repayment of the loan at any time. O. Howard Wolfe, Practical Banking 102 (1918) (“Call, demand, temporary, and overnight loans are loans which differ from other classes of loans chiefly in the matter of maturity . . . . The time of their payment is optional, both with
and working class persons. Furthermore, bank policy generally precluded home mortgage and personal lending because such lending was too risky, too troublesome for the returns, or too long-termed when depositors could demand their money at any time. On the other hand, building and loan associations, credit unions, and ILCs were very willing to do business with the working class during the early years of the twentieth century. State-chartered building and loan associations made loans to members tied to share accumulation contracts. Credit unions encouraged saving and made small loans to “people of small means” on reasonable terms. ILCs issued investment certificates and made uncollateralized installment loans to low- and moderate-income industrial workers.

B. Convergence

During the second half of the twentieth century, market developments, legislative enactments, and institution policies and practices decreased the variation in the regulation, supervision, and activities of depository institutions and DIHCs. In financial markets, rising interest rates and competitive pressure from money market funds led to federal legislation and changes in financial institution policy and

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116. CLARK, supra note 74, at 5–6; NUGENT, supra note 74, at 59; CALDER, supra note 74, at 283–84.

117. Association members made monthly payments on shares typically over a period of years, which accumulated in a sinking fund used to pay off the loan when the shares matured. Rose & Snowden, supra note 75, at 5–6 (describing the movement of savings associations from share accumulation loans to fully amortized residential mortgage loans in the 1930s); see also FISHBACK ET AL., supra note 75, at 14–15. Other lenders typically required 50–60% down payments for loans with five-year terms and large balloon payments at the end of the term. While some of these loans provided for payment on principal, most loans were made on an interest-only basis, which did not apply anything to the principal of the loan. FISHBACK ET AL., supra note 75, at 12–13.

118. MOODY & FITE, supra note 76, at 35.

119. THE MORRIS PLAN OF INDUSTRIAL LOANS AND INVESTMENTS, supra note 77, at 9–10, 42; see also Control and Regulation of Bank Holding Companies: Hearings on H.R. 2674 Before the H. Comm. on Banking and Currency, 84th Cong. 585 (1955) (statement of Arthur J. Morris, Chairman, Morris Plan Corporation of America) (“I began the first Morris Plan bank . . . for the sole purpose of making a start in the democratization of credit. . . . I was not long in discovering that fact that more than 80 percent of the American public had no access to credit of any kind except as they resorted to loan sharks or charitable institutions.”); HERZOG, supra note 77, at 20–21.
practice. Congress enacted legislation related to depository institutions: (1) continuing to support housing finance; (2) extending and then eliminating prohibitions on affiliation with securities firms; (3) equalizing institution powers; (4) expanding eligibility for system membership and access to services; (5) unifying deposit insurance funds and extending coverage to industrial loan companies; (6) establishing branching rights parity; (7) extending restraints of bank activities to savings associations related to deposit interest rates, affiliations, affiliate transactions, insider loans, and tying the availability of products to obtaining other products; (8) mandating uniform accounting rules and tax treatment; (9) repealing prohibitions on bank affiliation with securities firms; and (10) imposing accountability measures for savings associations similar to those for banks. Institutions changed policy to engage in newly authorized activities and adopted names that blurred the distinctions between different types of institutions.

1. Congressional Support of the Role of Thrifts in Home Mortgage Lending

The first reason for convergence in the regulation of depository institutions was continued Congressional support of the role of thrifts in home mortgage lending. In the high interest rate environment of the 1970s and 1980s, depositors withdrew funds in banks and thrifts to invest in higher yielding money market funds. The impact on thrifts was particularly acute because of the mismatch between low-yield mortgage loans on their books and high cost of borrowing funds. Thrifts paid more to borrow funds than they earned on their mortgage loans. Thrifts suffered huge operating losses and depleted retained earnings. Congress responded to the difficulties faced by thrifts with legislation that
deregulated deposit interest rates,\textsuperscript{123} expanded the loans and investments permissible for federal savings and loan associations and mutual savings banks,\textsuperscript{124} and recapitalized the FSLIC.\textsuperscript{125} These actions allowed thrifts to diversify their assets and compete more effectively in a high interest rate environment.\textsuperscript{126} In doing so, Congress affirmed the continuing role of the thrift industry in home mortgage lending.\textsuperscript{127}

2. Repeal of Prohibitions on Affiliation with Securities Firms

The second reason for convergence in the regulation of depository institutions was reversal of public policy barring the affiliation


\textsuperscript{124} Qualified Thrift Lender Reform Act of 1991, Pub. L. No. 102-242, § 441(a), 105 Stat. 2236, 2381 (amending HOLA to authorize unsecured consumer loans to up 35% of assets); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 5(c)(D)(2), 103 Stat. 183, 287 (1989) (amending HOLA to authorize unsecured consumer loans to up 30% of assets); Thrift Institutions Restructuring Act, Pub. L. No. 97-320, § 325, 96 Stat. 1469, 1500 (1982) (amending HOLA to authorize commercial loans up to 10% of assets); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 401–402, 94 Stat. 132, 151–155 (authorizing unsecured consumer loans to up 20% of assets, commercial real estate loans up to 20% of assets, residential construction loans up to 5% of assets, education loans up to 5% of assets, and community development loans up to 2% of assets).


\textsuperscript{126} 126 Cong. Rec. 6893–6900 (1980) (statement of Sen. Proxmire) (“[T]he Depository Institutions Deregulation and Monetary Control Act of 1980 ... provides new lending powers to thrift institutions in order to enhance their competitive viability, which means that savings and loans can do many things banks can do, with trust powers, consumer loan powers, and so on. ... [T]itle IV augments the powers of thrift—... institutions—savings and loan associations and Federal mutual savings banks so that they may better serve the consumer and remain viable in a market environment.”).

\textsuperscript{127} S. REP. NO. 96-368, at 12–13 (1979) (“Thrifts have historically functioned as depositories and home mortgage lenders ... . This legislation gives federal savings and loans the ability to compete for the savings dollar while remaining housing oriented.”). Subsequent legislation during the 1980s continued to support the thrift industry. \textit{See, e.g.}, S. REP. No. 97-641, at 85 (1982) (Conf. Rep.) (“The purpose of the Act was “to revitalize the housing industry by strengthening the financial stability of home mortgage lending institutions and ensuring the availability of home mortgage loans.”); H.R. REP. NO. 100-261, at 164 (1987) (Conf. Rep.) (“The House Bill and the Senate amendment provide an approach for dealing with troubled but well-managed and viable thrifts ... . The overall objective of the two approaches is to maximize the long-term viability of the thrift industry at the lowest cost to the Federal Savings and Loan Insurance Corporation (FSLIC).”); S. REP. NO. 101-19, at 3 (1989) (“[T]he Committee found most persuasive the testimony of those experts who concluded that good reasons to maintain a separate thrift industry still exist. Essential to that conclusion, however, is the assumption that the thrift industry will continue to pay a distinct economic role, distinguishable from that fulfilled by the commercial banking industry, as the primary source of residential housing finance.”).
of banking organizations and securities firms. In 1999, Congress enacted the Gramm-Leach-Bliley Act (“GLBA”), which repealed prohibitions on the affiliation of banking organizations and securities firms.128

3. Institution Powers Equalized

The third reason for convergence in the regulation of depository institutions was the equalization of the powers of depository institutions. In 1980, Congress authorized savings associations to offer interest bearing checking accounts like banks,129 and required all insured depository institutions to maintain reserves on deposits.130 In the lending realm, Congress authorized savings associations to make commercial, consumer, educational, credit card, and other types of loans offered by banks.131 Congress also authorized the FHLBB to permit federal savings


130. Id. § 103., 94 Stat. at 133.

associations to provide trust services, paralleling the authority available to national banks. In 1982, Congress authorized insured savings associations to offer demand deposits, which brought parity to deposit taking activity.

4. Banking System Membership and Access to Services Expanded

The fourth reason for convergence in the regulation of depository institutions was the expansion of institutions eligible for FHLB System membership and access to FR System services. In 1980, Congress mandated that Federal Reserve Banks make their services and loans equally available to all depository institutions. In 1989, Congress expanded the scope of institutions eligible for FHLB System membership by authorizing any depository institution with at least 10% of its total assets in residential mortgage loans to become FHLB members. In 1999, the GLBA authorized FDIC-insured banks with average assets under $500 million to become members of the FHLB System, regardless of its percentage of assets in residential mortgages.

5. Deposit Insurance Extended and Unified

The fifth reason for convergence in the regulation of depository institutions was the extension of deposit insurance to ILCs and merger of deposit insurance funds. In the 1930s, Congress provided for separate insurance funds with the FDIC insuring bank deposits and the FSLIC insuring savings association deposits. In 1982, Congress required the FDIC to insure the deposits of ILCs. In 1989, Congress moved

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138. Garn-St Germain Act of 1982 § 703, 96 Stat. at 1538. In 1933, the FDIC determined that industrial loan companies (“ILCs”) were not eligible for deposit insurance. Mindy West, The FDIC’s Supervision of ILCs: A Historical Perspective 8 FED. DEPOSIT INS. CORP. SUPERVISORY INSIGHTS, Summer 2004; see also GOV’T ACCOUNTABILITY OFFICE, GAO-05-
administration of the savings association deposit fund from the FLSIC to the FDIC.\textsuperscript{139} In 2006, Congress merged the bank and savings association funds into one fund administered by the FDIC.\textsuperscript{140} Currently, banks, thrifts, and ILCs operate under the same laws and regulations applicable to deposit accounts.

6. Branching Rights Parity

The sixth reason for convergence in the regulation of depository institutions was that Congress and state legislatures slowly established parity in the branching rights of depository institutions. Historically, thrifts\textsuperscript{141} and ILCs\textsuperscript{142} enjoyed more expansive rights to establish branches than banks. In the early 1980s, several states authorized interstate branching by banks and BHCs. Some states allowed banks from any state to enter the state.\textsuperscript{143} Other states provided for entry on a reciprocal...
basis,\textsuperscript{144} authorized entry for special-purpose facilities such as credit card operations,\textsuperscript{145} or authorized the acquisition of a troubled or failing institution.\textsuperscript{146} By 1992, all states but Hawaii had passed laws authorizing regional or nationwide banking.\textsuperscript{147}

The biggest step toward bank parity with savings association regarding branches came through the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal Act”).\textsuperscript{148} The Riegle-Neal Act authorized a bank in a state that satisfied several conditions to acquire an existing bank in another state, unless the state opted-out of interstate banking.\textsuperscript{149} Only two states opted out.\textsuperscript{150} Forty-seven states adopted legislation authorizing interstate branching legislation.\textsuperscript{151} All but two of these states chose to bar \textit{de novo} interstate branching—opening a new in-state branch rather than acquiring an existing branch.\textsuperscript{152} The Act largely eliminated the advantage federal savings associations held over banks related to interstate banking.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{144}Roussakis, supra note 143, at 45 (citing Kentucky, New York, Washington, and West Virginia).
\item \textsuperscript{145}Roussakis, supra note 143, at 45 (citing South Dakota and Delaware).
\item \textsuperscript{146}Id.
\item \textsuperscript{149}Id. §§ 101, 102, 108 Stat. at 2339–2343; see also Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, § 2, 111 Stat. 238 (1997) (establishing that laws of a state bank’s host state apply only to the extent that they would apply to a branch of an out-of-state national bank).
\item \textsuperscript{150}All But Few States Beat Trigger Date on Nationwide Branching, BANKING POL’Y REP., June 1992, at 11 (“Texas and Montana were the only states to opt-out but in both cases the law includes a sunset provision that will automatically cancel the opt-out provision.”); Fed. Deposit Ins. Corp., \textit{ supra} note 86, at 4 (“Only one state, Texas, had ‘opted-out.’”).
\item \textsuperscript{151}All But Few States Beat Trigger Date on Nationwide Branching, \textit{ supra} note 150 (“As of May 23, 47 states plus the District of Columbia had acted on interstate branching under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.”).
\item \textsuperscript{152}Id. (“Most states chose to bar \textit{de novo} interstate branching – that is, opening a brand new in-state branch rather than having to acquire an in-state bank.”).
\item \textsuperscript{153}Fed. Deposit Ins. Corp., \textit{ supra} note 86, at 3 (“The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 reduced much of the historical branching advantage of savings institutions.”). Still, federal savings associations maintained slight branching advantages over banks. A federal savings association could establish an interstate \textit{de novo} branch, while a bank was not authorized to do so unless the state affirmatively opted-in to such branching (and only one state did so). \textit{Id.} at 4 (“Of the states that have ‘opted-in,’ however, only Indiana and Puerto Rico allow immediate interstate branching.”). However, Congress eliminated the opt-in requirement for \textit{de novo} branching in 2010, which allowed
7. Restraints on Activities Extended

The seventh reason for convergence in the regulation of depository institutions was the extension of many of the prohibitions, restrictions, and limitations initially applicable to banks to savings associations. In 1966, Congress authorized the FHLBB to limit the deposit interest rates paid by savings associations, as the FRB and FDIC exercised similar authority to limit the deposit interest rates paid by banks beginning in the 1930s. In 1987, savings associations also temporarily became subject to a prohibition on affiliations with securities firms that applied banks. Congress repealed these prohibitions for all institutions in 1999. Restrictions on loans to directors, officers, and principal shareholders applicable to banks became applicable to savings associations in 1989. Savings associations also became subject to banks to establish branches nationwide on a de novo basis. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, § 613(a), 124 Stat. 1376, 1614 (2010) (codified at 12 U.S.C. § 36(g)(1)(A) (pertaining to national banks); 12 U.S.C. § 1828(d)(4)(A)(i) (pertaining to state insured banks)).

154. An Act of Sept. 21, 1966, Pub. L. No. 89-597, §§ 2(c), 3, 4, 80 Stat. 823, 824–825. Even then, the FHLBB, the FRB, and FDIC established interest rate ceilings that gave savings and loan associations an advantage over banks in attracting deposits. DEP’T OF THE TREASURY, THE REPORT OF THE PRESIDENT’S INTER-AGENCY TASK FORCE ON REGULATION Q: DEPOSIT INTEREST RATE CEILINGS AND HOUSING CREDIT 40 (1979) (“Thus, the beginning of the “differential” saw a 75 basis point advantage in passbook savings for savings and loan associations over commercial banks, and a 25 basis point advantage for the former in small CDs.”). Savings associations could pay a higher rate of interest on deposits than banks until deposit interest rate ceilings were eliminated in 1986. Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221, § 202, 94 Stat. 132, 142. ILCs were not subject to deposit interest rate limitations. Barth et al., supra note 105, at 22 n. 18.


limitations that applied to bank loans and other covered transactions with affiliates in 1989.\textsuperscript{159}

8. Similar Accountability Measures Imposed

The eighth reason for convergence in the regulation of depository institutions was the imposition of similar accountability measures for all depository institutions. In 1989, Congress imposed cross-guarantee liability on commonly controlled depository institutions.\textsuperscript{160} In 1991, Congress required all of the federal banking agencies to take prompt corrective action when a depository institution under its jurisdiction failed to meet capital requirements.\textsuperscript{161} At the same time, Congress imposed requirements on depository institution management, accountants, and audit committees to enhance accountability for financial statements, internal controls, and compliance with law and regulation.\textsuperscript{162} Through laws enacted in 1966, 1978, and 1989, Congress strengthened the authority of all of the federal banking agencies to take enforcement action against depository institutions and institution-affiliated parties.\textsuperscript{163}

\textsuperscript{159} Id. at § 301; see generally Williams, supra note 102, at § 13.01[1].

\textsuperscript{160} Financial Institutions Reform, Recovery, and Enforcement Act of 1989, § 206, 103 Stat. at 201 (stating that, with certain exceptions, if the FDIC or FSLIC incurred a loss in connection with the default of an insured bank or thrift or in connection with providing assistance to a bank or thrift in danger of default, any other commonly controlled insured depository institution may be required to reimburse the FDIC for such loss).

\textsuperscript{161} Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 131, 105 Stat. 2236, 2253. Congress established mandatory and discretionary restrictions on any depository institution that fails to remain at least adequately capitalized. 12 U.S.C. § 1831o(e)-(i) (2018). The mandates become progressively more restrictive as capital levels decrease: (i) restricting discount window borrowing, (ii) requiring a capital restoration plan, (iii) prohibiting asset growth, acquisitions, new lines of business, (iv) restricting interest rates paid, (v) requiring election of new directors or dismissal of senior management, (vi) requiring divestitures, and (vii) prohibiting payments on subordinated debt. Id. The agencies must issue a PCA directive to impose certain provisions on a significantly or critically undercapitalized bank. Id. The agencies may also issue a PCA directive to impose discretionary provisions on an undercapitalized bank. Id. at § 1831o(f)(2). Within 90 days of a depository institution’s becoming critically undercapitalized, the agency must appoint a receiver, or take such other action that the agency, with the concurrence of the FDIC, determines would better serve the purposes of a PCA. Id. § 1831o(h)(3).

\textsuperscript{162} Federal Deposit Insurance Corporation Improvement Act of 1991, § 112, 105 Stat. at 2242.

\textsuperscript{163} Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, §§ 102,201, 80 Stat. 1028, 1036, 1040, 1046, 1049 (authorizing federal banking regulators to issue cease and desist orders, remove any bank officer or director for breach of fiduciary duty, and suspend any officer or director charged with a felony involving dishonesty or breach of trust); Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, §§ 103,107(b), 92 Stat. 3641, 3643, 3657 (authorizing assessment of civil money penalties against depository institutions and issuance of temporary cease and desist orders); Financial
9. Uniform Accounting Rules and Tax Treatment Mandated

The ninth reason for convergence in the regulation of depository institutions was that Congress mandated that thrifts use the same accounting rules that applied to banks and eliminated favorable tax treatment of thrifts over banks. With regard to accounting, Congress required thrifts to shift from Regulatory Accounting Principles to Generally Accepted Accounting Principles (“GAAP”) to the same extent required of banks, mandated the phase-out of the inclusion of “supervisory goodwill” in the calculation of regulatory capital, and directed an end to the deferral of loan losses resulting from adverse changes in interest rates. With regard to federal income tax, Congress subjected thrifts to federal income tax in 1954. However, Congress allowed mutual thrifts to calculate reserves for bad debts in ways more favorable than the method required for banks. Congress gradually diminished the favorable treatment mutual thrifts enjoyed related to reserves for bad debts. The tax acts of 1969, 1976, and 1986 gradually diminished the impact of this tax advantage. In 1996, Congress totally eliminated the preferential tax treatment of thrifts.

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Institutions Reform, Recovery, and Enforcement Act of 1989 §§ 224, 902(a), 907, 913, 926, 103 Stat. at 450, 451, 462, 483, 488 (requiring FDIC approval for less than adequately capitalized banks to accept brokered deposits, expanded authority to issue cease and desist orders to cover specific banking activities, authorized issuance of temporary orders to restrict an insured bank’s growth, authorized expedited termination of deposit insurance coverage, established a three-tiered system for assessment of civil money penalties, and required federal banking agencies to publicly disclose enforcement actions).


165. Id. This action caused many more savings associations to fall out of compliance with capital standards and face closure. Williams, supra note 102 § 1.03[4].


168. Id. at § 593, 68A Stat. at 205.


10. Ambiguous Institution Names Permitted

The tenth reason for convergence in the regulation of depository institutions is the use of names by depository institutions that blur the distinctions between different types of depository institutions. Ambiguity arises from use of trade names, names of acquired institutions, and legal names that reflect an institution’s charter prior to conversion to another type of charter (e.g., use of the word “bank” for the name of a branch of a savings association). Additional ambiguity about the type of institution represented by a name arises from the use of the word “bank” in the legal name of thrift institutions (e.g., federal savings bank and state savings bank). Furthermore, the use of the word “bank” by ILCs dilutes the meaning of the word in the name of a depository institution (e.g., “industrial bank”).

11. Institution Policy Changed

Finally, the regulation of depository institutions has converged because expanded powers and revised assessments of risk and profitability by depository institutions have prompted changes in policies and entry into lines of business occupied by other depository institutions. In simplistic terms, national banks entered the market for residential

against taxable income additions to bad-debt reserve equal to 8% of taxable income) or experience method (based on institution’s bad-debt experience over previous 6 years). Prior to January 1, 1987, the percentage of taxable income limitation was 40%. Banks with total assets over $500 million required to deduct bad-debts as they occurred using the specific charged-off method, while smaller banks allowed to use the experience method or the specific charge-off method. Fed. Deposit Ins. Corp., supra note 86, at 3.


mortgage loans and consumer loans in the late 1920s and thrifts entered the market for commercial and consumer loans in the early 1980s.

175. Federal Reserve Act, Pub. L. No. 63-43, §24, 38 Stat. 251, 273 (1913) (improved and unencumbered farmland); McFadden Act, Pub. L. No. 69-639, § 16, 44 Stat. 1224, 1232 (1927) (codified at 12 U.S.C. § 371) (improved real estate). In 1900, non-institutional lenders held almost 50% of the nonfarm residential mortgage debt, followed by mutual savings banks with approximately 22%, savings and loan associations with 13%, commercial banks with 6%, and life insurance companies with 5%. LEO GREBLER ET AL., CAPITAL FORMATION IN RESIDENTIAL REAL ESTATE 197 tbl. 54, 200 chart 23 (1956) (non-farm residential mortgage debt); see also CARL F. BEIHREN, COMMERCIAL BANK ACTIVITIES IN URBAN MORTGAGE FINANCING 33, tbl. 4 (1952) (commercial banks held 18.2% of nonfarm mortgage debt in 1949). In 1913, state banks accounted for more than 95% of residential real estate loans held by all commercial banks, and such loans accounted for 16% of the total assets of state banks. After national banks obtained the authority to make loans secured by a first lien on improved real estate in 1927, national banks began to hold a larger portion of residential real estate loans relative to state banks.

176. At the beginning of the twentieth century, banks rarely made consumer loans. See supra section III.A.8. Working people relied on industrial loan banks, finance companies, credit unions, pawn shops, loan sharks, and others for small loans to purchase goods or meet unexpected expenses. CLARK, supra note 74, at 27–29. However, banks saw profit opportunities in lending to consumers as the century progressed. In 1928, the National City Bank of New York (predecessor of Citibank) opened a personal loan department to make loans unsecured by tangible property. Id. at 9, 75. More than 100 banks quickly opened similar departments. Id. By 1936, 685 banks operated personal loan departments. NUGENT, supra note 74, at 342. The consumer debt held by the personal loan departments grew from $17 million in 1928 to $131 million in 1936. Id. at 343.

177. In the 1980s, thrifts began to offer new deposit and loan products enabled by broader authorities granted by Congress. Thrifts were authorized to extend their lending beyond financing residential real estate to lending for consumer, commercial, educational, and other purposes. See, e.g., Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 401,402, 94 Stat. 132, 153–155 (codified at 12 U.S.C. § 1461) (authorizing unsecured consumer loans to up 20% of assets, commercial real estate loans up to 20% of assets, residential construction loans up to 5% of assets, education loans up to 5% of assets, and community development loans up to 2% of assets); Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 325, 96 Stat. 1469, 1500 (codified at 12 U.S.C. § 1464) (authorizing commercial loans up to 10% of assets); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 301, 103 Stat. 183, 287 (codified at 12 U.S.C. § 1464) (authorizing unsecured consumer loans to up 30% of assets); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 441(a), 105 Stat. 2236, 2381 (codified at 12 U.S.C. § 1464) (unsecured consumer loans to up 35% of assets); Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, § 2303, 110 Stat. 3009, 3009-424 (codified at 12 U.S.C. § 1464) (authorizing commercial loans up to 20% of assets). Congress also authorized thrifts to offer the interest-bearing checking accounts and demand deposit accounts. Depository Institutions Deregulation and Monetary Control Act of 1980, § 303, 94 Stat. at 146; Garn-St Germain Depository Institutions Act of 1982, § 312, 96 Stat. at 1496. Unfortunately, the inexperience of thrifts with these new lines of business became a significant contributor to the failure of many institutions. NAT’L COMM’N ON FIN. INST. REFORM, RECOVERY, AND ENFT, supra note 113, at 2, 42 ("The S&L’s asset and liability powers were expanded sharply, and they were allowed to move rapidly into risky new areas..."
C. Remaining Differences

Small differences remain in the regulation of banks and thrifts related to banking system membership, intrastate branching, types of lending, and permissible activities.

1. FHLB System Membership Eligibility

First, some differences in eligibility for bank system membership remain in place. Savings associations are not eligible for membership in the FR System, but savings associations are eligible for membership in the FHLB System. However, savings associations are subject to stricter eligibility requirements than banks for membership in the FHLB System. A savings association must meet the QTL test to be eligible for and maintain membership in the FHLB System. More dramatically, an insured bank with average assets under $500 million may become a member of the FHLB System, regardless of its percent of assets in residential mortgages.

2. Intrastate Branching Rights

Second, there are differences in federal law applicable to branching by banks and thrifts. Thrifts are permitted to establish

of business in which they lacked expertise . . . . [The FHLBB] allowed members . . . to enter risky areas in which they had little or no experience, and in which there was an unusual potential for abuse and fraud.

LAWRENCE J. WHITE, THE S&L DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION 115, 117 (1991) (“The hundreds of rapidly growing thrifts of the 1982-1985 period did not use their new powers for prudent diversification. Rather, these thrifts plunged into new assets and investments in ways that increased their risks, not decreased them . . . . [Insolvent thrifts] largely failed because of an amalgam of deliberately high-risk strategies, poor business judgments, foolish strategies, excessive optimism, and sloppy and careless underwriting, compounded by deteriorating real estate markets.” (emphasis in original)).

178. 1 FED. RES. BULL. 212 (1915).
180. 12 U.S.C. § 1467a(a)(1)(D)(ii)(I), (b). The QTL test requires a savings association to have at least 65% of its total assets in residential real estate loans or investments. However, an insured bank with $500 million or more in total assets must only hold 10% of its total assets in residential real estate loans and investments to continue to maintain its FHLB System membership. 12 U.S.C. § 1467a(m)(1), (3)(C).
interstate and intrastate branches regardless of state law. While national and state banks may establish interstate branches, they are still limited to locations within a state where a locally chartered state bank would be permitted to establish a branch.

3. Lending and Investment Limitations

Third, there are differences in federal law related to lending. To remain regulated as a federal savings association, the association must meet the QTL test or qualify as a domestic building and loan association under the Internal Revenue Code. While federal savings associations can engage in almost all of the types of lending authorized for national banks, they are subject to a percentage of total asset limitations. For example, a bank may concentrate its overall lending in commercial real estate loans subject only to the management of risk consistent with safe and sound banking practices, but the commercial real estate loans made by a federal savings association are limited to 20% of its total assets.

4. Permissible Activities

Finally, there are minor differences in the permissible activities of banks and thrifts under federal law. For instance, federal savings associations are authorized to engage in real estate brokerage, management, and development activities through service corporations. National banks and their subsidiaries, however, are not authorized to

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182. WILLIAMS, supra note 102, at § 6.02[2] (“Federal savings institutions have the statutory authority to branch nationwide, subject to few constraints. The authority of the . . . OTS to permit interstate expansion by federal institutions derives from the agency’s ‘plenary authority’ with respect to federal institutions.”). id. (“[I]ntrastate restrictions on branching continue to apply to national banks, to the same extent as their state counterparts, and federal thrifts are not similarly constrained.”)


186. 12 U.S.C. § 1464(c)(2)(A) (2018). Similarly, a federal savings association’s consumer lending is limited to 35% of its total assets, construction lending is limited to 5% of total assets, and community development lending is limited to 2% of total assets. 12 U.S.C. § 1464(c)(2)(D), (c)(3)(A), (c)(3)(C) (2018).

engage in these activities. On the other hand, national banks and state banks may engage in certain financial activities through a financial subsidiary, while savings associations are not permitted to form financial subsidiaries.

D. Proposals to Eliminate the Thrift Charter

The convergence in the regulation and activities of banks and thrifts prompted proposals for the elimination of the thrift charter. In the late 1990s, Congress considered legislation to eliminate the federal savings association charter, but support for a separate thrift industry led to the preservation of the charter. In 2018, Congress granted the OCC the authority to permit certain federal savings associations to operate subject to the same investment and lending powers as a national bank without converting to a national bank. The authority results in a functional elimination of the thrift charter without requiring thrifts to change their form of organization. Going further, at least two states have eliminated their thrift charters while adopting a universal charter for banks.
The advantages and disadvantages of proposals to eliminate the thrift charter are beyond the scope of this article. However, the related issue of a unified statutory scheme for the regulation and supervision of DIHCs is taken up in the conclusion of this article. The following review of differentiation and convergence in the regulation and supervision of DIHCs provides the foundation for the recommendation made in the conclusion that Congress unify regulation of all companies controlling an FDIC-insured depository institution in one statute of uniform application.

IV. DIFFERENTIATION AND CONVERGENCE IN THE REGULATION OF DIHCs

Generally, a company owning or controlling a bank is a BHC, while a company owning or controlling a saving association is an SLHC. If a company owns or controls both a bank and a savings association, it is a BHC. A company owning or controlling a state savings bank is a BHC unless its subsidiary state savings bank files an election with the FDIC to be treated as a savings association. Then, the holding company is regulated as an SLHC rather than a BHC unless the company also controls another entity that is a “bank” under the BHCA. Companies owning or controlling a credit card bank, a non-depository trust company, or an ILC are not subject to regulation as BHCs or SLHCs unless they also own or control a bank or thrift.

The activities permissible for a DIHC depend upon the type of holding company. BHCs are prohibited from owning or controlling any company other than a bank or engaging in any business other than managing or controlling banks unless the activity fits within the exemptions specified in the BHCA, such as an activity “so closely related

creation of a “universal” bank charter in the state . . . consolidate[es] the three existing charter types into one universal charter. On Jan. 1, 2018, this new universal “state bank” charter became effective, encompassing Ohio-chartered banks, savings and loan associations (S&Ls) and savings banks.”

197. Id. § 1841(a)(1).
198. Id. § 1841(c)(2)(D), (F), (H).
199. Id. §§ 1467a(a)(1)(D), 1841(a)(1).
to banking or managing or controlling banks as to be a proper incident thereto.”

SLHCs that own or control more than one savings association are prohibited from engaging in any business activity other than exempt activities specified in the Home Owners’ Loan Act (“HOLA”). Certain SLHCs that own or control only one savings association not subject to the activities restrictions of HOLA if their subsidiary savings associations satisfy the requirements for a QTL. These SLHCs are called grandfathered unitary savings and loan holding companies (“GUSLHCs”).

BHCs and SLHCs that become financial holding companies (“FHCs”) may engage in certain financial activities, as well as activities incidental or complementary to a financial activity. Financial activities include securities underwriting and dealing, insurance underwriting and agency, merchant banking activities, activities previously determined by the FRB to be closely related to banking, and activities routine in connection with the transaction of banking abroad. The FRB may also determine that an activity is “complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.”

The activities of a parent company of an industrial loan company are not limited by banking law or regulation because they are not BHCs or SLHCs under the BHCA or HOLA, respectively. Parent companies of ILCs are free to engage in commercial activities without the restrictions of the BHCA an HOLA applicable to BHCs and SLHCs, respectively. ILCs have engaged in a variety of commercial activities, including automobile manufacturing, retail consumer sales, transportation, and energy production. The FDIC’s recent proposal

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regarding the supervision of the parent companies of ILCs would not limit them to financial or any other activities.\(^\text{208}\)

**A. Growth in the Number of Holding Companies**

During the latter half of the twentieth century, banks and thrifts generally found it advantageous to form DIHCs. The commonly cited reasons for the formation of holding companies include providing access to capital markets, facilitating acquisitions, expanding activities, and avoiding state franchise taxes.\(^\text{209}\) The following chart shows the growth in the number of BHCs.

![Figure 1](image)

**Figure 1**

Source: FRB Annual Reports, FFIEC, National Information Center

Figure 1 shows the number of BHCs grew from 69 in 1956 to a high of 6,474 in 1988.\(^\text{210}\) In 1988, BHCs controlled 9,025 banks, which held 91% of the assets of all insured commercial banks.\(^\text{211}\) At the end of 2019, there were 3,725 top-tier BHCs that controlled 3,827 banks, which

\(^{208}\) See Parent Companies of Industrial Banks and Industrial Loan Companies, 85 Fed. Reg. 17771 (Mar. 31, 2020). This proposal differs from the FDIC’s 2007 proposal, which limited the control of ILCs to financial companies and required a commitment from the parent company that it would only engage, directly or indirectly in financial activities. Industrial Bank Subsidiaries of Financial Companies, 72 Fed. Reg. 5217, 5224 (Feb. 5, 2007).

\(^{209}\) See, e.g., L. GARRETT DUTTON, JR. & WILLIAM R. COLMERY, FORMATION OF A BANK HOLDING COMPANY IN PENNSYLVANIA 2–12 (Packard Press, 1982).

\(^{210}\) MARK B. GREENLEE, GROWTH OF BHCs (1957–2019), [https://perma.cc/8SH4-JKYB] (calculating the change in the number of BHCs based on information obtained from FRB annual reports, available at provided link); 1957 FRB ANN. REP. 71; 1988 FRB ANN. REP. 169.

\(^{211}\) 1988 FRB ANN. REP. 169.
held $23.1 trillion in total assets, which represented 94% of the assets of all insured commercial banks.\textsuperscript{212}

![Figure 2](image)

Source: FFIEC, National Information Center

Figure 2 shows the growth in the number of SLHCs from two in 1968 to a high of 893 in 2008.\textsuperscript{213} In 2008, SLHCs controlled 479 savings associations with total assets of $767 billion, which represented 62% of all assets of savings associations.\textsuperscript{214} At the end of 2019, there were 187 top-tier SLHCs that controlled 195 depository institutions, which held $1.86 trillion in total assets.\textsuperscript{215} Approximately 92% of SLHCs engaged primarily in depository activities.\textsuperscript{216} The other SLHCs engaged primarily

\begin{itemize}
  \item \textsuperscript{212} 2019 FRB ANN. REP., 41, 44. Any company with direct or indirect control of a bank is a BHC. Many banking organizations use a tiered ownership structure. A “top-tier” BHC is the ultimate parent of a banking organization.
  
  \item \textsuperscript{213} National Information Center, Fed. Fin. Institutions. Examination Council, [https://perma.cc/SRS3-FPQ4] (providing a copy of calculations based on data download accessible through link); see also S. REP. No. 86-810, at 4 (1959) (“At the time of the hearings on the Financial Institutions Act of 1957, only two of these companies were known -one controlling four associations in California, the other controlling two associations in Utah and Idaho.”).
  
  \item \textsuperscript{214} National Information Center, supra note 213.
  
  \item \textsuperscript{215} 2019 FRB ANN. REP., 41, 45. There were 358 SLHCs at this time, 171 of which were subsidiaries of top-tier SLHCs. \textit{Id}. Any company with direct or indirect control of a savings association is an SLHC. Many thrift organizations use a tiered ownership structure. A “top-tier” SLHC is the ultimate parent of a banking organization.
  
  \item \textsuperscript{216} \textit{Id}. at 41.
\end{itemize}
in nonbanking activities, such as insurance underwriting, securities brokerage, and commercial activities.\textsuperscript{217}

Many commercial companies formed or acquired an ILC during the latter half of the twentieth century. The following figure shows the number of ILCs from 1910 to 2010.

Figure 3

![Number of Industrial Loan Companies](image)

Source: James R. Barth, Tong Li, Apanard Angkinand, Yuan-Hsin Chiang, and Li Li, *ILCs: Supporting America’s Financial System* (Milliken Institute, 2012), Appendix 4.

Figure 3 shows the growth of ILCs from one institution in 1910 to a high of 254 institutions in 1966. The total assets held by all ILCs was $408 million in 1966. The number of ILCs declined to 130 by 1977, before increasing to 155 in 1983. The total assets of ILCs reached an all-time high of $270 billion in 2007, which were held by 94 ILCs. In 2010, the number of ILCs declined to 78, which held $122 billion in total assets. At the end of 2019, there were 34 ILCs with $102.4 billion in total assets.\textsuperscript{218}

For most of the twentieth century, the regulation of BHCs, SLHCs, and parent companies of ILCs differed significantly. As the twentieth century progressed, changes in public policy, market developments, and changes in law made the regulation of BHCs and SLHCs more and more similar. The following sections of this article

\textsuperscript{217} See id.

summarize the areas of differentiation and convergence in the regulation of DIHCs.

B. Differentiation

Differentiation in the regulation of DIHCs arose from variations in: (1) Congressional public policy objectives related to holding company affiliations with other companies; (2) limitations on transactions with affiliates; (3) reporting, examination, and voting permit requirements; (4) permissible activities for holding companies; and (5) Congressional concern about the separation of banking and commerce.

1. Prohibitions on Affiliation with Securities Firms

Differentiation in the regulation of BHCs, SLHCs, and parent companies of ILCs arose partially due to variations in federal law related to bank affiliations with other companies. In the early 1930s, Congress became concerned about the role of banks, their affiliates, and holding companies in stock speculation that contributed to the stock market crash of 1929. This concern led to provisions in the 1933 Act that prohibited affiliations between a member bank and affiliates of a member bank with securities firms, limited member bank transactions with affiliates, required member banks to obtain reports from affiliates, and conditioned voting of member bank stock by a holding company on obtaining a permit from the FRB.

219. The Senate report in support of the 1933 Act identified “excessive use of bank credit in making loans for the purpose of stock speculation” as a source of the “panic of 1929.” S. REP. NO. 73-77, at 9 (1933); S. REP. NO. 72-584, at 9 (1932). The same Senate report viewed bank affiliates devoted to “perilous underwriting operations, stock speculation, and maintaining a market for the banks’ own stock” as a large factor contributing to the panic of 1929. S. REP. NO. 73-77, at 10. Similarly, the House Report supported legislation to “prevent the undue diversion of funds into speculative operations” and recommended provisions “strengthening restrictions upon banks . . . making loans for speculative purposes.” H. REP. NO. 73-150, at 1 (1933).


221. Id. § 13, 48 Stat. at 183 (adding section 23A to the FR Act).

222. Id. § 5(c), 48 Stat. at 165.

The Glass-Steagall Act prohibited the affiliation of banking organizations and securities firms. Section 20 of the 1933 Act prohibited affiliations between a member bank\(^\text{224}\) and any firm engaged principally in the underwriting of securities, as well as affiliations between such securities firms and shareholders of a member bank that owned or controlled a majority of the shares of such a bank or owned or controlled more than 50% of the number of shares voted for election of such bank’s directors.\(^\text{225}\) This brought many companies that owned or controlled a member bank within the scope of the prohibition. However, Section 20 did not apply to nonmember banks, savings associations, or the companies controlling them.\(^\text{226}\) Section 21 prohibited any person engaged in the underwriting of securities from receiving deposits.\(^\text{227}\) Section 32 prohibited interlocking directors and management between a member bank and a securities firm.\(^\text{228}\)

2. Limitations on Transactions with Affiliates

Differentiation in the regulation of BHCs, SLHCs, and parent companies of ILCs also arose due to variations in the limitations on affiliate transactions. The 1933 Act added Section 23A to the FR Act, which limited (1) the aggregate amount of member bank transactions, such as loans and investments, with any one affiliate to 10% of the member bank’s capital and surplus; and (2) member bank transactions with all affiliates to 20% of the member bank’s capital and surplus.\(^\text{229}\)

\(^\text{224}\) All national banks were automatically member banks and state-chartered banks could elect to become member banks. Federal Reserve Act, Pub. L. No. 63-43, ch. 6, 38 Stat. 251 (1913).

\(^\text{225}\) See Banking Act of 1933, § 2(c), 48 Stat. at 163.

\(^\text{226}\) WILLIAMS, supra note 102, at § 11.01[1] (The G-S Act “did not and does not apply to thrifts for two reasons. First, at the time it was enacted, thrifts were small, locally oriented institutions with a narrow focus on residential lending. . . . Second, thrifts were entirely state-chartered and supervised. . . . And even though the subsequent enactment of HOLA provided for federal chartering of thrifts, they still were not thought of as ‘banks’ because of their limited powers and functions.”). Sections 20 and 32 of the G-S Act applied to savings associations from August 10, 1987 to March 1, 1988. Competitive Equality Amendments of 1987, Pub. L. No. 100-86, § 106, 101 Stat. 552, 576. Even then, the statute set forth a number of exceptions to the prohibition related to specifically named entities and activities. Id.

\(^\text{227}\) Banking Act of 1933 § 21., 48 Stat. at 166, 189. As originally enacted, only section 21 of the G-S Act applied to nonmember banks and savings associations. Section 21 did not apply to an ILC unless it received deposits rather than issued thrift certificates.

\(^\text{228}\) Id. § 32, 48 Stat. at 194.

\(^\text{229}\) Id. § 13, 48 Stat. at 183 (adding section 23A to the FR Act).
These limitations applied to member bank transactions with a holding company that owned or controlled a majority of the shares of the bank or owned or controlled more than 50% of the number of shares voted for election of the bank’s directors. These limitations did not apply to transactions between a nonmember state bank, SLHC, or parent company of an ILC.

For most of the twentieth century, the regulation of savings association transactions with affiliates differed significantly from the regulation of bank transactions with affiliates, because the 1933 Act did not govern savings association transactions with affiliates. However, in 1968, the SLHCA prohibited certain transactions between a savings association subsidiary of an SLHC and its affiliates, such as a parent SLHC and its other subsidiaries. The SLHCA also required regulatory approval for certain other transactions between a savings association subsidiary of an SLHC and its affiliates.

3. Affiliate Reports, Examinations, and Voting Permits

Differentiation in the regulation of BHCs, SLHCs, and parent companies of ILCs also arose from variation in the applicability of reporting, examination, and voting permit requirements. The 1933 Act enabled bank regulators to determine the relationships between member banks and their affiliates. Member banks were required to provide the FRB with reports obtained from affiliates to fully disclose the relations between affiliates and the bank to enable the FRB to determine the effect of the relations upon the affairs of the bank. In addition, holding
company affiliates were required to obtain a permit from the FRB before voting any stock of a member bank that it owned or controlled. In applications for a voting permit, the FRB required the holding company affiliate to agree to certain conditions, such as submission of reports and consent to examination.

4. Permissible Activities

Differentiation in the regulation of BHCs, SLHCs, and parent companies of ILCs arose from variation in permissible activities. Currently, the BHCA and HOLA restrict the activities of BHCs, SLHCs and their non-depository subsidiaries, but not the activities of GUSLHCs or the parent companies of ILCs. BHCs and SLHCs may not engage in any business or activity that is not authorized by statute, regulation, or order. While there are substantial similarities in the activities permissible under the BHCA and SLHCA, there also are significant differences.

i. Bank Holding Companies

In 1956, the BHCA required registration of companies owning or controlling two or more banks as BHCs, prohibited a company from acquiring two or more banks without the prior approval of the FRB, and authorized the FRB to issue regulations, approve certain nonbanking activities, require reports, conduct examinations, and enforce law and regulation. With regard to activities, the BHCA prohibited a BHC from engaging in any business other than managing or controlling banks.


237. 12 U.S.C. §§ 1467a(c), 1843(a).

238. \textit{Id.} § 1467a(c)(3), (9)(C).

239. \textit{Id.} § 1841(c)(2)(H).

240. The similarities and differences changed over time. In the following subsections a. and b., a similarity is the authority to originate loans secured by real estate, and a difference is SLHC authority to develop and manage real estate, which is not authorized by BHCs. See Section IV.C.4. for current similarities and Section IV.D. for current differences in permissible activities.

unless it fit within an exemption.\textsuperscript{242} The exemptions included holding property used substantially in bank operations, acquiring shares of a company in good faith in a fiduciary capacity, acquiring up to 5% of the voting securities of any company, and engaging in activities approved by the FRB as “so closely related to banking as to be a proper incident thereto.”\textsuperscript{243} In the Bank Holding Company Act Amendments of 1970 (“1970 BHCA Amendments”), Congress brought one-bank holding companies within the scope of the BHCA’s registration, activity, approval, report, examination, and enforcement authority.\textsuperscript{244}

The activities permissible for BHCs expanded most significantly as the FRB interpreted its ability to authorize activities closely related to banking. The FRB determined whether activities were “closely related activities” by order on a case-by-case basis after notice and hearing.\textsuperscript{245} In 1971, the FRB began to set forth permissible closely-related activities in its Regulation Y.\textsuperscript{246} The activities listed in Regulation Y came to be

\begin{itemize}
  \item 242. Bank Holding Company Act of 1956 § 4(a), 70 Stat. at 135 (codified at 12 U.S.C. § 1843(a)). The 1970 amendments to the BHCA simplified the closely related to banking exception to the BHCA’s generally prohibition on engaging in activities other than managing or controlling banks by eliminating the requirement that the FRB determine it was unnecessary to apply the nonbanking prohibitions of the BHCA in order to carry out the purposes of the act. Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 103, 84 Stat. 1760, 1765 (codified at 12 U.S.C. § 1843(c)(8)) (replacing section 4(c)(6) of the BHCA with section 4(c)(8) of BHCA).
  \item 243. In connection with these activities, the FRB was also required to determine the activity was so closely related to banking “as to make it unnecessary for the [nonbanking prohibitions of the BHCA] to apply in order to carry out the purposes of [the BHCA].” Bank Holding Company Act of 1956 § 4(b)(6), 70 Stat. at 137. This requirement was eliminated in 1970.
  \item 246. After a notice, comment, and hearing process, the FRB amended its Regulation Y to include a list of closely-related-activities. 36 Fed. Reg. 10777 (Jun. 3, 1971) (codified at 12 C.F.R. § 222.4(a) (1971)) (permitting activities including making loans, operating an industrial bank, servicing loans, trust company functions, investment and financial advisory services, leasing personal property, and community welfare investments). The FRB continued to add to the list through further amendments to its Regulation Y. See, e.g., 36 Fed. Reg. 11805, 11806 (Jun. 19, 1971) (permitting bookkeeping and data processing services for internal operations and performing payroll, accounts payable, or billing services); 37 Fed. Reg. 18520 (Sept. 13, 1972) (permitting underwriting insurance directly related to extension
known as the “laundry list” of permissible activities.\textsuperscript{247} By 1986, the FRB
determined by regulation that twenty-four activities were closely related
to banking\textsuperscript{248} and determined by order that additional activities were
closely related to banking.\textsuperscript{249} During the 1980s, the FRB also issued
many orders approving securities broker, advisory, private placement,
and underwriting activities as closely related to banking.\textsuperscript{250}

of credit); 37 Fed. Reg. 26534 (Dec. 13, 1972) (permitting leasing real and personal property);
(permitting selling money orders, traveler’s checks, and savings bonds).

\textsuperscript{247} During debate leading up to the enactment of the 1970 BHCA Amendments, the
phrase “laundry list” referred to a proposed statutory list of prohibited activities, which
ultimately did not become part of the BHCA. \textit{See}, e.g., One-Bank Holding Company
the S. Comm. on Banking and Currency, 91st Cong. 186–87 (statement of William B. Camp,
Comptroller of the Currency). Later, the phrase was used to refer to the regulatory list of
permissible activities set forth in the FRB’s Regulation Y. \textit{See}, e.g., 62 Fed. Reg. 9290, 9302
(Febr. 28, 1997) (“The list of nonbanking activities contained in Regulation Y (the “laundry
list”) is intended to serve the purpose of providing a convenient and detailed list of most of
the activities that the FRB has found to be closely related to banking and therefore permissible
for bank holding companies.”).

\textsuperscript{248} 51 Fed. Reg. 39994, 40000 (Nov. 4, 1986) (24 activities); \textit{see also} 51 Fed. Reg. 36211
(Oct. 9, 1986); 54 Fed. Reg. 37301 (Sept. 8, 1989); 57 Fed. Reg. 20961 (May 18, 1992); 57

(operating a pool reserve plan for loss reserves of banks for loans to small businesses);
retail check authorization and guarantee); \textit{Hong Kong & Shanghai}, 69 Fed. Res. Bull. 221
(1983) (offering informational, advisory, and transactional foreign exchange); \textit{Citicorp}, 72
close banking transactions).

\textsuperscript{250} \textit{See, e.g.}, \textit{Bank of America Corp.}, 69 Fed. Res. Bull. 105 (1983) (discount securities
investment advice in combination with brokerage services through a nonbank subsidiary);
commercial paper through a nonbank affiliate); \textit{The Chase Manhattan Corp.}, 73 Fed. Res.
Bull. 367 (1987) (adding underwriting and dealing in securities that a member bank may not
and dealing in commercial paper, municipal revenue bonds, and mortgage back-securities);
(adding private placement of commercial paper). Many of these determinations were
468 U.S. 207, 216–21 (1984) (holding that affiliation between a BHC and discount broker
does not violate the G-S Act); \textit{Sec. Indus. Ass’n v. Bd. of Governors of the Fed. Reserve Sys.},
821 F.2d 810, 811 (D.C. Cir. 1987), cert. denied 484 U.S. 1005 (1988) (holding that
BHC subsidiary providing brokerage services and investment advice did not violate the G-S
Act); \textit{Sec. Indus. Ass’n v. Bd. of Governors}, 807 F.2d 1052, 1055, 1062 (D.C. Cir. 1986),
cert. denied 107 S.Ct. 3328 (1987) (holding that BHC subsidiary placement of commercial
paper did not violate the G-S Act); \textit{Sec. Indus. Ass’n v. Bd. of Governors}, 839 F.2d 47 (2d
In 1997, the FRB reorganized its laundry list of permissible activities, dividing them into the following fourteen groups of functionally related activities:

i. Extending credit and servicing loans;
ii. Activities related to extending credit;
iii. Leasing personal or real property;
iv. Operating non-bank depository institutions;
v. Trust company functions;
vi. Financial and investment advisory activities;
vii. Agency transactional services for customers;
viii. Securities investment transactions as principal;
ix. Management consulting and counseling activities for unaffiliated depository institutions;
x. Support services, such as check courier, printing, and encoding;
x. Insurance agency, underwriting credit insurance, and sale of insurance in small towns;
xii. Community development activities;
xiii. Issuance and retail sale of money orders, savings bonds, and traveler’s checks; and
xiv. Data processing, storage, transmission, and facilities for financial, banking, or economic data.  

The FRB continued to approve by order other activities as closely related to banking.

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252. See, e.g., Popular, Inc., 84 FED. RES. BULL. 481 (1998) (adding government services, including postage stamps, public transportation tickets, vehicle registration, and notary public services, and incidental services, such as mailboxes, photocopying, and facsimiles); Dresdner Bank AG, 84 FED. RES. BULL. 361 (1998) (acting as commodity pool operator for private investment vehicles acting as commodity pool operator for private investment vehicles); Compagnie Financière de Paribas, 82 FED. RES. BULL. 348 (1996) (providing fraud detection services in connection with billing services).
ii. Savings and Loan Holding Companies

In 1968, the SHLCA prohibited a company that owned or controlled two or more savings associations from commencing or continuing any business activity other than those permitted by specific exemptions. Permissible actions include furnishing management services for a subsidiary, conducting insurance agency business, acting as a trustee under a deed of trust, and engaging in activities approved or prescribed by FSLIC regulation “as being a proper incident to the operations of insured institutions and not detrimental to the interests of savings account holders.”253 The FSLIC, and subsequently the FHLBB, interpreted its authority to approve activities related to the operations of insured institutions through the issuance of regulations. By March 5, 1987, the list of related activities prescribed by regulations included the following:

i. Originating, selling, and servicing real estate, educational, and consumer loans;

ii. Clerical accounting and internal services primarily for affiliates;

iii. Services primarily for affiliates and other SLHCs;

iv. Acquisition of unimproved real estate;

v. Development of unimproved real estate;

vi. Acquisition of improved real estate;

vii. Development of improved real estate;

viii. Real estate management;

ix. Insurance underwriting;

x. Tax preparation;

xi. Coin purchases and sales; and

xii. Any services or activities approved by order of the FSLIC.254

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254. 12 C.F.R. § 584.2-1(b) (1987).
At that point in time, the most significant activities permissible for an SLHC but not a BHC were (1) real estate acquisition, development, and management activities;\(^{255}\) (2) insurance agency activities;\(^{256}\) (3) insurance underwriting;\(^{257}\) and (4) travel agency activities.\(^{258}\)

5. Separation of Banking and Commerce

Differentiation in the regulation of BHCs, SLHCs, and the parent companies of ILCs arose from varying degrees of Congressional concern about the separation of banking and commerce. Congress imposed more restrictions on BHCs participating in commercial activities than it imposed on SLHCs and left the parent companies of ILCs free to engage in commercial activities.

i. Bank Holding Companies

In 1956, the BHCA separated banking from commerce by prohibiting a company controlling multiple banks from engaging in any activity other managing or controlling banks unless it fit within an exemption, such as an activity closely related to banking.\(^{259}\) The BHCA

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required divestiture of nonbanking activities within two years.\textsuperscript{260} Congress reaffirmed its support for the separation of banks and commerce in the 1970 BHCA Amendments, which brought one-bank holding companies within the scope of regulation as a BHC.\textsuperscript{261} This required a company controlling one bank to divest of impermissible commercial activities or the bank by December 31, 1980.\textsuperscript{262}

ii. Savings and Loan Holding Companies

Congressional concern with the separation of banking and commerce with respect to SLHCs has lagged behind congressional concern with respect to BHCs. While Congress passed the Spence Act in 1959 to temporarily halt the acquisition of two or more savings associations by any company, the Spence Act did not limit the activities of the parent companies of savings associations, nor did it require any divestiture.\textsuperscript{263} In 1968, Congress took action to comprehensively regulate companies controlling multiple savings associations in the SLHCA, which required divestiture of unrelated activities within two years.\textsuperscript{264} Still, the SLHCA allowed for greater blending of banking and commerce than the BHCA because the SLHCA did not prohibit unitary SLHCs—that controlling only one insured institution—from engaging in unrelated activities, including commercial activities. The lack of concern with maintaining the separation of SLHCs from commerce may arise from the fact that subsidiary savings associations did not take demand deposits or make commercial loans.\textsuperscript{265}

\textsuperscript{260} Id. § 4(a)(2), 70 Stat. at 135 (requiring divestiture within two years or as of the date of becoming a BHC).
\textsuperscript{262} One-bank holding companies had until December 31, 1980 to conform their activities to the BHCA. Id. § 103, 84 Stat. at 1762–63; see generally Heller, supra note 114, at 182–203 (describing “Grandfather” exemptions for one-bank holding companies).
\textsuperscript{263} Pub. L. No. 86-374, 73 Stat. 691 (1959); S. Rep. No. 86-810, at 1 (1959) (“The bill . . . would not require an existing holding company to divest itself of an insured association it now controls. But the company could not acquire control of any additional insured association.”).
\textsuperscript{264} Pub. L. No. 90-255, § 2, 82 Stat. 5, 8 (1968) (requiring divestiture within two years or 180 days after becoming an SLHC).
\textsuperscript{265} See Williams, supra note 102, at § 11.01[1] (The G-S Act “did not and does not apply to thrifts for two reasons. First, at the time it was enacted, thrifts were small, locally oriented institutions with a narrow focus on residential lending . . . . Second, thrifts were entirely state-chartered and supervised . . . . And even though the subsequent enactment of HOLA provided
iii. Parent Companies of ILCs

Generally, the regulation of the commercial activities of parent companies of ILCs has remained outside the scope of the activity restrictions applicable to BHCs and SLHCs. As originally enacted, and amended by the 1970 BHCA Amendments, ILCs did not fit the definition of a bank and the parent companies of ILCs were not BHCs subject to the activity restrictions of the BHCA. The Competitive Equality Banking Act of 1987 (“CEBA”) amended the BHCA’s definition of a “bank” to include an insured bank as defined by the Federal Deposit Insurance Act (“FDIA”). This action brought ILCs within the definition of a bank unless they satisfy at least one of the following conditions: (1) the institution does not accept deposits, (2) the institution’s total assets are less than $100 million, or (3) control of the institution has not been acquired by any company after August 10, 1987. This left qualifying parent holding companies of ILCs free to engage in commercial activities.

In 1999, GLBA did not alter the exclusion of the parent companies of ILCs from regulation as BHCs.

In 2005, Walmart and Home Depot filed applications with the Utah Department of Financial Institutions (“UDFI”) and FDIC to acquire ILCs. These filings ignited a storm of controversy. The FDIC imposed a moratorium on the acceptance of new applications for deposit insurance and solicited public comment on commercial ownership and regulation of ILCs. Walmart and Home Depot eventually withdrew their applications because of overwhelming opposition from lawmakers,

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banking industry officials, and watchdog groups. In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) imposed a three-year moratorium on approving FDIC deposit insurance for new ILCs that would be owned or controlled by a commercial firm and on the transfer of ownership of an ILC to a commercial firm.

Between 2011 and 2016, the FDIC received no new applications to insure industrial loan companies. In 2017, Square, Inc. (“Square”), a provider of payment services to small businesses, submitted applications to the FDIC and UDFI. Square subsequently withdrew its FDIC application, before re-filed in 2018. Nelnet, Inc. (“Nelnet”), a student loan processor, also filed applications with the FDIC and UDFI in 2018 and plans to begin originating educational and consumer loans. In 2020, the UDFI and FDIC approved ILC applications from Square and Nelnet.

At the same time, the FDIC published notice of a proposed rulemaking regarding its supervision of the parent companies of ILCs. Historically, the FDIC has exercised authority over the parent companies of ILCs through written agreements entered into as a condition of FDIC

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276. Sullivan, supra note 274.
277. Id.
approval. The proposed rule would formalize past FDIC practice, requiring parent companies of ILC applicants to agree to commitments related to: (1) subsidiary information; (2) consent to examination; (3) annual reports; (4) maintenance of records; (5) independent audit; (6) limitation on BODs representation; (7) maintenance of capital and liquidity; and (8) execution of a tax allocation agreement. It would also require ILCs controlled by a parent company to obtain prior written approval for material changes in business plan, changes in directors and senior officers, and entering into service contracts with specified entities.

In 2016, the FRB recommended Congress place the parent companies of ILCs under its supervision. The reasons cited by the FRB included maintaining the separation of banking and commerce, leveling the competitive and regulatory playing field for entities controlling an insured depository institution, and mitigating the risks to the federal safety net by imposing consolidated supervision on the parent companies of ILCs.

ILCs remain the subject of debate because they continue to offer commercial firms the ability to own or control an FDIC-insured institution without regulation as a BHC or SLHC. Proponents of these exemptions point to lack of ILC failures and diversification of risk in support of continuing exemption of ILCs from regulation as BHCs or SLHCs. Opponents point to unfair competitive advantage and systemic risks that could result from the formation of additional ILCs.


280. *Id.* at 32–35.


282. See Peter J. Wallison, *Why Are We Still Separating Banking and Commerce?* 182 A.M. Banker, July 27, 2017, at 1 ("Gramm-Leach-Bliley allowed BHCs to enter various nonbanking fields . . . ."); see also Keith A. Noreika, Acting Comptroller of the Currency, Innovation and Financial Technology: Rethinking the Banking & Commerce Split, Remarks to the Utah Association of Financial Services and the National Association of Industrial Bankers 7–8 (Aug. 17, 2018) ("Arguments that this separation makes banks safer ignore the benefits that banking institutions gain from diversification . . . .").

C. Convergence

Convergence in the regulation of DIHCs arose from the common objectives of the BHCA and SLHCA to: (1) preserve competition and prevent concentration, as well as subsequent laws; (2) equalize and then eliminate the prohibitions on affiliations with securities firms; (3) extend limitations on transactions with affiliates to savings associations transactions with SLHCs and their affiliates; (4) establish substantial parity regarding permissible activities for BHCs and SLHCs; (5) increase consistency related to the separation of banking and commerce; and (6) require SLHCs to maintain capital on a consolidated basis not lower than requirements in effect for insured depository institutions.

1. Competition Preserved and Concentration Prevented

First, Congress sought to preserve competition and prevent concentration of banking control. In the 1950s, Congressional reports connected with legislation to regulate bank holding companies cited concern with preserving bank competition and minimizing concentration of economic power among the reasons for further regulation of BHCs.284 In 1956, Congress enacted the BHCA, which regulated companies controlling two or more banks.285 The FRB was required to consider whether a proposed merger or acquisition would be consistent with the “preservation of competition in the field of banking.”286 The House report supporting the legislation expressed concern with further

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284. The proposed Bank Holding Company Act of 1947 declared it to be the express policy of Congress to “control the creation and expansion of bank holding companies; to separate their business of managing and controlling banks from unrelated businesses, and generally maintain competition among banks and to minimize the danger inherent in concentration of economic power through centralized control of banks.” S. 829, 80th Cong. § 2 (1947) (emphasis added). The Senate Report in support of the act noted that “loopholes and deficiencies” in the Banking Act of 1933 had “nullified” its basic purpose and called for new legislation to guard against the use of holding companies to “evade traditional limitations upon bank expansion” and “gather under one management many different and varied enterprises wholly unrelated to the conduct of the banking business.” S. Rep. No. 80-300, at 1–2 (1947). The Senate Report also noted that “the administrative agencies must take into account the national policy against restraints of trade and commerce and the undue concentration of economic power and in favor of the maintenance of competition in the field of banking” when approving or disapproving the creation or expansion of bank holding companies. id. at 6.


“concentration of credit,” “monopolistic control of credit,” and “concentration of banking control in fewer and fewer hands.”\textsuperscript{287} The Senate report supporting the legislation noted the need for “adequate safeguards against undue concentration of control of banking activities” and avoidance of “dangers accompanying monopoly in this field.”\textsuperscript{288}

In 1966, Congress required the FRB to apply a balancing test in assessing the competitive impact of a proposed acquisition. The BHCA was amended to prohibit the FRB from approving any acquisition that would result in a monopoly, or which may substantially lessen competition, unless the anticompetitive effects of the proposed acquisition are clearly outweighed by the convenience and needs of the community.\textsuperscript{289}

Congress took a similar approach to the regulation of SLHCs. In 1959, the House report in support of legislation temporarily halting the acquisition of saving and loan associations by companies cited desires to “preserve the traditional pattern of independent, locally managed savings and loan associations” and to “prevent undue concentration of economic control through the holding company device” among the reasons for the legislation.\textsuperscript{290} In 1968, Congress enacted the SLHCA, which established a comprehensive framework for the regulation of companies controlling one or more savings associations.\textsuperscript{291} The SLHCA required the FSLIC to consider factors identical to the factors contained in the amended standards embodied in the BHCA and Bank Merger Act (“BMA”) for

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\item \textsuperscript{287} H. REP. NO. 84-609, at 2 (1955). The report also noted the “threat” to the “democratic ideal” of “the independent unit bank as an institution having its ownership and origin in the local community.” \textit{Id}.
\item \textsuperscript{288} S. REP. NO. 84-1095, pt. 1, at 1 (1955); \textit{see also} S. REP. NO. 84-1095, pt. 2, at 1 (1956).
\item \textsuperscript{289} Act of July 1, 1966, Pub. L. No. 89-485, § 7(c), 80 Stat. 236, 237-38. The amendment prohibited the FRB from approving any acquisition, merger, or consolidation that “would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking.” \textit{Id}. In addition, the FRB was prohibited from approving a proposed transaction whose effect may be “substantially to lessen competition, or tend to create a monopoly, or which in any manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.” \textit{Id}.
\item \textsuperscript{290} H. REP. NO. 86-679, at 2–3 (1959).
\item \textsuperscript{291} Savings and Loan Holding Company Amendments of 1967, Pub. L. No. 90-255, 82 Stat. 5 (1968); H. REP. NO. 90-997, at 2 (1967) (“The purpose of H.R. 8696 . . . is to provide a comprehensive statutory framework for the registration, examination, and regulation of holding companies controlling one or more savings and loan associations. . . .”).
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approval of mergers and acquisitions.\textsuperscript{292} The SLHCA similarly prohibited the FSLIC from approving any acquisitions which would result in a monopoly or which may substantially lessen competition, unless the anticompetitive effects of the proposed acquisition are clearly outweighed by the convenience and needs of the community.\textsuperscript{293}

2. Affiliation Prohibitions Equalized and then Eliminated

Second, Congress equalized and then eliminated the prohibitions on bank affiliations with securities firms. In 1987, Congress temporarily extended the applicability of the prohibition to member bank affiliations with securities firms engaged principally in underwriting securities and also the prohibition on director and management interlocks between a member bank and a securities firm extended the prohibition to nonmember banks and savings associations.\textsuperscript{294} These prohibitions also restricted the affiliation and interlocks of BHCs and SLHCs with securities firms.\textsuperscript{295} The extension of these prohibitions to savings associations expired in 1988. In 1999, the GLBA repealed the prohibitions on affiliation and interlocks between banks and securities firms.\textsuperscript{296} With the transfer of responsibility for the regulation of SLHCs

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\item \textsuperscript{292} Savings and Loan Holding Company Amendments of 1967 § 2, 82 Stat. at 10–11 (amending section 408(e)(2) of the National Housing Act); S. REP. NO. 90-354, at 8 (1967) ("In providing standards for approving mergers and acquisitions, the committee has inserted language identical to the comparable standards contained in the Bank Holding Company Act and Bank Merger Act.").
\item \textsuperscript{293} \textit{Id.} (amending section 408(e)(2) of the National Housing Act). "No acquisition shall be approved . . . which will . . . substantially lessen competition, or tend to create a monopoly, or which in any manner would be in restraint of trade, unless it found that the anticompetitive effects of the proposed acquisition are clearly outweighed in the public interest by the probable effect of the acquisition in meeting the convenience and needs of the community to be served." \textit{Id.}
\item \textsuperscript{294} Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, §§ 103, 106, 101 Stat. 552, 566, 576. An exemption provided for affiliations between savings associations and firms principally engaged in the sale or underwriting of mortgage-backed securities, real estate partnerships, insurance products deemed to be securities, mutual funds, and securities whose sale or underwriting was permitted for national banks. \textit{Id.}
\item \textsuperscript{296} Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (1999) (repealing sections 20 and 32 of the 1933 Act). A FDIC policy statement expressed the opinion that Glass-Steagall Act does not prohibit a nonmember bank from establishing an affiliate relationship with a bona fide subsidiary engaged in securities activities. The statement also stated that section 21 applied to nonmember banks, prohibiting
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from the Office of Thrift Supervision ("OTS") to the FRB in 2011, banks, savings associations, and their affiliates are on equal footing regarding affiliations with securities firms.  

3. Limitations on Transactions with Affiliates Extended

Third, Congress extended the limitations on bank transactions with affiliates to savings association transactions with affiliates. In 1987, CEBA made Section 23A, and the newly enacted Section 23B, applicable to transactions between a savings association subsidiary of an SLHC and its parent holding company or other affiliates solely engaged in activities permissible for a BHC. Other transactions between a savings association subsidiary of an SLHC and affiliates remained subject to affiliate transaction rules specified by the SLHCA. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") repealed the CEBA approach to affiliate transactions. FIRREA fully subjected all savings association transactions with affiliates to the same limitations on transactions with affiliates as were applicable to banks. The OTS issued implementing regulations in 1991. At the time, the FRB had not exercised its authority to issue regulations implementing Sections 23A and 23B. In 2002, the FRB issued Regulation W implementing Sections 23A and 23B for member banks. In 2002, the OTS revised its rules on savings association transactions with affiliates to conform to Regulation W.
4. Substantial Parity Regarding Permissible Activities

Fourth, Congress established substantial parity regarding the activities permissible for BHCs and SLHCs. In 1987, CEBA authorized an SLHC to engage in any activity that the FRB determined by regulation to be permissible for BHCs under Section 4(c) of the BHCA. In 1999, the GLBA authorized BHCs and SLHCs that become FHCs to engage in certain financial activities, as well as activities incidental or complementary to a financial activity. Financial activities include securities underwriting and dealing, insurance underwriting and agency, merchant banking activities, activities previously determined by the FRB to be closely related to banking, and activities usual in connection with the transaction of banking abroad. The FRB may also determine that an activity is “complementary to a financial activity and does not pose a


306. Gramm-Leach-Bliley Act (“GLBA”), Pub. L. No. 106-102, § 103(a), 113 Stat. 1338, 1342 (1999); see also Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Pub. L. No. 111-203, §§ 103(a), 606(b) (2010) (codified at 12 U.S.C. §§ 1467a(c), 1843(k)). The GLBA also added section 10(c)(9) to HOLAGA, which limited the activities of a new or existing company acquiring control of a savings association after May 4, 1999 to activities permitted for a financial holding company under section 4(k) of the BHCA. Gramm-Leach-Bliley Act (“GLBA”) § 401(a), 113 Stat. at 1435. The OTS read section 10(c)(9) as an affirmative grant of authority for SLHCs to engage in 4(k) activities without satisfying qualification requirements applicable to BHCs to become FHCs or providing any notice to the OTS. 76 Fed. Reg. 56508, 56510 (Sept. 11, 2011). Section 606(b) of the Dodd-Frank Act added section 10(c)(2)(H) to the HOLAGA, which authorized an SLHC to engage in section 4(k) activities if it meets the criteria and complies with the requirements applicable to a BHC electing FHC status under the BHCA. Dodd-Frank Act § 606(b), 124 Stat. at 1607. The FRB interpreted this authority as requiring an SLHC to file a declaration with the FRB to elect to be treated as an FHC and certify that it satisfies the criteria for a BHC to engage in 4(k) activities. 76 Fed Reg. 56508, 56510 (Sept. 11, 2011). Therefore, BHCs and SLHCs must file an effective declaration to become FHCs authorized to engage in financial in nature activities, as well as activities incidental or complementary to a financial activity. 12 C.F.R. §§ 225.82, 238.64 (2019).

307. Gramm-Leach-Bliley Act (“GLBA”) § 103(a), 113 Stat. at 1342. Regulation Y listed the banking aboard activities as providing management consulting services; operating a travel agency; and organizing, sponsoring, and managing a mutual fund. 66 Fed. Reg. 400, 418 (Jan. 3, 2001) (final rule) (codified at 12 C.F.R. § 225.86(b) (2019)). The FRB also determined by rule that acting as a finder in bring together one or more buyers and sellers of any product or service for transactions that the parties themselves will negotiate and consummate is incidental to a financial activity. 65 Fed. Reg. 80735 (Dec. 22, 2000) (codified at 12 C.F.R. § 225.86(d)).
substantial risk to the safety or soundness of depository institutions or the financial system generally."^308

5. Increased Consistency Related to the Separation of Banking and Commerce

Fifth, changes in federal law have brought increased consistency regarding separation of banking and commerce to the regulation of BHCs and SLHCs. The legislative history of the BHCA establishes that separating banking from commerce was one of its primary policy objectives. The separation of banking from commerce was embedded in the BHCA through its prohibition on a BHC’s engaging in activities other than banking or managing and controlling banks. The Senate Report in support of the BHCA noted that “the philosophy of this bill is that bank holding companies ought to confine their activities to the management and control of banks.”^310

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^308. 12 U.S.C. § 1843(k)(1)(B); see also 12 C.F.R. § 225.89 (2019) (defining the procedure to request approval to engage in an activity that is complementary to a financial activity). *JP Morgan Chase & Co.*, 92 FED. RES. BULL. C57 (2005) (defining a complementary activity as an activity that appears to be “commercial rather than financial in nature but that is meaningfully connected to a financial activity such that it complements the financial activity.”). 145 CONG. REC. H11529 (Nov. 4, 1999) (statement of Rep. Leach) (“It is expected that complementary activities would not be significant relative to the overall financial activities of the organization.”). The FRB determined by order that certain physical commodities activities are complementary to the financial activity of commodity derivatives activities. *Citigroup, Inc.*, 89 FED. RES. BULL. 508 (2003). The FRB also determined that energy management services are complementary to the financial activities of commodity derivatives activities and derivatives advisory services and that energy tolling activities are complementary to the financial activity of commodity derivatives activities. *Fortis, S.A./N.V.*, 94 FED. RES. BULL. C20 (2008); *Royal Bank of Scotland Group PLC*, 94 FED. RES. BULL. C60 (2008). In response to a request from the FDIC, the FRB also determined that disease management and mail-order pharmacy activities are complementary to the financial activities of underwriting and selling health insurance. *Wellpoint, Inc.*, 93 FED. RES. BULL. C133 (2007).


^310. S. REP. No. 84-1095, pt. 1, at 1 (1955). The Senate Report continued: “The combination under single control of both banking and nonbanking enterprises . . . [permits] departure from the principle that banking institutions should not engage in business wholly unrelated to banking.” *Id.* at 2; see also H.R. REP. No. 84-609, at 1 (1955) (“The need for immediate legislation which would at the same time control the future expansion of bank holding companies and force them to divest themselves of nonbanking business has been established to the complete satisfaction of your committee.”). The proposed Bank Holding Company Act of 1947 declared it to be the express policy of Congress “to separate [the] business of managing and controlling banks from unrelated businesses.” S. 829, 80th Cong. §2 (1947). The Senate Report supporting S. 829 stated: “The holding-company device . . . can be used to gather under one management many different and varied enterprises wholly
reinforced by the 1970 BHCA Amendments to the BHCA, which brought one-bank holding companies within the scope of the BHCA’s restrictions on activities\(^{311}\) and required divestiture of impermissible activities or the bank by December 31, 1980.\(^{312}\)

Historically, there has been less separation of banking and commerce in the savings and loan industry than in the banking industry. As initially enacted, the SLHCA only restricted the activities of multiple SLHCs—those controlling two or more insured institutions.\(^{313}\) Unitary SLHCs remained free to engage in commercial activities. Furthermore, while the SLHCA required divestiture of unrelated activities, the list of activities permissible for multiple SLHCs\(^{314}\) included some that were impermissible for BHCs.\(^{315}\) For example, the SLHCA authorized multiple SLHCs to conduct insurance agency businesses.\(^{316}\) As initially enacted, the BHCA did not authorize a BHC to engage in any insurance activities.\(^{317}\)

As the twentieth century progressed, federal laws regulating BHCs and SLHCs brought increased consistency regarding separation of banking and commerce through greater overlap in permissible activities and restrictions on unitary SLHCs. For instance, the Garn-St. Germain Depository Institutions Act of 1982 prohibited a BHC from providing insurance as a principal, agent, or broker, but expanded BHC authority to engage in insurance activities through specific exceptions, such as providing life insurance in connection with an extension of credit and engaging in insurance agency activities in a place with a population not unrelated to the conduct of a banking business, which the committee feels is inimical to sound banking practice.” S. REP. NO. 80-300, at 1 (1947).


\(^{312}\) Id. § 103, 84 Stat. at 1762, 1763; see generally HELLER, supra note 114, at 182–203.


\(^{314}\) Savings and Loan Holding Company Amendments of 1967 § 2, 82 Stat. at 8 (amending section 408(c) of the National Housing Act).


\(^{316}\) Savings and Loan Holding Company Amendments of 1967 § 2, 82 Stat. at 8 (amending section 408(c)(2)(B) of the National Housing Act).

\(^{317}\) Bank Holding Company Act of 1956 § 4(a), 70 Stat. at 135.
exceeding 5,000. In 1999, further overlap in permissible activities arose from the GLBA, which authorized a BHC that became an FHC to engage in insurance underwriting, agency, and brokerage. The OTS interpreted the GLBA to authorize SLHCs to engage in the same insurance activities.

Additional federal law regulating SLHCs raised the barriers separating banking and commerce. In 1987, CEBA narrowed the unitary SLHC exemption from activities restrictions to companies with a savings association subsidiary formed before March 5, 1987, which met the QTL test. Therefore, CEBA slightly increased the degree of separation between banking and commerce with respect to SLHCs, or in other words, slightly increased convergence in the regulation of BHCs and SLHCs. In addition, while the GLBA left GUSLHCs free from restrictions on activities, it also restricted the activities of a company that formed or acquired a unitary SLHC on or after May 4, 1999. In this way, the GLBA reinforced the separation of banking and commerce with respect to SLHCs and promoted convergence in the regulation of BHCs and SLHCs.

The GLBA also allowed greater mixing of banking and commerce by authorizing BHCs and SLHCs to engage in merchant banking activities. This authority permitted BHCs and SLHCs to control a company engaged in commercial activities for a limited time. Therefore, the GLBA slightly increased the convergence in the regulation of BHCs and SLHCs.

320. Availability of Information, Public Observation of Meetings, Procedure, Practice for Hearings, and Post-Employment Restrictions for Senior Examiners; Savings and Loan Holding Companies, 76 Fed. Reg. 56508, 56510 (Sept. 11, 2011) (“The OTS interpreted [section 10(c)(9)(A) of HOLA] to be an affirmative grant of authority to all Covered SLHCs to engage in 4(k) Activities . . . without having to satisfy any of the financial holding company-related criteria in the BHC Act.”)
323. Id. § 103, 113 Stat. at 1344.
6. Capital Required on a Consolidated Basis

Finally, in 2010, Congress required the FRB to establish minimum leverage and risk-based capital requirements for all DIHCs, including SLHCs, on a consolidated basis not less than generally applicable requirements in effect for insured depository institutions.\(^{324}\) The FRB’s current risk-based capital standards for BHCs, SLHCs, and state member banks are codified in Regulation Q.\(^{325}\) Generally, these institutions must maintain the following consolidated capital ratios: (1) a common equity tier 1 capital ratio of 4.5%; (2) a tier 1 capital ratio of 6%; (3) a total capital ratio of 8%; and (4) a leverage ratio of 4%\(^{326}\). However, certain BHCs and SLHCs with less than $10 billion in total consolidated assets can elect to be “Qualified Community Banking Organizations.” These organizations are considered to have met the above minimum capital requirements if they maintain a leverage ratio of 9%\(^{327}\). Furthermore, small BHCs and SLHCs (less than $3 billion in total consolidated assets) are exempt from Regulation Q\(^{328}\). Still, each insured depository subsidiary of a small BHC or SLHC is expected to be well-capitalized.\(^{329}\)


\(^{326}\) Id. § 217.10.

\(^{327}\) Id. § 217.12.

\(^{328}\) Id. § 217.1(c)(1)(ii)–(iii).

\(^{329}\) Id. pt. 225, app. C, § 2.B. A BHC is “well capitalized” if it maintains on a consolidated basis a total risk-based capital ratio of 10.0% or greater and a tier 1 risk-based capital ratio of 6.0% or greater, while not being subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FRB to meet and maintain a specific capital level for any capital measure. Id. § 225.2(r)(1). A SLHC is “well capitalized” if each of its depository institutions is well capitalized, while not being subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FRB to meet and maintain a specific capital level for any capital measure. Id. § 238.2(s).
D. Remaining Differences

There are very few remaining differences in the regulation of DIHCs. The most significant differences involve the authority of the holding company to engage in various activities.

First, a BHC that is not a FHC is prohibited from engaging in an activity other than managing or controlling banks, unless the activity fits within one of the narrow, circumscribed exceptions. For instance, an ordinary BHC is not authorized to engage in underwriting life insurance or property and casualty insurance. However, an ordinary BHC may act as a principal, agent, or broker for the sale of insurance related to the extension of credit by the BHC or its subsidiaries (e.g., sell life credit insurance) or engage in any insurance agency activity in a place that has a population not exceeding 5,000 (e.g., sell general property and casualty insurance).

Second, a BHC or SLHC that qualifies as a compliant FHC may engage in financial activities and activities incidental or complementary to a financial activity. For instance, a compliant FHC may act as a principal, agent, broker, or underwriter for any type of insurance, and underwrite, deal in, or make a market in any type of securities.

Third, a company that was not a BHC and becomes an FHC after November 12, 1999 may continue to engage in activities related to trading, sale, or investment in commodities that are not generally permissible activities for BHCs, if the company was engaged in any of these activities as of September 30, 1997 and meets other specified conditions. The HOLA and its implementing regulations do not contain a similar provision for a company that becomes an SLHC.

334. Id. § 1843(k)(4)(B), (E).
335. Id. § 1843(o). This statutory authority permits certain FHCs to engage in a broader set of physical commodity activities than may be otherwise authorized for a FHC under the complementary authority, such as storing, transporting, and extracting commodities, and without the conditions that the FRB has placed on engaging in complementary commodities activities to protect safety and soundness. Fed. Reserve Bd. et al., supra note 279, at 27.
Fourth, an ordinary SLHC may engage in activities that are not authorized for a BHC or FHC, such as general insurance agency and real estate development activities, as well as providing services to any person, so long as the SLHC primarily provides the service to its affiliates. A BHC is prohibited from engaging in general insurance agency and real estate development activities. A BHC, even if it is a compliant FHC, is limited to providing audit services for the BHC and its subsidiaries, but not for any other BHC, bank, savings association, or company.

Finally, GUSLHCs and ILC parent companies may engage in commercial activities. BHCs, even if they are compliant FHCs, are prohibited from engaging in commercial activities, unless the activities fit within one of limited exceptions to this prohibition, such as merchant banking. It is possible, however, that the exemption of GUSLHCs and corporate owners of ILCs from restrictions on activities, as well as the FHC authorization to engage in merchant banking, will be eliminated. In 2016, the FRB recommended to Congress that it:

(i) repeal the exemption that permits corporate owners of ILCs to operate outside of the regulatory and supervisory framework applicable to other corporate owners of insured depository institutions.

336. SLHCs may engage in insurance agency activities without restriction as to type of insurance. 12 U.S.C. § 1467a(c)(2)(B).
338. 12 U.S.C. § 1467a(c)(2)(F)(ii); 12 C.F.R. § 238.53(b)(3), (6); 12 C.F.R. § 584.2-1(b)(2), (3) (2019) (An SLHC “may engage in the following activities . . . furnishing or performing clerical accounting and internal audit services primarily for its affiliates.”).
340. 12 U.S.C. § 1843(c)(1)(C), (k); 12 C.F.R. §§ 225.22(b)(i), 225.86.
342. Id. § 1843.
343. Acceptance of this FRB recommendation by Congress through enactment of new legislation would limit the activities of ILC parent companies. The recent FDIC proposal to regulate the activities of the parent companies of ILCs would not limit the activities of ILC parent companies. Parent Companies of Industrial Banks and Industrial Loan Companies, 85 Fed. Reg. 17771 (Mar. 31, 2020).
(ii) repeal the exemption for GUSLHCs from the activity restrictions applicable to all other SLHCs; and
(iii) repeal the authority of FHCs to engage in merchant banking activities.344

These actions would reinforce the separation between banking and commerce, subject ILCs to consolidated supervision, and level the playing field among organizations that control an FDIC-insured depository institution.345 The repeal of the industrial loan company exemption from the definition of a “bank” in the BHCA would force the corporate owners of ILCs to cease engaging in commercial activities or divest of the industrial loan company. Similarly, the repeal of merchant banking authority would force FHCs to divest of merchant banking investments, reinforcing the separation of banking and commerce.

V. DIFFERENTIATION AND CONVERGENCE IN THE SUPERVISION OF DIHCS

During the first half of the twentieth century, federal and state banking regulators developed slightly different approaches to the supervision of depository institutions under their jurisdiction. The supervisors generally agreed that supervision should prevent and correct unsound situations; however, there were variations in the manner in which they accomplished that goal.346 As the FDIC began to examine

344. FED. RESERVE BD. ET AL., supra note 279, at 28. The report also recommends repeal of the grandfather provision of section 4(o) of the BHCA. Id. The report noted:

[The] grandfather provision ... has permitted two FHCs to engage in a broad range of activities related to physical commodities such as the storage, transportation, and extraction of commodities. This grandfathered authority raises safety and soundness concerns as well as competitive issues, as it is currently available to only two firms. In addition, this grandfather provision is inconsistent with the separation of banking and commerce.

Id. at 29.


346. See, e.g., 1919 OCC ANN. REP. 6. (proposing adherence to the law, regulation, and principles of sound banking); 1938 FDIC ANN. REP. 61. (preventing and correcting unsound situations); 1939 OCC ANN. REP. 40., (correcting unhealthy situations to maintain sound operating condition); 9 FHLBB ANN. REP. 79 (1941) (encouraging sound business practices and preventing development of unsound practices); 1946 OCC ANN. REP. 15 (appraising management and the soundness of policies being followed); 1949 OCC ANN. REP. 13
banks in the 1930s, it observed diversity in the standards and procedures for supervision of state chartered banks and sought improvement and uniformity in standards and procedures among federal and state supervisory authorities.\textsuperscript{347} Thereafter, the FDIC, OCC, FRB, and state supervisors often reached agreement on standard examination policies, released joint statements on examination and supervisory practices, and cooperated in the resolution of issues at particular institutions.\textsuperscript{348}

During the second half of the twentieth century, the supervisory practices of the federal banking regulators became even more similar. This occurred through continued consultation, cooperation, agreements, and statements, as well as conferences and training. For instance, in 1952, the OCC, FDIC, and FRB established an Inter-Agency Bank Examination School, which trained examiners from these three agencies and many state banking departments.\textsuperscript{349} In addition, the FRB, OCC, and FDIC routinely shared bank examination reports.\textsuperscript{350} Furthermore, the FRB often conducted joint examinations in cooperation with the state banking authorities or alternated examinations with state authorities.\textsuperscript{351} In 1976, the FDIC began to conduct bank examinations on an alternate year basis with state authorities.\textsuperscript{352} In 1978, the federal banking agencies agreed to a uniform rating system for depository institutions, calling it the CAMEL rating system.\textsuperscript{353}

\begin{itemize}
    \item \textsuperscript{347} 1938 FDIC ANN. REP. 61.
    \item \textsuperscript{348} See, e.g., 1938 FRB ANN. REP. 36 (suggesting cooperation of federal and state banking authorities to work out management issues at banks); 1938 FRB ANN. REP. 37 (explaining the agreement of OCC, FRB, FDIC, and representatives of state banking departments regarding revisions to bank examination procedures); 1940 FRB ANN. REP. 26 (using FRB policy when practicable to conduct joint examinations or make alternate examination agreements with state banking authorities); 1942 FRB ANN. REP. 2, 21 (explaining the joint statement of OCC, FDIC, FRB, and National Association of Supervisors of State Banks regarding examination and supervisory policy concerning investments in government securities and loan on such securities).
    \item \textsuperscript{349} 1958 FRB ANN. REP. 94.
    \item \textsuperscript{350} See, e.g., 1960 FRB ANN. REP. 89; 1975 FRB ANN. REP. 299; 1976 FRB ANN. REP. 413.
    \item \textsuperscript{351} 1956 FRB ANN. REP. 57.
    \item \textsuperscript{352} 1976 FDIC ANN. REP. xiii; 1980 FDIC ANN. REP. 5.
\end{itemize}
requirements, and made suggestions for institution practices and policies. FHLBB examiners used a “standard form” with sections for comparison of monthly balance sheets, statement of operations, loan statistics, share accounts, and other real estate owned. Examiners also reported on record keeping and internal checks and controls used by associations to safeguard assets. Examination reports concluded with examiner comments on the condition, operations, and policies of the association. In the 1980s, the FHLBB developed the MACRO rating system for insured savings associations.

The formation of the Federal Financial Institutions Examination Council (“FFIEC”) provided further impetus for convergence in supervisory practices. In 1979, Congress established the FFIEC to

355. 9 FHLBB ANN. REP. 77–79 (1941); 1948 FHLBB ANN. REP. 8; Centralized Examining Division, 1 FHLB REV., NOV. 1934, AT 33; The New Examination Form, 5 FHLB REV., Jan. 1939, at 8; Subject to Federal Examination, 6 FHLB REV., Jan. 1940, at 110; Verne C. Bonesteel, The Supervisory Examination – its Purposes and Objectives, 11 FHLB REV., Sept. 1945, at 344.


357. George H.K. Wang & Daniel Sauerhaft, Examination Ratings and the Identification of Problem/Non-problem Thrift Institutions, 2 J. Fin. Serv. Res. 319, 320–21 (1989); Astoria Federal Savings and Loan Association v. United States, 80 Fed. Cl. 65, 75–76 (Fed. Cir. 2008). In the MACRO rating system, “M” stood for Management, “A” stood for Asset quality, “C” stood for Capital adequacy, “R” stood for Risk, and “O” stood for Operating results. Id. Examiners rated each of these areas on a scale of 1 (strong performance) to 5 (poor performance), and then assigned a composite rating based on a subjective weighting of the categories. Wang & Sauerhaft, supra note 357. The ratings were not disclosed with the institution or public. In 1988, the FHLBB began to disclose component and composite ratings savings associations. Christopher, supra note 353, at 36 (“[Thrift] [i]nstitutions will not be permitted to disclose their [MACRO] ratings ‘in any form’ to the public.”).

prescribe uniform principles, standards, and report forms for the federal examination of financial institutions and to make recommendations to promote uniformity in the supervision of financial institutions. At that time, the FFIEC consisted of the Comptroller of the Currency, the Chairman of the FDIC, a Governor designated by the Chairman of the FRB, the Chairman of the FHLBB, and the Chairman of the NCUA. Changes in law and the work of the FFIEC have resulted in a great deal of uniformity regarding capital, reporting, applications, examination, and enforcement for financial institutions under the jurisdiction of the federal banking regulators and state banking agencies.

A. Examinations

1. Bank Holding Companies

As initially enacted, the BHCA authorized the FRB to conduct examinations of the holding companies under its jurisdiction. The FRB fulfilled its responsibilities regarding BHCs through evaluation of reports, on-site inspections, and actions on applications to form or expand activities. In 1978, the FRB began to utilize a new standardized Report of Bank Holding Company Inspection, which resulted in the on-site review of 85% of BHCs on an annual basis. In 1979, the federal banking agencies approved policies to enhance interagency coordination in the inspection of BHCs and examination of lead banks controlled by BHCs.

In 1979, the FRB adopted the BOPEC/F-M rating system for inspections of BHCs. The "B" stood for "Bank Subsidiaries," "O"
stood for Other (Nonbank) Subsidiaries, "P" stood for "Parent Company," "E" stood for "Earnings-Consolidated," "C" stood for "Capital adequacy-Consolidated," "F" stood for "Financial Composite Rating," and "M" stood for "Management Composite Rating." Examiners assigned a numeric value to each component on a scale of one to five in descending order of performance quality. The "F" composite was assigned a numeric value on the same scale and the "M" composite was assigned "S" for Satisfactory, "F" for Fair, or "U" for Unsatisfactory. In adopting the BOPEC/F-M rating system, the FRB noted its concern with the "risk characteristics of the entire organization," as well as the need for "capital on a consolidated basis that must serve as the ultimate source of support and strength to the entire corporation." Initially, the ratings were not shared with bank directors or management. However, examiners were instructed to provide the numeric and alphabetic ratings to senior management and directors in 1996.

In 2005, the FRB replaced the BOPEC rating system with the RFI rating system. Under the RFI rating system, each BHC was assigned component ratings of “R” for Risk Management; “F” for Financial Condition, and “I” for potential Impact of the parent company and non-depository subsidiaries on the subsidiary depository institution(s); “D” for Depository Institution; as well as “C” for a Composite rating. The ratings were presented in this manner: RFI/D(C). The R component was supported by four subcomponents that reflect the effectiveness of the banking organization's risk management and controls: (1) Board and Senior Management Oversight; (2) Policies, Procedures, and Limits; (3) Risk Monitoring and Management Information Systems; and (4) Internal Controls. The F component was similarly supported by four subcomponents reflecting an assessment of the quality of the banking

366. Id.
367. Id.
368. Id. at 2.
369. Id. at 10.
organization's (1) Capital; (2) Asset Quality; (3) Earnings; and (4) Liquidity. The composite, component, and subcomponent ratings were assigned using a one to five numeric scale with one indicating the highest rating and five the lowest rating. The inspection report included the composite and component ratings. Contemporaneously, the FRB issued guidance stating that the ratings were furnished for confidential use and should not be disclosed to the public. 372

In 2019, the FRB adopted the Large Financial Institution (“LFI”) system. 373 The LFI system applies to all domestic BHCs with $100 billion or more in total consolidated assets. The FRB continues to apply its RFI rating system to BHCs with less than $100 billion in total consolidated assets. 374 The LFI rating system reflects three core areas of focus: (1) Capital Planning and Positions; (2) Liquidity Risk Management and Positions; and (3) Governance and Controls. Each LFI component is rated according to a four-category scale: (1) Broadly Meets Expectations; (2) Conditionally Meets Expectations; (3) Deficient-1; and (4) Deficient-2. 375

2. Savings and Loan Holding Companies

The FHLBB developed the CORE rating system for use in its examination of SLHCs. As initially enacted, the SLHCA authorized the FHLBB to conduct examinations of the holding companies under its jurisdiction. 376 In 1988, the FHLBB adopted the CORE rating system for

SLHCs. Under the CORE rating system, the “C” stood for Capital, “O” for Organizational Structure, “R” for Relationship, and “E” for Earnings. Examiners rated these components on a scale of one to three in descending order of performance quality and assigned a composite rating of Above Average, Satisfactory, or Unsatisfactory. FIRREA transferred responsibility for the supervision of SLHCs and savings associations from the FHLBB to the OTS. In 2007, the OTS revised the CORE rating system. The OTS changed the meaning of the “R” to Risk Management and adopted a numeric rating scale from one to five for component and composite ratings.

When the FRB assumed responsibility for the supervision of SLHCs in 2011, the FRB stated that its intention was to eventually supervise SLHCs “on a consolidated basis in a manner that is consistent with the [FRB’s] established risk-based approach regarding bank holding company . . . supervision.” Initially, the FRB assigned “indicative” ratings to SLHCs using the RFI rating system. The frequency and scope of inspection for BHCs was also applied to SLHCs by the Economic Growth, Regulatory Relief, and Consumer Protection Act (“EGRRCPA”). The FRB applied the same off-site surveillance

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377. 72 Fed. Reg. 72442, 72443 (Dec. 20, 2007) (The preamble to the rating system states that the OTS implemented the former CORE rating system in “1988.” However, because the OTS was not formed until 1989, the former implementation must refer 1989 or action by the FHLBB in 1988); see also OFFICE OF THRIFT SUPERVISION, HOLDING COMPANIES HANDBOOK, SECTION 100, SUPERVISORY APPROACH 100.8 (2009), https://occ.gov/static/ots/holding-co-handbook/ots-hch-000.pdf [https://perma.cc/A35R-T5KU].


381. Fed. Reserve Bd., SR 11-11/CA 11-5, Supervision and Regulation Letter on Supervision of Savings and Loan Holding Companies (SLHCs) to the Officer in Charge of Supervision at Each Federal Reserve Bank and To Savings and Loan Holding Companies Supervised by the Federal Reserve 2 (July 21, 2011), https://www.federalreserve.gov/supervisionreg/srletters/sr1111.pdf [https://perma.cc/4HU4-BKF3]. The FRB’s RFI rating system replaced the CORE rating system of the OTS for SLHCs. Id.

382. Id. at 3. Previously, the OTS used the CORE rating system for SLHCs in which the “C” stood for Capital, “O” for Organizational structure, “R” for Risk management, and “E” for Earnings. 72 Fed. Reg. 72942 (Dec. 20, 2007) (final rule)). The OTS seems to have implemented CORE system in 1989 when “C” stood for Capital, “O” for Organizational structure, “R” for Relationship, and “E” for Earnings.

program to BHCs and SLHCs. In 2019, the FRB began to assign ratings using the RFI rating system to every SLHC of a depository in nature with less than $100 billion in total consolidated assets. However, the FRB delayed its application of the LFI rating system for SLHCs that are depository in nature with $100 billion or more in assets to consider whether the RFI, LFI, or some other rating system is appropriate on a permanent basis. The FRB continued to assign “indicative” ratings for SLHCs, those large SLHCs, as well as to SLHCs engaged in significant commercial or insurance activities.

Generally, DIHCs of like size and nature are subject to the same examination standards and rating systems. The FRB assesses the condition of all SLHCs of a depository nature and BHCs with up to $100 billion in total consolidated assets using the RFI rating system. BHCs and SLHCs between $3 billion and $100 billion in total consolidated assets are examined annually, while BHCs and SLHCs with less than $3 billion in total consolidated assets are examined every eighteen months. However, the FRB assigns indicative RFI ratings to insurance SHLCs and commercial SLHCs regardless of size.

385. Fed. Reserve Bd., supra note 371, at 1. SLHCs are considered “insurance SLHCs” if they are either insurance companies or hold 25% or more of their total consolidated assets in subsidiaries that are insurance companies. SLHCs are considered “commercial SLHCs” if they derived 50% or more of their total consolidated assets or total revenues form activities that are not financial in nature under section 4(k) of the BHCA. Id.
B. Capital

Until the early 1980s, bank regulators used informal standards to determine the capital of depository institutions. Traditionally, banking law required a minimum capitalization for organizers to obtain a charter and begin operations.\footnote{391 From 1864 to 2000, section 5138 Revised Statutes imposed minimum capital amount for national banks. However, in 2000, Congress repealed the requirement because it previously granted the federal banking agencies the authority to establish minimum capital requirements. American Homeownership and Economic Opportunity Act of 2000, Pub. L. No. 106-569, § 1233, 114 Stat. 2944, 3037 (2000). Many state laws still impose minimum capital amounts for banks. See, e.g., 5 DEL. CODE ANN. § 745 (2019); GA. CODE ANN. § 7-1-410 (2019); KY. REV. STAT. ANN. § 286.3-070 (West 2019). Other state laws grant the banking commissioner the discretion to establish minimum capital amounts. See, e.g., OHIO REV. CODE ANN. § 1107.03 (2019); 7 PA. CONS. STAT. § 1102 (West 2019).} However, banking regulators expected operating institutions to maintain a higher level of capital than the legal minimum.\footnote{392 HOWARD D. CROSSE & GEORGE H. HEMPEL, MANAGEMENT POLICIES FOR COMMERCIAL BANKS 73–74 (Prentice-Hall, Inc., 2nd ed., 1973) (“In recent years as a matter of policy, supervisory authorities have usually required new banks to start with more than the legal minimum of capital.”).} Federal banking regulators began to use ratios to access capital adequacy, starting with a capital-to-deposit ratio, then capital-to-asset ratios, and eventually risk-based asset ratios.\footnote{393 From 1900 to the late 1930s, bank regulators used the ratio of capital to deposits to measure capital adequacy. State bank regulators expected a capital to deposits ratio of 10% or more for healthy institutions. YAIR E. ORGLER & BENJAMIN WOLKOWITZ, BANK CAPITAL 68 (1976); see also 1914 OCC ANN. REP. 21. In 1939, the FDIC criticized the capital-to-deposits ratio because banks incur losses on assets rather than deposits. ORGLER & WOLKOWITZ, supra, at 69. So, the FDIC began to use a capital-to-assets ratio to measure the soundness of insured banks. 1939 FDIC ANN. REP. 12. In 1947, the FDIC enhanced its calculations, adding a ratio without cash and U.S. government obligations. 1947 FDIC ANN. REP. 49. In 1948, the OCC developed a risk-asset ratio as a screening device for assessment of capital adequacy, which excluded cash, bank balances, and U.S. government obligations. See, e.g., 1948 OCC ANN. REP. 4. However, the OCC viewed the risk-asset ratio as a preliminary step and made final determinations of capital adequacy based on its assessment of factors, particularly management competence and asset quality. CROSSE & HEMPEL, supra note 392, at 76.} Despite regulatory
attention to capital, federal banking regulators did not impose explicit minimum capital requirements until the early 1980s.\footnote{1}

1. Bank Holding Companies

The FRB’s authority to impact the capitalization of institutions under its jurisdiction arises from its authority to act on applications, promulgate capital standards, and issue capital directives. Under the BHCA, the FRB is required to take various factors into consideration when reviewing a BHC’s proposed acquisition of a bank or nonbank entity, including the impact of the acquisition on the financial resources of the acquiring and acquired firm.\footnote{3} For example, an acquisition may benefit an acquired firm with access to capital or dilute the capital position of an acquiring firm. The FRB weighs these and other considerations in making decisions to approve or deny applications. The FRB has denied applications based on capital considerations.\footnote{4}

The FRB first issued formal capital guidelines for BHCs in 1981.\footnote{5} In 1983, the International Lending Supervision Act (“ILSA”)
gave the federal banking regulators explicit authority to establish capital standards for bank affiliates, including bank holding companies and their nonbank subsidiaries.\(^{398}\) In 1985, the FRB issued revised capital adequacy guidelines for BHCs.\(^{399}\) In 1989, the FRB adopted risk-based capital guidelines for BHCs.\(^{400}\) The OCC and FDIC also adopted capital adequacy guidelines.\(^{401}\) The capital adequacy guidelines issued by these three federal banking regulators aligned capital regulation in the United States with the standards set forth the initial Basel Accord (“Basel I”).\(^{402}\)

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\(^{398}\) International Lending Supervision Act of 1983 (“ILSA”), Pub. L. No. 98-181, § 908, 97 Stat. 1278, 1280 (1983). Congress enacted the International Lending Supervision Act (“ILSA”) in reaction to a decision of the Fifth Circuit Court of Appeals overturning an OCC capital directive related to the unsafe and unsound capital level at a national bank. First Nat’l Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 685 (5th Cir. 1983). ILSA directed the federal banking agencies to "cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions." International Lending Supervision Act of 1983 § 908(a)(1), 97 Stat. at 1280. ILSA further stated that the "failure of a banking institution to maintain capital at or above its minimum level . . . may be deemed . . . to constitute an unsafe and unsound practice." Id. § 908(b)(1), 97 Stat. at 1280; see also S. REP. No. 98-122, at 17 (1983) ("[A]ny of the provisions of the bill may be applied by the appropriate federal banking agency to any affiliate of any insured bank, including any bank holding company individually or on a consolidated basis for its nonbank subsidiaries . . . ."); S. REP. No. 100-19, at 36 (1987); 50 Fed. Reg. 16,057, 16,064 (Apr. 24, 1985) (FRB); Wake Bancorp, Inc., 73 FED. RES. BULL. 925 (1987).


\(^{400}\) 40. 54 Fed. Reg. 4186 (Jan. 27, 1989).


\(^{402}\) In 1988, the Governors of the Basel Committee on Banking Regulations and Supervisory Practices endorsed the Basel Accord. The Basel Committee consisted of central bank representatives from the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, the United Kingdom, and the United States) and Luxembourg. 54 Fed. Reg. 4186, 4186–87 (Jan. 27, 1989). The Basel Committee is headquartered at the Bank for International Settlements in Basel, Switzerland. The Basel Accord arose from recognition of the need to "strengthen the soundness and stability of the international banking system and to remove a source of competitive inequality arising from differences in national capital requirements." History of Basel Committee, BANK FOR INT’L SETTLEMENTS, https://www.bis.org/bcbs/history.htm [https://perma.cc/5M5F-PWXG] (last visited Jan. 6, 2020). Action by the Basel Committee does not issue bind member countries but recommends a regulatory framework for the member countries.
These guidelines also reinforced the existing policy that organizations undertaking significant expansion, either through internal growth or acquisitions, maintain strong capital positions substantially above minimum levels. In 1991, the Federal Deposit Insurance Corporation Improvement Act of 1991 gave the FRB the authority to issue capital directives.

2. Savings and Loan Holding Companies

The FHLBB’s concern with the capital adequacy of SLHCs was based on its approach to capital adequacy of insured savings associations, which focused on the risk associated with assets as it calculated the net worth of insured savings associations. However, in 1985, the FHLBB shifted its focus from net worth to capital adequacy, stating that it used minimum net worth requirements to “gauge capital adequacy.” In 1986, the FHLBB amended its regulations pertaining to the calculation of “regulatory net worth” to refer to the calculation of “regulatory capital.” In 1987, CEBA specifically authorized the FHLBB to set and enforce regulatory capital requirements. FIRREA abolished the FHLBB and required its successor, the newly created OTS, to establish

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405. From 1934 to 1980, the National Housing Act required each insured savings association to hold a reserve of 5% of its insured accounts. 50 Fed. Reg. 6891 (Feb. 19, 1985) (referring to 12 C.F.R. § 563.13 (1984)). The FHLBB viewed its express statutory authority under section 403(b) of the National Housing Act as broad authority for it to establish and define the minimum reserve requirements. Id. at 6893. In 1964, the FHLBB began to include “risk assets,” “adjusted net worth,” and “scheduled items” in the calculation of the reserve requirement. 29 Fed. Reg. 44 (Jan. 3, 1964). In 1972, the FHLBB required insured savings associations to have a net worth equal to the greater of 5% of insured accounts plus 20% of scheduled items or the amount determined by the so-called “Asset Composition and Net-Worth Index.” 37 Fed. Reg. 26579 (Dec. 14, 1972). The Depository Institutions Deregulation and Monetary Control Act of 1980 eliminated the specific statutory reserve requirement and left the determination of the appropriate reserve to the discretion of the FHLBB within the range of 3 to 6% of insured accounts. Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221, § 409, 94 Stat. 132, 160.
uniform capital standards for savings associations.409 The OTS did not promulgate a standardized capital requirement for SLHCs, but considered the overall risk profile of the consolidated entity on a case-by-case basis.410

When the Dodd-Frank Act transferred responsibility for the supervision of SLHCs from the OTS to the FRB,411 the so-called “Collins Amendment” to the Dodd-Frank Act required the federal banking agencies to establish minimum leverage and risk-based capital requirements on a consolidated basis for insured depository institutions, DIHCs, and nonbank financial companies supervised by the FRB.412 The

409. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 301, 103 Stat. 183, 303–04 (amending section 5(t) of HOLA). Specifically, FIRREA required savings associations to have core capital of 3% of assets, tangible capital of at least 1.5% of assets, and risk-based capital in amounts required by regulations to be issued by the OTS that would be at least as stringent as those applicable to national banks. Id. In its preamble to the implementing regulations, the OTS noted the importance of “levels of capital . . . related to the risk of activities in which a savings association engages . . . to ensure that the association can afford to cover losses that may arise from such activities without becoming insolvent.” 54 Fed. Reg. 46845, 46846 (Nov. 8, 1989). The OTS intended these standards to be consistent with the capital standards established by Basel I. Id.

410. OFFICE OF THRIFT SUPERVISION, supra note 377, at 100.8. The OTS described its process as follows:

This involves assessing traditional analytical measures, including the overall leverage, the level of short-term debt and liquidity, cash flow and reliance on thrift and other subsidiary earnings, interest coverage, quality of earnings, and level of consolidated tangible and equity capital. The objective is to ensure that the holding company enterprise maintains adequate capital to support its risk profile and to meet the minimum capital standards of any regulated financial sector (banking, securities, or insurance) in which it operates. Another objective is to ensure that an appropriate equity buffer exists to shield the thrift from unexpected problems within the enterprise. OTS can require holding company enterprises to meet individualized capital requirements when capital adequacy is a concern.


412. Dodd-Frank Act § 171(b)(1)-(2), 124 Stat. at 1436. The leverage and capital standards were required to be not less than or quantitatively lower than the leverage and risk-based capital requirements applicable to insured depository institutions as of July 21, 2010. Id. Small BHCs subject to the Small Bank Holding Company Policy Statement of the FRB were exempt from these requirements. Dodd-Frank Act § 171(b)(5), 124 Stat. at 1437. The Dodd-Frank Act did not provide a similar exemption for small SLHCs. The FRB, OCC, and FDIC issued implementing regulations. 78 Fed. Reg. 55340 (Sept. 10, 2013) (FDIC); 78 Fed. Reg. 62018 (Oct. 11, 2013) (OCC and FRB). These changes became effective from 2014 to 2019. These actions also partially implemented international agreements. BANK FOR INT’L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, BASEL III: A GLOBAL REGULATORY
Collins Amendment delayed effectiveness of the requirement until 2015 for SLHCs. The FRB adopted consolidated capital requirements applicable to SLHCs that became effective January 1, 2014.

3. Source of Strength

Historically, the FRB expected BHCs to act as a source of strength for their bank subsidiaries. As amended in 1984, Regulation Y provided that a "bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks." Later, an FRB policy statement provided that "a bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity."

The Dodd-Frank Act codified this doctrine, by requiring BHCs, SLHCs, and any other company that directly or indirectly controls an insured depository institution to act as a source of strength. Therefore, the FRB, OCC, or FDIC, as the case may be, is required to impose the source-of-strength requirement on companies that control an insured depository institution, including entities exempt from the definition of a

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Framed by the Responsibility of Bank Holding Companies to Act as Sources of Strength to Their Subsidiary Banks, 52 Fed. Reg. 15707 (Apr. 30, 1987); see also Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 251 (1978) (reversing the 7th circuit decision in First Lincolnwood Corp. Board of Governors, 560 F.2d 258 (7th Cir. 1977)).

bank under the BHCA or savings association under HOLA, such as a credit card bank, limited purpose trust entity, or ILC.\footnote{12 U.S.C. § 1831o-1(b) (2018).}

4. Basel II

In 2007, the federal banking agencies adopted a new risk-based capital adequacy framework for banks, savings associations, and BHCs, which covered risk-based capital requirements arising from credit risk, market risk, and operational risk.\footnote{72 Fed. Reg. 69288, 69289 (Dec. 7, 2007); see also BANK FOR INT’L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK (2006), https://www.bis.org/publ/bcbs128.pdf [https://perma.cc/B888-6FER].} This action partially aligned the United States with the report released by the Basel Committee on Banking Supervision (“BCBS”), entitled \textit{International Convergence of Capital Measurement and Capital Standards: A Revised Framework} (“Basel II”).\footnote{72 Fed. Reg. 69288 (Dec. 7, 2007) (covering FRB, FDIC, OCC, and OTS); see also BANK FOR INT’L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, supra note 420.} The framework set forth three pillars for risk-based capital: (1) credit risk, market risk, and operational risk; (2) supervisory review of capital adequacy; and (3) market discipline through enhanced public disclosures.\footnote{BANK FOR INT’L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, supra note 420, at 2.}

5. Stress Tests

The Dodd-Frank Act required the FRB to conduct annual stress tests on the largest and most complex financial firms to determine whether they have capital necessary to absorb losses as a result of adverse economic conditions.\footnote{Dodd-Frank Act, § 165(i), 124 Stat. at 1430 (codified at 12 U.S.C. § 5365(i)(1) (2018)).} The FRB conducts Dodd-Frank Act stress tests for BHCs with average total consolidated assets of $100 billion or more, U.S. intermediate holding companies of foreign banking organizations, and any nonbank financial company the Financial Stability Oversight Council has determined shall be supervised by the FRB.\footnote{12 C.F.R. 252.4(a) (2020). On July 6, 2018, the FRB issued a statement regarding the impact of EGRRCPA, Economic Growth, Regulatory Relief, and Consumer Protection Act (“EGRRCPA”), Pub L. No. 115-174, 132 Stat. 1296 (2018). The FRB stated, consistent with} Stress test
models assess whether each firm is “sufficiently capitalized to absorb losses in stressful economic conditions while continuing to meet obligations to creditors and other counterparties and to lend to households and businesses.” The stress test models are also used in the Comprehensive Capital Analysis and Review (“CCAR”), pursuant to the FRB’s capital plan rule.

6. Basel III

In 2010, the BCBS released a report entitled *Basel III: A Global Regulatory Framework for a More Resilient Banks and Banking Systems* (“Basel III”), which sought to strengthen bank capital requirements, increase bank liquidity, and decrease bank leverage. The reforms embodied in the report aimed to “improve the banking sector’s ability to absorb shocks arising from financial and economic stress, whatever the source, thus reducing the risk of spillover from the financial sector to the real economy.”

The FRB issued Regulation Q to implement Basel III for BHCs, SLHCs, and state member banks. Regulation Q raised minimum capital requirements. It also required all institutions regulated by the FRB to maintain a capital conservation buffer to avoid restrictions on capital distributions and discretionary bonus payments to executive officers. In addition, Regulation Q required certain BHCs to maintain a leverage buffer and institutions using “advanced approaches” to calculate of risk-based assets to maintain a countercyclical buffer.

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the EGRRCPA, that it will not take action to require BHCs with total consolidated assets greater than or equal to $50 billion but less than $100 billion to comply with the FRB’s capital plan rule (12 C.F.R. § 225.8) or the FRB’s supervisory stress test and company-run stress test rules (12 C.F.R. pt. 252, subparts E–F). Fed. Reserve Bd. et al., Interagency Statement Regarding the Impact of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) (July 6, 2018), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180706a1.pdf [https://perma.cc/2T6Q-HCC9].

428. Id. at 1.
430. 12 C.F.R. § 217.10.
431. Id. § 217.11(a).
432. Id. § 217.11(d); 79 Fed. Reg. 24528 (May 1, 2014).
433. 12 C.F.R. §§ 217.11(b), 100(b)(1).
Furthermore, Regulation Q imposed public disclosure requirements on certain large institutions. Regulation Q does not apply to BHCs and SLHCs governed by the Small Bank Holding Company Policy Statement or SLHCs substantially engaged in insurance underwriting or commercial activities.

C. Reporting

As initially enacted, the BHCA and SLHCA authorized the FRB and FSLIC, respectively, to require periodic reports from supervised institutions. The scope and number of reports increased over time with the increased size and complexity of financial institutions. Generally, the reports assist the federal banking agency in fulfilling their responsibilities for the supervision and regulation of financial institutions. Currently, the FRB has authority to require reports from BHCs and SLHCs. The FRB requires BHCs and SLHCs to file annual reports and changes in organizational structure reports as they occur. Depository institutions that engage in transactions with affiliates, such as a parent BHC or SLHC, are required to file a report. Generally, BHCs and SLHCs file financial

434. Id. §§ 217.61–217.63.
435. Id. § 217.1(c).
436. Id. §§ 217.1(c), 217.2.
statements with the FRB.\textsuperscript{442} However, SLHCs engaged primarily in commercial or insurance activities are exempt from filing the same report but are required to file similar reports.\textsuperscript{443}

\textbf{D. Applications}

Current federal law requires BHCs and SLHCs to file applications with the FRB seeking the approval of acquisitions. For instance, the BHCA requires the prior approval of the FRB for any action (1) that causes a company to become a BHC; (2) that causes a bank to become a subsidiary of a BHC; (3) by which a BHC acquires direct or indirect control of more than 5\% of the voting shares of a bank; (4) by which a BHC acquires all the assets of a bank; or (5) by which a BHC merges or consolidates with another BHC.\textsuperscript{444} Similarly, the HOLA requires the prior approval of the FRB for an SLHC to acquire a subsidiary savings association, acquire voting shares of a savings association, purchase assets of a savings association, or merge or consolidate with another SLHC.\textsuperscript{445} The form for a BHC to acquire a savings association differs from the form used by an SLHC to acquire a savings association.\textsuperscript{446} While there are minor differences in the information requested by the forms,\textsuperscript{447} the core statutory factors for
review of proposed acquisitions under the BHCA and HOLA are substantially the same. Under both statutes, the FRB must consider the impact of the acquisition on: (1) competition; (2) financial and managerial resources and future prospects; (3) the deposit insurance fund; and (4) convenience and needs of the community to be served. 448 The forms filed with the FRB to seek approval of acquisitions reflect the requirements of the underlying statutes and the historical development of the forms under different federal banking regulators, even though the FRB now has jurisdiction over both types of transactions.449

E. Enforcement

The agencies may take informal and formal enforcement actions against institutions for violations of laws, rules, or regulations, unsafe or unsound practices, and violations of written commitments.450 Informal enforcement actions are non-binding, good faith actions. Examples of informal actions include commitments, board resolutions, and memoranda of understanding. Formal actions are legally binding and enforceable actions. The appropriate enforcement action for a particular institution depends upon the severity of the problems, the institution's ratings, supervisory confidence in management, and other factors.

Formal actions that the federal banking agency may take include cease and desist orders, written agreements, and orders assessing civil money penalties. The agencies may seek a cease and desist order when a supervised institution or an institution-affiliated party is engaging, has

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449. Id. § 1467a (effectuating § 10 of HOLA for SLHC acquisitions through filing Form H-(e)); id. § 1843 (effectuating § 4 of the BHCA for BHCs acquisitions through filing Form FR Y-4).
450. The often-cited definition of “unsafe and unsound practice” is “any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.” 112 CONG. REC. 26,474 (1966) (remarks of Senator Robertson) (adapting the testimony of John Horne, Chairman, Federal Home Loan Bank Board); see also Gulf Federal Savings and Loan Association v. FHLBB, 651 F.2d 259, 263 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982).
engaged, or is about to engage in an unsafe or unsound practice in conducting the business of a supervised institution. The agencies may impose civil money penalties for (1) violation of law or regulation, written agreement or cease and desist order; or (2) recklessly or knowingly engaging in unsafe and unsound practices likely to cause substantial institutional loss or leading to individual pecuniary gain. The amount of the penalty is tied to a number of factors, as set forth in interagency guidance. The agencies are required to disclose these formal actions to the public.

When an agency pursues an enforcement action it usually attempts to obtain consent to the action. If consent is not obtained, the agency prepares a notice of charges. The notice of charges is served on the affected party or parties. If the party continues to contest the action, a public hearing is held before administrative law judge, who issues a recommendation to the agency. The agency then issues a final

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451. 12 U.S.C. § 1818(b). The agencies may also issue a temporary cease and desist order in certain circumstances. Id. § 1818(c).
452. Id. § 1818(i).
454. 12 U.S.C. § 1818(u). The agencies are also authorized to take enforcement action against current and former institution-affiliated parties of institutions under their jurisdiction. These actions include removal and prohibition orders and orders assessing civil money penalties. Id. § 1818(e),(i). The agencies may suspend, remove, or prohibit an institution-affiliated party from participation in the conduct of the affairs of a supervised institution based upon (i) violation of law or regulation, breach of fiduciary duty or unsafe or unsound practice (ii) when there is an institutional loss, prejudice to depositors or personal gain to the party, and (iii) personal dishonesty or willful or continuing disregard for safety and soundness. Id. § 1818(e). Furthermore, any person convicted of any criminal offense involving dishonesty or a breach of trust or money laundering or who entered into a pre-trial diversion in connection such an offence may not (i) become or continue as an institution-affiliated party with respect to any insured depository institution (ii) own or control, directly or indirectly any insured depository institution or otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution, unless the obtain the prior written consent of the FDIC. Id. § 1829; see also Modifications to the Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs for Such Offenses, 83 Fed. Reg. 38143 (Aug. 3, 2018); Modifications to Statement of Policy for Section 19 of the Federal Deposit Insurance Act, 77 Fed. Reg. 74849 (Dec. 18, 2012); FDIC Policy Statement, 63 Fed. Reg. 66184 (Dec. 1, 1998).
decision and order.\textsuperscript{456} Within the next ten days, the affected party may appeal the determination to an appellate court.\textsuperscript{457}

Noncompliant FHCs are subject to a type of formal enforcement action. FHCs are noncompliant if they fail to meet capital, management, and community reinvestment requirements.\textsuperscript{458} A noncompliant FHC must either decertify as an FHC and cease engaging in activities only permissible pursuant to BHCA Section 4(k), or enter into an agreement to correct its noncompliance within 180 days.\textsuperscript{459} The FRB does not generally publicly disclose the existence of these enforcement agreements. However, a BHC or SLHC with securities registered pursuant to the Securities Exchange Act may decide that it must disclose the agreement upon advice of its legal counsel to decrease the risk of insider trading liability because execution of the agreement is a material event under federal securities laws.\textsuperscript{460}

\section*{F. Consolidated Supervision}

The FRB developed the practice of consolidated supervision to understand BHC structure, activities, resources, and risks, as well as address deficiencies before they pose a danger to subsidiary depository institutions.\textsuperscript{461} The consolidated supervision of BHCs and SLHCs takes place within the framework of legal authority established by Congress.\textsuperscript{462}

\begin{itemize}
\item \textsuperscript{456} 12 U.S.C. § 1818(h)(1).
\item \textsuperscript{457} Id. § 1818(h)(2).
\item \textsuperscript{459} Id. § 4(m), 12 U.S.C. § 1843(m) (BHCs); Home Owners’ Loan Act § 10(c), 12 U.S.C. § 1467a(c) (SLHCs).
\item \textsuperscript{460} See 15 U.S.C. § 78 (prohibiting use of a “manipulative and deceptive device” in connection with the purchase or sale of securities); 17 C.F.R. § 240.10b5-1 (2019) (stating that “manipulative and deceptive devices” includes the purchase or sale of an issuer’s securities on the basis of material non-public information).
\item \textsuperscript{461} Fed. Reserve Bd., SR 08-9/CA 08-12, Supervision and Regulation Letter on Consolidated Supervision of Bank Holding Companies and the Combined Operations of Foreign Banking Organizations to the Officer in Charge of Supervision at Each Reserve Bank and to Domestic and Foreign Large Complex Banking Organizations, Regional Banking Organizations, and U.S. Offices of Multi-Office Foreign Banking Organizations Supervised by the Federal Reserve (Oct. 16, 2008), https://www.federalreserve.gov/boarddocs/srlletters/2008/SR0809.htm [https://perma.cc/T2BG-F5T5] (“Consolidated supervision of a BHC encompasses the parent company and its subsidiaries, and allows the Federal Reserve to understand the organization’s structure, activities, resources, and risks, as well as to address financial, managerial, operational, or other deficiencies before they pose a danger to the BHC’s subsidiary depository institutions.”).
\item \textsuperscript{462} Id.
\end{itemize}
The key authorities needed to practice consolidated supervision are the authority to require reports, conduct examinations, establish capital requirements, and take enforcement action.\footnote{463} The FRB’s concern with the impact of affiliates on depository institutions has a long history. In 1933, the FRB obtained authority to require reports from any affiliate of a member bank, and require such affiliates to submit to examination as a condition of the FRB’s approval of an application of a holding company affiliate of a member bank to vote stock of a member bank. In connection with its consideration of applications for voting permits, the FRB sought a “comprehensive picture of the entire group” and “information concerning various relationships within the group.”\footnote{464}

In 1956, the FRB obtained the power to require reports from and conduct examinations of multi-bank holding companies.\footnote{465} In 1970, the FRB obtained the authority to require reports and conduct examinations of one-bank holding companies.\footnote{466} In 1974, Congress authorized the FRB to take enforcement action against BHCs and their nonbank subsidiaries through issuance of a cease-and-desist order.\footnote{467} In 1978, Congress granted the FRB the explicit authority to order a bank holding

\footnote{463} ILCs-A Review of Charter, Ownership, and Supervision Issues: Hearing Before the Subcomm. On Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Serv., 109th Cong. 83 (2006) (statement of Scott G. Alvarez, General Counsel, Federal Reserve Board) (“The hallmarks of this consolidated supervisory framework are broad grants of authority to examine and obtain reports from bank holding companies and each of their subsidiaries, establish consolidated capital requirements for bank holding companies, and take supervisory or enforcement actions against bank holding companies and their nonbank subsidiaries to address unsafe or unsound practices or violations of law. Consolidated capital requirements help ensure that bank holding companies have real capital to support their group-wide activities, do not become excessively leveraged, and are able to serve as a source of strength for their subsidiary banks.”).

\footnote{464} 1934 FRB ANN. REP. 54 (“In connection with the consideration of applications of holding company affiliates for voting permits, arrangements were completed, wherever practicable, to have the various banks controlled by the same holding company affiliate examined as nearly as practicable as of the same date in order that a comprehensive picture of the entire group might be obtained and information concerning various relationships within the group be developed.”).


\footnote{466} Bank Holding Company Act Amendments of 1970 § 101, 84 Stat. at 176 (providing authority to require reports and conduct examinations obtained through amendment of the definition of a bank holding company).

company to divest a nonbank subsidiary or cease activity.\footnote{468 Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 105(a), 92 Stat. 3646.} In 1983, Congress gave the FRB explicit authority to set capital requirements.\footnote{469 International Lending Supervision Act of 1983, Pub. L. No. 98-181, § 908, 97 Stat. 1280.} Therefore, the FRB had accumulated all the powers necessary to practice consolidated supervision related to BHCs by 1983.

In 1999, the GLBA repealed prohibitions on affiliations between bank, securities, and insurance firms and authorized FHCs to engage in financial activities, as well as activities incidental or complementary to a financial activity.\footnote{470 Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (1999).} Subject to limitations, the GLBA also extended the supervisory and enforcement powers of the FRB to FHC subsidiaries engaged in securities, insurance, and commodities activities.\footnote{471 Id. § 113, 113 Stat. at 1369.} Furthermore, the FRB obtained the authority to require divestiture of a depository institution subsidiary of a BHC.\footnote{472 Previously, the FRB could only issue a cease-and-desist order against a depository institution subsidiary or order the divestiture of a nonbank subsidiary. See Financial Institutions Regulatory and Interest Rate Control Act of 1978 § 105(a), 92 Stat. at 3646; H.R. Rep. No. 95-1383, at 19 (1978).} Therefore, in 1999, the FRB possessed the authority, albeit subject to some limitations, to assess FHC risk on a group-wide basis and take enforcement action to address threats to a depository institution subsidiary from its nonbank affiliates.

In 2011, the Dodd-Frank Act transferred responsibility for the supervision of SLHCs from the OTS to the FRB.\footnote{473 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, § 312, 124 Stat. 1376, 1521 (2010).} While the OTS did not practice consolidated supervision, the FRB began to apply its consolidated approach to supervision to SLHCs in 2011, after the transfer of responsibility for the supervision of SLHCs from the OTS to the FRB.\footnote{474 Fed. Reserve Bd., supra note 381.} Congress also required the FRB to establish consolidated capital requirements for SLHCs by 2015.\footnote{475 Dodd-Frank Act, § 171(b)(1), (b)(4)(D), 124 Stat. at 1436-37 (codified as amended at 12 U.S.C. § 5371 (2018)); Insurance Capital Standards Clarification Act of 2014, Pub. L. No. 113-279, 128 Stat. 3017 (amending Dodd-Frank Act section 171).} The FRB set forth its capital requirements for SLHCs, as well as BHCs, in rules that became effective in 2014.\footnote{476 78 Fed. Reg. 62018 (Oct. 11, 2013) (effective Jan. 1, 2014).}
G. Remaining Differences in Supervision

Only a few differences remain in the supervision of DIHCs. First, there are differences in the rating system used to evaluate DIHCs of the same size. The FRB assesses BHCs with total consolidated assets of $100 billion or more using the LFI rating system; however, the FRB assesses SLHCs of a depository nature with $100 billion or more in total consolidated assets using the RFI rating system. The FRB also assigns “indicative” RFI ratings to SLHCs that are engaged in significant commercial or insurance activities rather than actual RFI ratings.

Second, there are differences in the capital requirements applicable to BHCs and SLHCs based upon the activities in which they are engaged. Generally, all top-tier BHCs and SLHCs domiciled in the United States are subject to the same capital requirements. However, SLHCs domiciled in the United States and substantially engaged in insurance underwriting or commercial activities are not currently subject to the FRB’s consolidated capital requirements. In 2019, the FRB issued a notice of proposed rulemaking to establish a “Building Block Approach” to capital requirements for DIHCs that are significantly engaged in insurance activities, which adjusts and aggregates existing legal requirements to determine an enterprise-wide capital requirement.

Third, there are different forms for routine reports and approval of acquisitions of the same type of institution. For example, SLHCs engaged primarily in commercial or insurance activities are exempt from filing form FR Y-9 filed by BHCs and most SLHCs. Instead, they file form FR 2320 and FR LL-(b)11 reports. As a further example, the acquisition of a savings association by a BHC requires the filing of form

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481. QUARTERLY SAVINGS AND LOAN HOLDING COMPANY REPORT—FR 2320, supra note 443; SAVINGS ASSOCIATION HOLDING COMPANY REPORT—FR LL-(b)(11), supra note 443.
FR Y-4, while the acquisition of a savings association by a SLHC requires the filing of form H(e).

Finally, there are differences in the FRB’s supervision of mutual BHCs and mutual SLHCs. The FRB has statutory responsibilities related to mutual SLHCs that it does not have with respect to mutual BHCs. Because Congress preempted state law related to the chartering and regulation of mutual SLHCs, the FRB has exclusive authority to charter and regulate mutual SLHCs. Congress has not preempted state law related to mutual BHCs. Several states charter mutual BHCs. In any event, the FRB supervises all SLHCs through examination, capital, reporting, source of strength, and other requirements. Furthermore, the FRB acts upon the applications of mutual SLHCs to convert to stock form. The FRB also acts upon the requests of mutual SLHCs to waive dividends. The FRB’s responsibilities with respect to charters,
conversions, and dividend waivers are unique to its role as the primary federal regulator of mutual SLHCs.

VI. CONCLUSION

The separate regulation and supervision of BHCs and SLHCs arises from the charters of the depository institutions controlled by these companies. BHCs control banks and SLHCs control savings associations.\(^489\) During the first half of the twentieth century, banking organizations were authorized to engage in very different lines of business. Banks were authorized to accept demand deposits, make consumer, residential, and commercial loans and provide trust services,\(^490\) while savings associations were authorized to accept time deposits and finance home loans.\(^491\) These differences in authorized activities existed when Congress authorized the comprehensive regulation of BHCs in 1956 and SLHCs in 1968.\(^492\)

As the twentieth century progressed, the regulation of banking organizations became more and more similar. Congress eliminated almost all differences in the authorized activities of banks and savings associations, as well as permissible activities for BHCs and SLHCs. For example, Congress authorized federal savings associations to accept demand deposits, make consumer and commercial loans, and provide trust services.\(^493\) Congress also authorized BHCs to acquire savings associations\(^494\) and authorized SLHCs to engage in activities permissible


\(^{491}\) See, e.g., Home Owners’ Loan Act of 1933, Pub. L. No. 73-42, § 5(b)–(c), 48 Stat. 128, 132 (federal savings and loan associations authorized to accept deposits related to borrowed money and make loans on security of first liens on homes).


for BHCs.\textsuperscript{495} When Congress transferred responsibility for the regulation and supervision of SLHCs from the OTS to the FRB in 2011\textsuperscript{496} the Dodd-Frank Act also required the FRB to establish minimum leverage and risk-based capital requirements for SLHCs on a consolidated basis not less than generally applicable requirements in effect for insured depository institutions.\textsuperscript{497}

As regulation of banking organizations became more and more similar, the supervisory practices of the federal banking agencies also converged. The agencies adopted similar approaches to capital adequacy, examinations, reports, application forms, and enforcement. The FRB also began to supervise SLHCs on a consolidated basis in a manner consistent with its supervision of BHCs.\textsuperscript{498} In 2011, the FRB began to assign indicative ratings to SLHCs using the RFI rating system developed for BHCs.\textsuperscript{499} In 2019, the FRB started to assign actual RFI ratings to SLHCs of a depository nature with less than $100 billion in total consolidated assets.\textsuperscript{500}

The number of BHCs and SLHCs grew throughout most of the twentieth century. At the beginning of the twentieth century, it appears that no companies controlled depository institutions.\textsuperscript{501} At the time of enactment of the BHCA in 1956, there were sixty-nine BHCs.\textsuperscript{502} In 1957, only two companies were known to control savings and loan associations.\textsuperscript{503} In 1966, there were ninety-eight SLHCs.\textsuperscript{504} During the 1970s and 1980s, the number of BHCs and SLHCs grew dramatically.\textsuperscript{505}

\textsuperscript{497}. Id. § 171, 124 Stat. at 1436.
\textsuperscript{498}. Fed. Reserve Bd., supra note 381. The FRB’s RFI rating system replaced the CORE rating system of the OTS for SLHCs.
\textsuperscript{499}. Id.
\textsuperscript{500}. 83 Fed. Reg. 56081 (Nov. 9, 2018); Fed. Reserve Bd., supra note 371.
\textsuperscript{501}. Group Banking in the United States, 24 FED. RES. BULL. 92, 97 (1938).
\textsuperscript{502}. 1957 FRB ANN. REP. 71.
\textsuperscript{504}. Savings and Loan Holding Company Amendments of 1967: Hearings on H.R. 1322, H.R. 8696, and H.R. 12025 Before the Subcommittee on Domestic Finance of the Committee on Banking and Currency of the House of Representatives, 90th Cong. 1st, Sess. 1 (Aug. 21-22, 1967) (statement of John E. Horne, Chairman, FHLBB), at 10 (“By the end of 1966 . . . there were 98 holding companies controlling 184 associations representing 12.5 percent of the whole industry.”).
\textsuperscript{505}. See supra Figures 3 and 4 and accompanying footnotes.
At their height, there were 6,474 BHCs in 1988. The number of BHCs began to decrease near the end of the twentieth century. The number of SLHCs crested at 893 in 2008. When the FRB assumed responsibility for the regulation and supervision of SLHCs in 2011, there were 427 top-tier SLHCs. At the end of 2019, there were 3,725 top-tier BHCs and 187 top-tier SLHCs.

The convergence in the regulation and supervision of BHCs and SLHCs, decrease in the number of SLHCs, and consolidation of responsibility for the regulation and supervision of BHCs and SLHCs with the FRB suggest that it is time to unify statutory framework for the regulation of DIHCs. Congress could consolidate regulation of all holding companies controlling an FDIC-insured depository institution under one statute of uniform application. One way to create a unified statutory framework would be to transfer the regulation of SLHCs from HOLA to a revised version of the BHCA entitled the “Depository Institution Holding Company Act” (“DIHCA”).

A unified statutory framework for the regulation of holding companies controlling FDIC-insured depository institutions could have a number of benefits. First, a unified statutory framework for the regulation of DIHCs would reinforce the separation of banking from commerce. The separation of banking from commerce generally prevents companies controlling an insured depository institution from obtaining a funding advantage over companies that do not. The separation also prevents extension of the federal safety net, ultimately backed by taxpayers, to commercial entities. However, several exceptions to

507. See supra Figures 3 and 4 and accompanying footnotes.
508. National Information Center, supra note 213.
509. 2011 FRB ANN. REP. 90.
511. The unified statutory framework would only apply to holding companies controlling FDIC-insured DIIs. It would not apply to credit unions for two reasons. First, natural person credit unions are not controlled by holding companies, but by their share account holders (depositors). This article addresses holding companies. Second, the deposits of credit unions are federally insured through the National Credit Union Share Insurance Fund administered by the NCUA. See supra introductory text in Part II.
512. INDEP. COMTY. BANKS OF AMERICA, supra note 218, at 3–4.
separation currently exist. BHCs and SLHCs that become FHCs are authorized to engage in merchant banking activity—investing in commercial companies for a limited period of time. Furthermore, the parent companies of ILCs may engage in commercial activities. They are not subject to restrictions on their activities because ILCs, while insured by the FDIC, are excluded from the definition of a bank in the BHCA. In addition, GUSLHCs may engage in commercial activities because they are not subject to restrictions on their activities by the HOLActing. The separation of banking and commerce would be reinforced by the repeal of FHC authority to engage in merchant banking activity, elimination of the exclusion of ILCs from the definition of a bank in the BHCA, and elimination of the GUSLHC exemption from the restriction on activities in HOLActing. The FRB has recommended Congress take these actions.

Second, a unified statutory framework would level the competitive playing field among DIHCs. This could be accomplished by establishing a standardized list of permissible activities for DIHCs. The permissibility of activities for BHCs and SLHCs developed in a patchwork manner in response to market developments and policy choices. The underlying rationale for differences in permissible activities may have made sense in the market for financial services at the time they became authorized. In the contemporary market, the authority of SLHCs and BHCs to engage in an activity may differ for no reason other than the charter of the underlying depository institution. For example, ordinary SLHCs are authorized to engage in real estate development, while ordinary BHCs and FHCs are not authorized to engage in real estate development activities. This may have made sense when savings

Counsel, Federal Reserve Board) (stating that protections of the federal safety net consist of deposit insurance and access to the Federal Reserve's discount window and payments system).

515. Id. § 1841(c)(2)(H).
516. Id. § 1467a(c)(3), (9)(C).
517. The FRB views merchant banking, the ILC exclusion, and the GUSLHC exemption as undermining the separation of banking from commerce. In the FRB's view, the ILC exclusion and GUSLHC exemption create an uneven playing field among organizations that control an FDIC-insured depository institution and increase risk to the federal safety net. The FRB has recommended the repeal of merchant banking authority as well as elimination of the ILC exclusion and GUSLHC exemption. Fed. Reserve Bd. et al., supra note 279, at 28.
518. Id.
associations were the principal means of home financing. Today, banks, savings associations, and government sponsored enterprises all play a role in making home mortgage loans. In enacting a unified statutory framework for the regulation of DIHCs, Congress could set forth a standardized list of permissible activities after weighing the risks and benefits associated with specific activities, such as real estate development.

Third, a unified statutory framework would expand the ability of the FRB to address dangers to depository institutions posed by their affiliates by subjecting all DIHCs to consolidated supervision. This would be accomplished by eliminating the exclusion of ILCs from the definition of a bank in the BHCA and elimination of the GUSLHC exemption from the restriction on activities in HOLA. With these actions, depository holding companies not currently subject to consolidated supervision would become subject to consolidated supervision. One of the primary purposes of consolidated supervision is to assess risk and address deficiencies on a consolidated group basis before they pose a danger to a holding company’s subsidiary depository institutions. Expanding the FRB’s jurisdiction to cover GUSLHCs and the parent companies of ILCs would help mitigate potential dangers to subsidiary depository institutions and the federal safety net.

Finally, a unified statutory framework for the regulation of DIHCs could improve supervisory efficiency through eliminating unnecessary complication. There would be many opportunities to standardize and simplify statutory language in a DIHA. The definitions applicable to the regulation of DIHCs could be standardized. For instance, the definition of “control” could be standardized for determinations of control related to a bank, savings association, BHC, SLHC, or other company. In addition, simplification could flow from the deletion of statutory language that is no longer applicable, such as grace periods for divestiture of impermissible activities. Furthermore, statutory language could be eliminated that incorporates authorized activities by reference, such as language in Section 10 of HOLA

522. Id. § 1842(a).
authorizing SLHCs to engage in activities permissible for BHCs under Sections 4(c) and 4(k) of the BHCA.\textsuperscript{523}

In light of regulatory convergence, consolidation of supervisory responsibility, declining numbers of holding companies, and the benefits of a unified statutory framework, it is now time for Congress to consolidate the regulation and supervision of companies controlling an FDIC-insured depository institution under a unified statutory framework.

\textsuperscript{523} \textit{Id.} § 1467a(c)(2)(F)(i), (c)(2)(H).
This article uses many terms and acronyms to refer to types of financial institutions, banking regulators, and federal laws. Key words and phrases are defined below. Acronyms are defined when first used in this article and are collected below.

<table>
<thead>
<tr>
<th>Acronym/Word/Phrase</th>
<th>Meaning</th>
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<tr>
<td>1933 Act</td>
<td>Banking Act of 1933</td>
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<td>1970 BHCA Amendments</td>
<td>Bank Holding Company Act Amendments of 1970</td>
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<tr>
<td>Activities</td>
<td>Broad categories of things done by a financial institution, such as accepting deposits, making loans, selling securities, or providing insurance. Activities may be authorized by the institution’s charter or enabling legislation and may automatically apply or require notice or approval by a regulator.</td>
</tr>
<tr>
<td>Bank</td>
<td>Unless noted, the definition of bank in the BHCA is used when referring to a “bank.” The BHCA defines a bank as an institution organized under the laws of the United States that (1) is an FDIC-insured institution; or (2) receives demand deposits and makes commercial loans.</td>
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524. Id. § 1841(c)(1). Generally, a demand deposit is payable as a matter of right on demand. Heller, supra note 114, at 5–6. Broadly speaking, commercial loans are secured or unsecured loans to companies or individuals for other than personal, family, or household purposes. Id. at 10. The Federal Deposit Insurance Act defines a bank as any national or state bank. 12 U.S.C. § 1813(a)(1). A state bank is any bank, trust company, savings bank, or similar institution that is in the business of receiving deposits (other than trust funds) and is incorporated under the laws of any state. Id. § 1813(a)(2). Under the Federal Deposit Insurance Act, a bank does not include nationally-chartered savings banks and savings associations, as well as state savings associations. Id. § 1813(a)(1). However, as depository institutions, they may obtain deposit insurance if they met the definition of a depository institution set forth in the Federal Deposit Insurance Act. 12 U.S.C. §§ 1813(c), 1815(a).
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<tr>
<th>Acronym/Word/Phrase</th>
<th>Meaning</th>
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<tr>
<td>Banking organization</td>
<td>An institution that performs banking functions, such as accepting deposits and making loans, as well as the companies that own or control such institutions, which includes banks, savings associations, BHCs, SLHCs, and ILCs.</td>
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<tr>
<td>Basel I</td>
<td>international accord reached by the BCBS in July 1988</td>
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<td>Basel II</td>
<td>international accord reached by the BCBS in June 2004</td>
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<td>Basel III</td>
<td>international accord reached by the BCBS in November 2010</td>
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<td>bank holding company(ies)</td>
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<td>Bank Holding Company Act of 1956</td>
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<td>BMA</td>
<td>Bank Merger Act</td>
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<td>CCAR</td>
<td>Comprehensive Capital Analysis and Review</td>
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<td>CEBA</td>
<td>Competitive Equality Banking Act of 1987</td>
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<td>CRA</td>
<td>Community Reinvestment Act of 1977</td>
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<tr>
<td>Depository institution</td>
<td>Institution whose deposits were or are insured by the FDIC, FSLIC, or NCUA.</td>
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<tr>
<td>DIHC</td>
<td>Depository Institution Holding Company, which includes a BHC and SLHC.</td>
</tr>
<tr>
<td>DIHCA</td>
<td>Depository Institution Holding Company Act</td>
</tr>
</tbody>
</table>

525. The FSLIC provided federal deposit insurance for savings associations, but it was abolished by FIRREA in 1989. The NCUA provides federal deposit insurance for state and federal credit unions.
<table>
<thead>
<tr>
<th>Acronym/Word/Phrase</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dodd-Frank Act</td>
<td>Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010</td>
</tr>
<tr>
<td>EGRCPA</td>
<td>Economic Growth, Regulatory Relief, and Consumer Protection Act</td>
</tr>
<tr>
<td>FDIA</td>
<td>Federal Deposit Insurance Act</td>
</tr>
<tr>
<td>FDIC</td>
<td>Federal Deposit Insurance Corporation</td>
</tr>
<tr>
<td>Federal banking agency or regulator</td>
<td>Refers to the OCC, FRB, FDIC, FHLBB, or OTS.</td>
</tr>
<tr>
<td>FFIEC</td>
<td>Federal Financial Institutions Examination Council</td>
</tr>
<tr>
<td>FHC(s)</td>
<td>financial holding company(ies)</td>
</tr>
<tr>
<td>FHLB</td>
<td>Federal Home Loan Bank</td>
</tr>
<tr>
<td>FHLBA</td>
<td>Federal Home Loan Bank Act</td>
</tr>
<tr>
<td>FHLBB</td>
<td>Federal Home Loan Bank Board</td>
</tr>
<tr>
<td>FHLB System</td>
<td>Federal Home Loan Bank System</td>
</tr>
<tr>
<td>Financial institution</td>
<td>An institution that provides financial services, such as a bank, thrift, industrial loan company, securities firm, insurance company, or commodities broker</td>
</tr>
<tr>
<td>FIRIRCA</td>
<td>Financial Institutions Regulatory and Interest Rate Control Act of 1978</td>
</tr>
<tr>
<td>FIRREA</td>
<td>Financial Institutions Reform, Recovery, and Enforcement Act of 1989</td>
</tr>
<tr>
<td>FISA</td>
<td>Financial Institutions Supervisory Act of 1966</td>
</tr>
<tr>
<td>FR Act</td>
<td>Federal Reserve Act</td>
</tr>
<tr>
<td>FRB</td>
<td>Board of Governors of the Federal Reserve System</td>
</tr>
<tr>
<td>FR System</td>
<td>Federal Reserve System</td>
</tr>
<tr>
<td>FSLIC</td>
<td>Federal Savings and Loan Insurance Corporation</td>
</tr>
<tr>
<td>Acronym/Word/Phrase</td>
<td>Meaning</td>
</tr>
<tr>
<td>--------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>GAAP</td>
<td>≡ Generally Accepted Accounting Principles</td>
</tr>
<tr>
<td>GLBA</td>
<td>≡ Gramm-Leach-Bliley Act</td>
</tr>
<tr>
<td>Glass-Steagall Act</td>
<td>≡ Section 16, 20, 21, and 32 of the 1933 Act</td>
</tr>
</tbody>
</table>
| Guidance or Guidelines   | ≡ General, nonbinding agency expectations, priorities, or views related to compliance with law, regulation, or safe and sound practices.  
526                                                                 |
| GUSLHC(s)                | ≡ Grandfathered Unitary Savings and Loan Holding Company                  |
| HOLA                     | ≡ Home Owners Loan Act                                                   |
| ILC(s)                   | ≡ industrial loan company(ies)                                            |
| Insured depository       | ≡ Institution whose deposits were or are insured by the FDIC or FSLIC.  
527                                                                 |
| institution              |                                                                          |
| Laundry list             | ≡ List of permissible activities for BHCs included in Regulation Y        |
| LFI                      | ≡ large financial institution                                            |
| NB Act                   | ≡ National Bank Act                                                      |
| NCUA                     | ≡ National Credit Union Administration                                   |
| Nelnet                   | ≡ Nelnet, Inc.                                                           |
| NHA                      | ≡ National Housing Act                                                   |

526. Fed. Reserve Bd. et al., SR 18-05/CA 18-7, Supervision and Regulation Letter on Interagency Statement Clarifying the Role of Supervisory Guidance to the Officer in Charge of Supervision at Each Federal Reserve Bank, Attachment, at 1 (Sept. 11, 2018), https://www.federalreserve.gov/supervisionreg/srletters/sr1805.htm [https://perma.cc/4M2R-K95K] (“Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area.”); see also Peter Weinstock & Marysia Laskowski, “If it Walks Like a Duck. . . .”: The Demise of the Guidance Masquerade, 135 BANKING L. J. 215 (2018).

527. The FSLIC provided federal deposit insurance for savings associations, but it was abolished by FIRREA in 1989.
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<tr>
<th>Acronym/Word/Phrase</th>
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<tbody>
<tr>
<td>OCC</td>
<td>Office of the Comptroller of the Currency</td>
</tr>
<tr>
<td>OTS</td>
<td>Office of Thrift Supervision</td>
</tr>
<tr>
<td>Permissible activities</td>
<td>Activities authorized for an institution by legislation, charter, regulation, or order.</td>
</tr>
<tr>
<td>Powers</td>
<td>Activities authorized for an institution by legislation or charter.</td>
</tr>
<tr>
<td>QTL</td>
<td>qualified thrift lender</td>
</tr>
<tr>
<td>Regulation</td>
<td>Written rules by which a financial institution should conduct its business – laws enacted by legislatures and rules codified by banking regulators.</td>
</tr>
<tr>
<td>Riegle-Neal Act</td>
<td>Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994</td>
</tr>
<tr>
<td>SLHC(s)</td>
<td>savings and loan holding company(ies)</td>
</tr>
<tr>
<td>SLHCA</td>
<td>Savings and Loan Holding Company Amendments of 1967</td>
</tr>
<tr>
<td>Square</td>
<td>Square, Inc.</td>
</tr>
<tr>
<td>Supervision</td>
<td>Practices of regulators related to the monitoring, reporting, inspecting, and examining of financial institutions.</td>
</tr>
<tr>
<td>Thrift(s)</td>
<td>Various forms of institutions that historically encouraged savings, such as savings banks, savings and loan associations, building and loan associations, cooperative banks, and homestead associations.</td>
</tr>
<tr>
<td>UDFI</td>
<td>Utah Department of Financial Institutions</td>
</tr>
</tbody>
</table>

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529. *Id.*