Proposed Dodd-Frank Concentration Limit on Financial Institution M&A Transactions

Visual Memorandum

May 27, 2014

Davis Polk

Davis Polk & Wardwell LLP

Table of Contents

Click on an item to go to that page

Davis Polk

Table of Contents *(cont.)*

Click on an item to go to that page

Overview of Federal Reserve's Concentration Limit Proposal

- In May 2014, the Federal Reserve issued a proposal that would implement the financial sector concentration limit set forth in Section 622 of the Dodd-Frank Act.*
  - Comments due: July 8, 2014
- The concentration limit generally prohibits a financial company from merging or consolidating with, acquiring all or substantially all of the assets of, or otherwise acquiring control of another company **if:**

Liabilities of Resulting Financial Company	>	10% of Aggregate Financial Sector Liabilities

- **Financial companies** subject to the concentration limit include insured depository institutions, bank holding companies, savings and loan holding companies, other companies that control an insured depository institution, foreign banking organizations and nonbank financial companies designated as systemically important by the Financial Stability Oversight Council (**FSOC**). *See* **page 5**.
- **Liabilities:** Subject to certain exceptions and adjustments, liabilities are measured as a financial company's risk-weighted assets (**RWAs**) minus its regulatory capital. For foreign financial companies, only the liabilities of their U.S. operations would be considered. *See* **page 12**.
- **New Reporting Obligations:** The proposal would impose periodic reporting requirements on financial companies that do not otherwise report their financial information to the Federal Reserve or other U.S. banking agency. *See* **page 24**.

Davis Polk

* The proposal reflects the FSOC's *Study and Recommendations Regarding Concentration Limits on Large Financial Companies* (Jan. 2011), available here.

Overview of Federal Reserve's Concentration Limit Proposal *(cont.)*

- **Concentration Limit Is Approximately $1.8 Trillion**
  - The Federal Reserve estimates aggregate financial sector liabilities to be approximately $18 trillion as of December 31, 2013.
  - Accordingly, the 10% concentration limit would be approximately **$1.8 trillion**.
- **M&A Transactions Subject to Close Regulatory Scrutiny Well Before Reaching Concentration Limit**
  - In the current environment, large financial institution M&A transactions are subject to intense regulatory scrutiny for financial stability and other considerations well before they approach the statutory ceiling set by the Dodd-Frank concentration limit.*
  - Federal Reserve Governor Daniel K. Tarullo has stated that acquisitions by global systemically important banks ("**G-SIBs**") are subject to presumptions against approval:
    - "I would urge a strong, though not irrebuttable, presumption of denial for any acquisition by any firm that falls in the higher end of the list of global systemically important banks developed by the Basel Committee for purposes of assessing capital surcharges."
    - "Firms at the lower end of the Basel Committee [G-SIB] list, or that U.S. authorities may later designate as domestic systemically important banks under a parallel Basel Committee exercise, might have a slightly less robust, but still significant presumption against acquisitions."

* The proposed concentration limit supplements the existing nationwide deposit cap, which generally prohibits the appropriate U.S. banking agency from approving an application by a bank holding company, insured depository institution, or savings and loan holding company to acquire an insured depository institution located in a different home state than the acquiring company if the acquiring company controls, or following the acquisition would control, more than 10% of the total amount of deposits of insured depository institutions in the United States.

Definition of Financial Company

- A "**financial company**" includes:
  - U.S. insured depository institution (**IDI**)
  - Bank holding company (**BHC**)
  - Savings and loan holding company (**SLHC**)
  - Foreign banking organization (**FBO**)
  - Any other company that controls an IDI, *e.g.*, the parent company of an FDIC-insured industrial loan company, limited-purpose credit card bank or limited-purpose trust bank
  - U.S. or foreign nonbank financial company designated as systemically important by the FSOC (**Nonbank SIFI**)
- **Not Covered:** Financial institutions that are not affiliated with an IDI, such as stand-alone broker-dealers or insurance companies, are **not** subject to the concentration limit *unless* they are designated as Nonbank SIFIs.

Definition of Covered Acquisition and Exclusions

- **Covered Acquisition** is defined as a transaction in which a company merges or consolidates with, acquires all or substantially all of the assets of, or otherwise acquires control of another company, and the resulting company is a financial company.
- **Organic Growth Excluded:** The concentration limit would **not** constrain internal or organic growth by a financial company.
- **Exclusions for Ordinary Business Transactions:** The definition of covered acquisition excludes the following transactions:
  - **Debt Previously Contracted:** An acquisition of securities or other assets, by foreclosure or otherwise, by a financial company in the ordinary course of collecting a debt previously contracted in good faith **if** the acquired securities or assets are divested within the time period permitted by the relevant U.S. banking agency (including extensions) or, if the financial company is not primarily regulated by a U.S. banking agency, five years.
  - **Fiduciary Capacity:** An acquisition of securities or other assets in good faith in a fiduciary capacity if the securities or assets are held in the ordinary course of business and not acquired for the benefit of the financial company or its shareholders, employees or subsidiaries.

Exclusions continue on next page →

Definition of Covered Acquisition and Exclusions *(cont.)*

- **Exclusions for Ordinary Business Transactions** *(cont.)*:
  - **Merchant or Investment Banking Activity:** An acquisition of ownership or control of securities or other assets by a financial company in connection with a bona fide merchant or investment banking activity, provided that the acquisition and control of such securities or assets complies with the conditions and requirements of Section 4(k) of the Bank Holding Company Act (**BHC Act**) and the Federal Reserve's Regulation Y.
    - **Stated Rationale for Exclusion:** Merchant banking is authorized as a financial activity under which a financial holding company acquires the shares for passive investment, holds the shares for a limited period of time, and does not exert managerial control over the investment.
  - **Underwriting or Market-Making:** An acquisition of ownership or control of securities or assets by a financial company in connection with bona fide underwriting or market-making activities.
    - **Stated Rationale for Exclusion:** The financial company acquires the shares for resale and does not exert managerial control over the underlying companies.
  - **Internal Corporate Reorganization:** An acquisition of ownership or control of securities or assets of a financial company that is solely in connection with a corporate reorganization and the companies involved are lawfully controlled and operated by the financial company both before and following the reorganization.

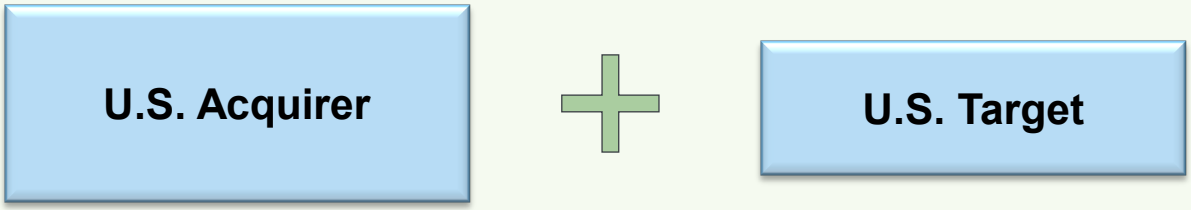
Exclusions continue on next page →

Definition of Covered Acquisition and Exclusions *(cont.)*

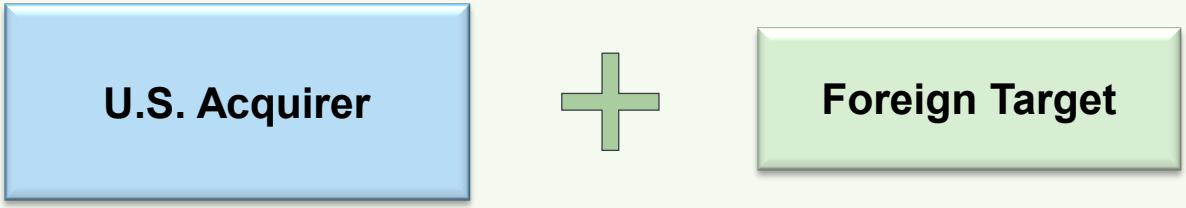
- **Exclusions with Prior Consent of Federal Reserve:** With the prior written consent of the Federal Reserve, the concentration limit would **not** apply to:
  - An acquisition of an **IDI in default or in danger of default**, as determined by the relevant U.S. banking agency in consultation with the Federal Reserve;
  - An acquisition with respect to which assistance is provided by the FDIC under Section 13(c) of the Federal Deposit Insurance Act; or
  - An acquisition that would result only in a ***de minimis* increase** in the liabilities of the financial company.
- ***De minimis* increase =** an increase in the liabilities of a financial company that is **≤ $2 billion** when aggregated with all other acquisitions by the company under the *de miminis* authority during the **12 months preceding** the date of the transaction.
  - The Federal Reserve expects that a financial company seeking to rely on the *de minimis* exception make a written request at least 60 days before it intends to consummate the transaction.
  - **Seeking Comments on Pre-approval Mechanism:** The Federal Reserve is seeking comment on whether it should consider requests by a financial company for **pre-approval** of *de minimis* transactions below a lower threshold, such as $25 **million**.

Davis Polk

M&A Transactions: Liabilities of Resulting Financial Company

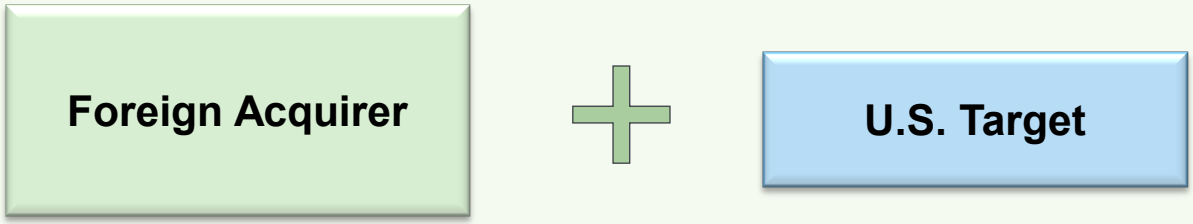


Liabilities of resulting company = pro forma consolidated liabilities of the resulting U.S. company

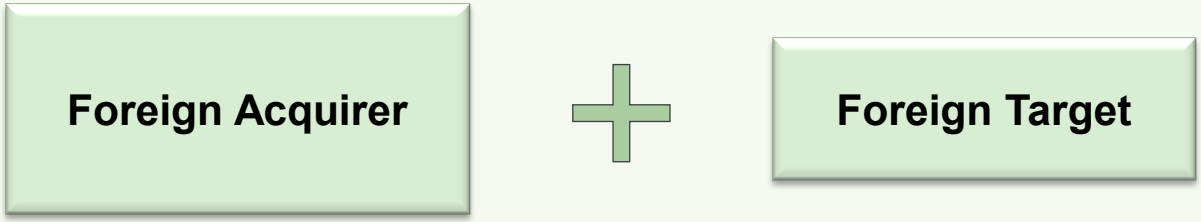


Liabilities of resulting company = pro forma consolidated liabilities of the resulting U.S. company

M&A Transactions: Liabilities of Resulting Financial Company *(cont.)*



Liabilities of resulting company = liabilities of the **U.S. operations** of the foreign company before the transaction **+** consolidated liabilities of the U.S. company before the transaction **–** post-transaction consolidation eliminations



Liabilities of resulting company = pro forma liabilities of the **U.S. operations** of the resulting foreign company

Requirement to Notify Federal Reserve About Concentration Limit

- The concentration limit would apply to any covered acquisition, regardless of whether a notice or application of the transaction is otherwise required to be filed with the Federal Reserve or another regulator.
- If the Federal Reserve receives a notice or application with respect to a covered acquisition, the Federal Reserve would review the application of the concentration limit in connection with its review of the transaction.
- **Requirement to Notify the Federal Reserve:** If prior notice or application to the Federal Reserve is not required with respect to a covered acquisition, the proposal would require a financial company to provide **written notice** to the Federal Reserve **if**:
  - As of the date of the consummation of the covered acquisition, the liabilities of the resulting financial company (estimated on the basis of the company's pro forma financial statements) would be **> 8%** of aggregate financial sector liabilities; and
  - The covered acquisition would increase the liabilities of the resulting financial company by **> $2 billion**, when aggregated with all other covered acquisitions during the **12 months preceding** the consummation of the transaction.
- **Timing:** The deadline for the notification would be the **earlier** of **(1)** 60 days before consummation of the covered acquisition and **(2)** 10 days after execution of the transaction agreement.
- **Contents of Notice:** The written notice must include a description of the proposed covered acquisition, estimates of the pro forma assets and liabilities of the resulting company upon consummation of the transaction, calculated in accordance with the proposal, and any other information requested by the Federal Reserve.

Calculating "Liabilities": High-Level Overview

Type of Financial Company	High-Level Overview
1. U.S. financial companies that are subject to consolidated risk-based capital rules	Liabilities = Total RWAs + Capital Deduction Adjustment – Total Regulatory Capital
2. U.S. financial companies that are **not** subject to consolidated risk-based capital rules	Liabilities = Total Liabilities Under Applicable Accounting Standards (generally U.S. GAAP)
3. FBOs	Liabilities = U.S. GAAP Assets of Each U.S. Branch/Agency **+** Liabilities of Each Top-tier U.S. Subsidiary That Is Subject to Risk-based Capital Rules (liabilities = total RWAs **+** capital deduction adjustment **–** total regulatory capital) **+** Assets of Each Top-tier U.S. Subsidiary That Is Not Subject to Risk-based Capital Rules (calculated using applicable accounting rules, generally U.S. GAAP)
4. Other foreign financial companies	Liabilities = U.S. GAAP Assets of Each U.S. Branch/Agency **+** Liabilities of Each Top-tier U.S. Subsidiary That Is Subject to Risk-based Capital Rules (liabilities = total RWAs **+** capital deduction adjustment **–** total regulatory capital) **+** Assets of Each Top-tier U.S. Subsidiary That Is Not Subject to Risk-based Capital Rules (calculated using applicable accounting rules, generally U.S. GAAP)

1. U.S. Financial Companies Subject to Consolidated Risk-Based Capital Rules

Liabilities = Total RWAs + Capital Deduction Adjustment – Total Regulatory Capital

- U.S. financial companies that are subject to consolidated risk-based capital rules would calculate liabilities as the difference between their total RWAs (as adjusted upward to reflect amounts that are deducted from regulatory capital) and their total regulatory capital.
- Financial companies in this category include IDIs, U.S. BHCs, Nonbank SIFIs at a later date and, beginning on January 1, 2015, SLHCs *other than* those that are substantially engaged in insurance or commercial activities.
- **U.S. Basel III:** The U.S. banking agencies' recent revisions to their risk-based capital framework, including U.S. Basel III and Basel 2.5 market risk capital rules, significantly increase the RWAs of certain banking organizations and thus increase their liabilities for purposes of the concentration limit.
  - The U.S. banking agencies will continue to revise their risk-based capital framework, including to implement new capital standards being developed by the Basel Committee.
  - Davis Polk's visual memorandum on U.S. Basel III is available **here**.
- **An advanced approaches banking organization** must use the **greater** of its advanced approaches total RWAs and standardized total RWAs to calculate liabilities. *See* **page 16**.

Determining the Capital Deduction Adjustment

Capital Deduction Adjustment = **Institution-Specific Risk Weight** × **Amounts Deducted from Regulatory Capital**

Institution-Specific Risk Weight = $\frac{1}{\text{Total Regulatory Capital Ratio}} - 1$

- The risk-based capital framework requires a banking organization to deduct certain items from its total regulatory capital.
  - *E.g.*, deductions are required for goodwill, certain mortgage servicing rights, deferred tax assets, other intangibles, investments in the capital of unconsolidated financial institutions and (per the Volcker Rule) investments in certain Volcker Rule covered funds.
  - A capital deduction, in effect, requires a banking organization to hold a dollar of capital against each dollar of the item being deducted.
- The proposal would upwardly adjust a banking organization's RWAs as if the deducted amounts were risk-weighted and the banking organization's total capital ratio were held constant. To make this adjustment, an institution-specific risk weight would be applied to amounts deducted from regulatory capital.
- The capital deduction adjustment would significantly increase the "liabilities" (for purposes of the concentration limit) of banking organizations with large amounts of goodwill or deferred tax assets.

Determining the Capital Deduction Adjustment *(cont.)*

Examples

For a banking organization with a total capital ratio of 8% (the current regulatory minimum):

Institution-Specific Risk Weight = 1/0.08 – 1 = 12.5 – 1 = 11.5

For a banking organization with a total capital ratio of 16%:

Institution-Specific Risk Weight = 1/0.16 – 1 = 6.25 – 1 = 5.25

- The use of an institution-specific risk weight is proposed as the arithmetically most precise way to convert a capital deduction to an RWA amount without changing the total capital ratio of the banking organization.

Advanced Approaches Banking Organizations

- For purposes of the concentration limit proposal, an advanced approaches banking organization under U.S. Basel III that has successfully completed its parallel run would be required to use the **greater** of its **(1)** advanced approaches total RWAs and **(2)** standardized approach total RWAs to calculate its liabilities.
  - Similarly, the Federal Reserve would use the greater of those two amounts in calculating a banking organization's contribution to the aggregate financial sector liabilities.
- If a banking organization's advanced approaches RWAs were larger than its standardized approach RWAs, the banking organization's total regulatory capital for purposes of the concentration limit proposal would be its advanced-approaches-adjusted total regulatory capital as defined in Section 10(c)(3)(ii) of U.S. Basel III.
  - Section 10(c)(3)(ii) of U.S. Basel III adjusts total regulatory capital by deducting any allowance for loan and lease losses included in Tier 2 capital and adding any excess eligible credit reserves over total expected credit loss, to the extent that the excess reserve amount does not exceed 0.6% of the advanced approaches banking organization's credit RWAs.
- **Future of Advanced Approaches Uncertain:** Federal Reserve Governor Daniel K. Tarullo has argued for removing the advanced internal ratings-based (**IRB**) approach for calculating RWAs in light of the Collins Amendment capital floor based on the standardized approach, the supplementary leverage ratio and stress testing requirements.

2. U.S. Financial Companies Not Subject to Consolidated Risk-Based Capital Rules

Liabilities = Total Liabilities Under Applicable Accounting Standards (generally U.S. GAAP)

- Under the concentration limit proposal, U.S. financial companies that are not subject to consolidated risk-based capital rules would calculate their liabilities in accordance with applicable accounting standards (generally U.S. GAAP).
- Financial companies in this category include:
  - Small BHCs with total consolidated assets of < $500 million
  - U.S. depository institution holding companies that are not BHCs or SLHCs, *e.g.*, the parent company of an FDIC-insured industrial loan company, limited-purpose credit card bank or limited-purpose trust bank
  - **SLHCs that are substantially engaged in insurance or commercial activities**
  - **U.S. Nonbank SIFIs**

  The Federal Reserve is in the process of tailoring the risk-based capital rules for these companies. Once these companies become subject to risk-based capital rules, they would calculate liabilities using the methodology for U.S. financial companies that are subject to consolidated risk-based capital rules.
- **New Reporting Obligations:** The Federal Reserve is proposing that financial companies in this category that do not already report information relating to their "liabilities" to the Federal Reserve or other U.S. banking agency begin reporting such information to the Federal Reserve. *See* **page 24**.

Davis Polk

Applicable Accounting Standards

- **Applicable Accounting Standards – Generally U.S. GAAP**
  - Applicable accounting standards are defined as U.S. GAAP or such other accounting standards applicable to the financial company that the Federal Reserve determines are appropriate.
  - The Federal Reserve expects that **most** U.S. financial companies that are not subject to consolidated risk-based capital rules would use U.S. GAAP to calculate their liabilities.
  - However, there are a small number of U.S. financial companies that only file financial statements in accordance with Statutory Accounting Principles (**SAP**).
- **Financial Companies Using SAP**
  - The proposal would allow such a company to request that it be permitted to file an estimate of its total consolidated liabilities using a method of estimation to convert SAP financial statements to U.S. GAAP financial statements.
  - The Federal Reserve may, subject to review and adjustment, permit the financial company to provide estimated total consolidated liabilities on an annual basis using that method of estimation.

3. Foreign Banking Organizations

Liabilities = Consolidated U.S. GAAP Assets of Each U.S. Branch/Agency

+

Liabilities of Each Top-tier U.S. Subsidiary That Is Subject to Risk-based Capital Rules
(liabilities = total RWAs + capital deduction adjustment – total regulatory capital)

+

Assets of Each Top-tier U.S. Subsidiary That Is Not Subject to Risk-based Capital Rules
(calculated using applicable accounting rules, generally U.S. GAAP)

- **Focus on U.S. Operations:** The proposal would define "U.S. operations" of an FBO as the liabilities of all U.S. branches/agencies and U.S. subsidiaries on a consolidated basis (including any lower-tier U.S. or foreign subsidiary of a U.S. subsidiary).
- **Calculating Liabilities of U.S. Operations:** "Liabilities" of an FBO would be calculated using U.S. GAAP to the extent that all or a portion of the FBO's U.S. operations does not calculate and report to the Federal Reserve RWAs independently from the consolidated FBO (*e.g.*, U.S. branches/agencies and any top-tier U.S. subsidiary that is not subject to U.S. Basel III capital rules).

3. Foreign Banking Organizations *(cont.)*

- **U.S. Branches and Agencies**
  - The "liabilities" of U.S. branches/agencies would **not** be reduced by any equity capital because U.S. branches/agencies are not required to hold capital separately from their foreign parent.
- **Adjustments for Intercompany Balances and Transactions**
  - The amount of U.S. GAAP assets would **include** any net amounts that the U.S. branch/agency or U.S. subsidiary has lent to the FBO's foreign offices or affiliates (other than those foreign affiliates owned by a U.S. subsidiary of the FBO).
  - The amount of U.S. GAAP assets would **exclude** amounts corresponding to balances and transactions between and among the FBO's U.S. branches, agencies and U.S. subsidiaries (including any foreign lower-tier subsidiaries of such U.S. subsidiaries).
- **U.S. IDI, BHC and IHC Subsidiaries of FBOs**
  - Top-tier U.S. subsidiaries of FBOs that are subject to U.S. consolidated risk-based capital requirements, such as IDIs, BHCs, and, beginning on July 1, 2016, U.S. intermediate holding companies (**IHCs**), would measure liabilities as:

Total RWAs + Capital Deduction Adjustment – Total Regulatory Capital

Davis Polk

Related Resources: Davis Polk's visual memorandum, *U.S. Intermediate Holding Company: Structuring and Regulatory Considerations for Foreign Banks*, is available **here**.

3. Foreign Banking Organizations *(cont.)*

- **Section 2(h)(2) Companies*:** An FBO's assets attributable to investments in Section 2(h)(2) companies are not included in liabilities for purposes of the concentration limit proposal.
- **Reporting Obligations:** In 2013, the Federal Reserve amended the Capital and Asset Report for Foreign Banking Organizations (Form FR Y-7Q) to require FBOs to report a new item entitled *Total combined assets of U.S. operations, net of intercompany balances and transactions between U.S. domiciled affiliates, branches, and agencies*. FBOs will begin reporting this item as of March 31, 2014.
  - In order to permit the Federal Reserve to calculate the aggregate financial sector liabilities as of the end of 2013, the Federal Reserve intends to request FBOs to report their liabilities as of December 31, 2013.
  - Otherwise, the Federal Reserve intends to use information from existing regulatory reports, including information reported on Form FR Y-7Q, to calculate the liabilities of an FBO for purposes of the concentration limit.
  - If the FBO owns an IDI, BHC or IHC, the Federal Reserve intends to use information reported on Form FR Y-9C and the Call Report to calculate liabilities.

* Section 2(h)(2) of the BHC Act allows qualifying FBOs to retain their interest in foreign commercial firms that conduct business in the United States. This statutory exception was enacted in recognition of the fact that some foreign jurisdictions do not impose a clear separation between banking and commerce.

4. Other Foreign Financial Companies

Liabilities = Consolidated U.S. GAAP Assets of Each U.S. Branch/Agency

+

Liabilities of Each Top-tier U.S. Subsidiary That Is Subject to Risk-based Capital Rules
(liabilities = total RWAs + capital deduction adjustment – total regulatory capital)

+

Assets* of Each Top-tier U.S. Subsidiary That Is Not Subject to Risk-based Capital Rules
(calculated using applicable accounting rules, generally U.S. GAAP)

- Financial companies in this category include foreign SLHCs, foreign companies that control FDIC-insured industrial loan companies, limited-purpose trust banks or limited-purpose credit card banks, and foreign Nonbank SIFIs.
- Financial companies in this category must adjust their liabilities for intercompany balances and transactions in a manner that is similar to FBOs. *See* **page 20**.
- **Reporting Obligations:** Currently, foreign financial companies that are not BHCs or SLHCs do not report consolidated financial information to the Federal Reserve or other U.S. banking agency.
  - The Federal Reserve plans to issue a reporting proposal that would require these foreign financial companies to report their liabilities to the Federal Reserve on an annual basis. *See* **page 24**.

* While the proposed rule text defines "liabilities" to include, among other things, the "total consolidated **assets** of a top-tier U.S. subsidiary that is not subject to applicable risk-based capital rules and does not report information regarding its capital under risk-based capital rules applicable to bank holding companies," the preamble to the proposal refers to the "sum of the **liabilities** of all other top-tier U.S. subsidiaries (calculated under applicable accounting rules)."

Calculating Aggregate Financial Sector Liabilities

Aggregate Financial Sector Liabilities =

Aggregate Liabilities of All Top-tier U.S. Financial Companies
(calculated using the appropriate methodology)

+

Aggregate Liabilities of the U.S. Operations of All Top-tier Foreign Financial Companies
(calculated using the appropriate methodology)

- **Two-Year Average:** As recommended by FSOC, the proposal would measure aggregate financial sector liabilities as the average of the financial sector liabilities as of December 31 of each of the preceding two calendar years.
- **Average Published by July 1st:** The Federal Reserve would calculate and publish, by July 1 of each year, the aggregate financial sector liabilities as of December 31 for the preceding calendar year and the average of the financial sector liabilities for the preceding two calendar years.
  - The two-year average would be used for all concentration limit calculations from July 1 of that year until June 30 of the subsequent year.
- **Current Estimate:** Using the methodologies in the proposal, the Federal Reserve estimates the aggregate financial sector liabilities to be approximately **$18 trillion** as of December 31, 2013.*

Davis Polk

* The Federal Reserve noted that limitations in existing reporting requirements may result in underestimation of the aggregate financial sector liabilities calculated as of December 31, 2013.

New Reporting Requirements

- To the maximum extent possible, the Federal Reserve proposes to use information already reported by financial companies to calculate their liabilities for purposes of the concentration limit.
  - **BHCs:** The Federal Reserve proposes to use RWAs, regulatory capital deductions and total capital reported on Form FR Y-9C (Consolidated Financial Statements for Holding Companies).
  - **Small BHCs** (< $500 million in total consolidated assets): The Federal Reserve proposes to measure liabilities as the difference between total consolidated assets and equity capital, which are reported on Form FR Y-9SP (Parent Company Only Financial Statements for Small Holding Companies).
  - **FBOs:** The Federal Reserve proposes to use information reported on Form FR Y-7Q and, in the case of any IDI, BHC or IHC subsidiaries, on Form FR Y-9C and the Call Report.
- **New Reporting Requirements for Other Financial Companies:** The proposal would require financial companies that do not otherwise report consolidated financial information to the Federal Reserve or other U.S. banking agency to report their liabilities to the Federal Reserve on an annual basis on Form FR Y-17.
  - Until these reporting requirements are adopted, the Federal Reserve proposes to rely on publicly available information in order to estimate the liabilities of these financial companies.

New Form FR Y-17

- The proposal would create a new report, the **Financial Company Report of Consolidated Liabilities (FR Y-17)**, for financial companies that do **not** otherwise report consolidated financial information to the Federal Reserve or other U.S. banking agency.
  - These financial companies must submit Form FR Y-17 to the Federal Reserve regardless of whether they are contemplating any covered acquisitions.
- Form FR Y-17 must be submitted by March 31 of each year.
  - Form FR Y-17 must include the financial company's liabilities (calculated using the appropriate methodology) as of the previous calendar year-end.
  - For purposes of the first Form FR Y-17 report due March 31, 2015, a financial company must report its liabilities as of December 31, 2013, and December 31, 2014.
- **Confidentiality:** According to the Federal Reserve, information in the Form FR Y-17 generally would be made available to the public upon request on an individual basis.
  - However, a financial company may request confidential treatment for the information in the Form FR Y-17 if it believes that disclosure of specific commercial or financial information would likely result in substantial harm to its competitive position or that disclosure of the submitted information would result in unwarranted invasion of personal privacy.

Anti-evasion and Other Restrictions

- **Anti-evasion:** To ensure that the concentration limit is effectively applied across all financial companies, the proposal contains an anti-evasion provision that would prohibit a financial company from organizing or operating its business or structuring any acquisition of, or merger or consolidation with, another company in such a manner that would result in evasion of the concentration limit.
  - *E.g.*, a U.S. financial company would not be subject to a different methodology for calculating its liabilities if it changed its jurisdiction of incorporation to become a foreign financial company in order to evade application of the concentration limit.
- **Other Restrictions on Covered Acquisitions**
  - The Federal Reserve, in evaluating applications or notices under Section 3 or 4 of the BHC Act or under Section 163 of the Dodd-Frank Act, is required to consider the risks to financial stability posed by an M&A transaction involving certain financial companies.
  - These provisions may result in more stringent limitations than the concentration limit for a particular proposed transaction, depending on the Federal Reserve's analysis of the effects of the transaction on financial stability.
  - Other restrictions, such as the competitive restrictions contained in the BHC Act or federal antitrust laws, may also limit certain M&A transactions by financial companies.

Davis Polk Contacts

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Luigi L. De Ghenghi	212 450 4296	luigi.deghenghi@davispolk.com
Randall D. Guynn	212 450 4239	randall.guynn@davispolk.com
Reena Agrawal Sahni	212 450 4801	reena.sahni@davispolk.com
Margaret E. Tahyar	212 450 4379	margaret.tahyar@davispolk.com
Andrew S. Fei	212 450 4063	andrew.fei@davispolk.com

Related Resources: Davis Polk's blog, memoranda, visuals, interactive tools and webcasts on bank capital, liquidity and other prudential standards are available at **USBasel3.com**

Davis Polk