

January 22, 2019

Via Electronic Mail

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20249
Attention: Robert E. Feldman, Executive Secretary

Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, DC 20551
Attention: Ann E. Misback, Secretary

Office of the Comptroller of the Currency
400 7th E Street, SW
Washington, DC 20219
Attention: Legislative and Regulatory Activities Division

Re: Proposed Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, FDIC RIN: 3064-AE96; OCC Docket ID OCC–2018–0037; Federal Reserve Docket No. R–1628; Comments on the Reporting Format for Risk and Complexity Data

Ladies and Gentlemen:

We appreciate the opportunity to submit this comment letter (“Letter”) to the Federal Deposit Insurance Corporation (“FDIC”), the Board of Governors of the Federal Reserve System (the “Federal Reserve”), and the Office of the Comptroller of the Currency (“OCC” and together with the FDIC and Federal Reserve, the “Agencies”) on the notice of proposed rulemaking (“NPR”) regarding Proposed Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements.¹ The proposed rule would establish a new framework for the

¹ Proposed Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, 83 Fed. Reg. 66024 (Dec. 21, 2018). The NPR implements statutory changes enacted in 2018 as part of the Economic Growth, Regulatory Relief and Consumer Protection Act, Pub. L. No. 115-174, (2018) (the “Economic Growth Act”). The Economic Growth Act increased from \$50 billion to \$250 billion the threshold at which a bank holding company becomes automatically subject to the enhanced prudential standards under Section 165 of the Dodd Frank Act and authorizes the Agencies on a case-by-case basis based upon systemic risk considerations to impose enhanced prudential requirements on bank holding companies with between \$100 and \$250 billion in total consolidated assets. The Economic Growth Act did not grant the Agencies with discretion to subject depository institutions without a holding company that have less than \$250 billion in total consolidated assets to enhanced prudential standards.

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applicability of enhanced prudential standards for banking organizations with \$100 billion or more in total consolidated assets, using certain risk-based indicators. Based on that framework, the proposed rule would establish risk-based categories for determining the applicability of certain prudential supervisory requirements.²

With the understanding that the four categories based on risk-based indicators proposed under the NPR will be relied upon by the Agencies on an on-going basis in tailoring the applicability of prudential regulations for banking organizations with total consolidated assets of \$100 billion or more, we submit this comment specifically in response to the Agencies' proposal for depository institutions without a holding company to calculate the risk-based indicators, apart from size, based upon the instructions of certain report forms that are currently filed with the Federal Reserve by holding companies, including the Banking Organization Systemic Risk Report (FR Y-15) and the Parent Company Only Financial Statements for Large Holding Companies (FR Y-9LP). Specifically, under the proposal a depository institution without a holding company would need to report to its primary supervisory agency on the institution's cross-jurisdictional activity, weighted short-term wholesale funding, off-balance sheet exposure, and nonbank asset indicator data.³ The NPR does not make clear how the data is to be submitted, particularly whether a depository institution would submit the data directly to its primary supervisory agency as a supplement to its call report, prepare and submit the data using the current FR Y-15 and FR Y-9LP report forms, or submit the data using some other form to be developed by the Agencies.

For the reasons further discussed below, we respectfully suggest that a depository institution without a holding company be allowed to submit the data, calculated according to the instructions of the FR Y-15 and FR Y-9LP, directly to its primary federal bank supervisor as a supplement to its *Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices—FFIEC 031* (Form FFIEC 031), including only the data relevant to the risk-based factors under the NPR, and in the format suggested in the attached Addendum or in a similar format acceptable to their primary supervisory agency and that poses the least amount of regulatory burden on the depository institutions. The universe of U.S. depository institutions

² The current liquidity coverage ratio ("LCR") rule, and the proposed net stable funding ratio ("NSFR") are applicable to depository institutions with \$250 billion or more in total consolidated assets. See 12 C.F.R. § 329.1; see also Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements, 81 Fed. Reg. 35124 (June 1, 2016).

³ 83 Fed. Reg. at 66029 (Dec. 21, 2018).

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with between \$100 and \$250 billion in consolidated assets and no holding company is a small one and lends itself to manual submission and tailored treatment of the format for reporting this information. If the primary federal bank supervisor requires that such information be reported in a uniform manner, the Form FFIEC 031 should be modified to capture the relevant data, given the small number of institutions that would be subject to such reporting requirements, and the fact that the two extra forms, the FR Y-15 and Y-9LP, are not designed to fit the context of a depository institution without a holding company.

The following section of this Letter describes our recommended calculation methodology, and attached as an Addendum to this Letter is a proposed reporting template for depository institutions without a holding company to calculate and report the relevant risk-based factors under the NPR.

I. Depository Institutions Without a Holding Company Should Provide Risk-Based Information As Supplement to Call Report Submission

In the NPR, the Agencies pose as Question 2 the following:

“[What are] the advantages and disadvantages of requiring a depository institution without a holding company to calculate indicators [based upon the instructions of certain reports that are currently required to be filed by holding companies, including the Banking Organization Systemic Risk Report (FR Y-15) and the Parent Company Only Financial Statements for Large Holding Companies (FR Y-9LP)]? What operational complexities and challenges would arise if the agencies adopted this approach? What additional information could the agencies incorporate into the Consolidated Reports of Condition and Income (Call Reports), or other reports currently required of depository institutions, to replicate the calculation methodology for these indicators such as the measure of foreign assets and liabilities captured in the FR Y-15? What existing information is currently reported by depository institutions that could be used to replicate the calculation methodologies described under the proposal? What alternative indicators and related reporting requirements should the agencies consider to apply the proposal to large depository institutions without holding companies?”⁴

⁴ 83 Fed. Reg. at 66028-66029.

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In reviewing the instructions for the FR Y-15 and FR Y-9LP, a depository institution without a holding company would be able to calculate the relevant risk-based factors in accordance with the form instructions, using information that is currently reported in the institution's call reports. Information that is not currently provided in the call reports could be provided as a supplement to the depository institution's call report to the supervisory staff of its primary federal bank supervisor.

The NPR is ambiguous as to the submission method for the risk information. We suggest a depository institution provide the relevant information to its primary federal bank supervisor as a supplemental submission in a form chosen by the banking organization (for example by completing the relevant schedules of the FR forms, and attaching such forms to the institution's call report submission). Submitting data using the full FR Y-15 and FR Y-9LP forms is not an appropriate method because the forms are not appropriately tailored for depository institutions without a holding company. For example, if a bank without a holding company found itself required to complete the FR Y-9LP form, the bank would (i) have to reformat information currently provided in the bank's quarterly call reports, (ii) be required to evaluate and attempt to respond to reporting items not applicable to the bank's operations or corporate structure (for example, Schedule PC-A - Investments in Subsidiaries and Associated Companies), and (iii) be required to evaluate information requests not relevant to consideration of the risk-based factors under the NPR (for example, Schedule PI-A - Cash Flow Statement). If the Agencies expect depository institutions without a holding company to submit the relevant data using a uniform form, the better alternative would be to modify the Form FFIEC 031 to include the relevant information.

In short, Forms FR Y-15 and FR-Y9LP are not designed for a depository institution with no holding company and it is not possible for a depository institution without a holding company to complete the full forms in a way that makes sense or that provides the information needed for the risk calculations. Some of the schedules to the forms, however, can be modified for this purpose. Below is a suggested methodology for calculating the risk-based indicators of depository institutions without a holding company, which includes references to specific schedules in the FFIEC 031 call report, as well as specific references to relevant schedules of the

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FR Y-15 or FR Y-9LP that are most relevant to calculating the risk-based factors set forth in the NPR.

II. Proposed Calculation Methodology for Depository Institutions Without a Holding Company

1. Total Asset Size

In accordance with the NPR, a depository institution without a holding company should be required to calculate total asset size using the average of the institution's total consolidated assets for the four most recent calendar quarters based on *Schedule RC – Balance Sheet* of the institution's call reports.

2. Cross-Jurisdictional Activities

Sufficient information related to Cross-Jurisdictional Activity is not available in the current Form FFIEC 031. Therefore, in accordance with the NPR, depository institutions without a holding company and over \$100 billion in total consolidated assets should be required to calculate cross-jurisdictional activities based on the instructions of FR Y-15, *Schedule E – Cross-Jurisdictional Activity Indicators*, as appropriate.

3. Weighted Short-Term Wholesale Funding

Sufficient information related to weighted short-term wholesale funding is not available in the Form FFIEC 031. Therefore, in accordance with the NPR, depository institutions without a holding company and over \$100 billion in total consolidated assets should be required to calculate weighted short-term wholesale funding based on the instructions under FR Y-15, *Schedule G – Short-Term Wholesale Funding Indicators*, as appropriate.

4. Off-Balance Sheet Exposure

Certain information related to off-balance sheet exposures is requested in the Form FFIEC 031, however, additional relevant information is requested in FR Y-15, Schedule A that is not included in the Form FFIEC 031. Therefore, depository institutions without a holding company and over \$100 billion in total consolidated assets should be required to calculate and report off-balance sheet exposures as follows:

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1. FR Y-15, *Schedule A*, which should not include memoranda items, to calculate total exposure;
2. Report total consolidated assets using the Form FFIEC 031, *Schedule RC Balance Sheet*; and
3. Calculate total off-balance sheet exposure as follows: (Item #1 (total exposure) minus item #2 (total consolidated assets)).

5. Nonbank Asset Indicator Data

The NPR states that “under the proposal, nonbank assets would be measured as the average amount of equity investments in nonbank subsidiaries.” The FR Y-9LP (Parent Company Only Financial Statements for Large Holding Companies), which is the equivalent of a call report for holding companies of depository institutions, includes reporting items for calculating the nonbank asset indicator under Schedule PC.

An area of ambiguity is the meaning of the term “nonbank subsidiaries” as used in the FR Y-9LP form in the context of a depository institution that has no holding company. The form was adopted under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841 *et seq.* (“BHC Act”). Under the BHC Act, a “nonbank subsidiary” means a subsidiary held by a bank holding company pursuant to authority of Section 4 of that Act.⁵ “Nonbank” assets and activities are those owned or conducted by the parent bank holding company or its nonbank subsidiaries pursuant to Section 4 of the BHC Act. A “nonbank” subsidiary does not include a “bank” held pursuant to Section 3 of the BHC Act or subsidiaries of a “bank” subsidiary of a bank holding company, even though the subsidiaries of the bank are not themselves “banks.” Consistent with that approach, the instructions to Form FR Y-9LP at Schedule PI Line Item 1(b) state that the reporting entity should exclude from nonbank income “income from banks [and] subsidiaries of banks....” Further, the instructions to Form FR Y-9LP at Schedule PC-B states that “[n]onbank subsidiaries exclude all banks (including commercial, saving and industrial that

⁵ See 12 C.F.R. § 225, Subparts B & C; *Citicorp v Board of Governors of the Federal Reserve System*, 936 F.2d 66 (2d Cir. 1991), *cert. denied* 112 S.Ct. 869 (1992); *Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System*, 890 F.2d. 1275 (2d Cir. 1989), *cert. denied* 111 S.Ct. 44 (1990).

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file the commercial bank Reports of Condition) and their subsidiaries...”⁶ This point is further confirmed by footnote 2 to the general instructions to Form FR 9C which is the definitional reference document to both Forms FR Y-15 and FR Y-9LP. Footnote 2 indicates that the criteria for evaluating risk levels is “whether the holding company ... is engaged in significant nonbanking activities either directly or through a nonbank subsidiary...” If this BHC Act form-based approach is applied to calculating the “nonbank” subsidiaries of a bank without a holding company, there are no “nonbank” subsidiaries, assets or activities for a bank without a holding company to report.

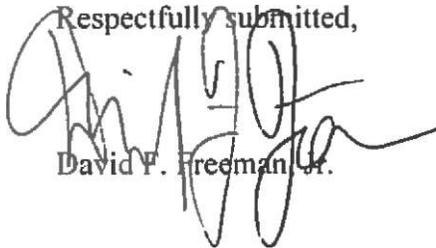
As such, a depository institution without a holding company and no “financial” subsidiaries would find it difficult to complete the FR Y-9LP in its current form, because it is not tailored for depository institutions. Additionally, the FR Y-9LP requires that the reporting entity report on interests in subsidiaries and associated companies on a nonconsolidated basis under the GAAP equity method. However, depository institutions currently report on interests in most of their subsidiaries and associated companies on a consolidated basis in their call reports. Therefore, a depository institution that has over \$100 billion in total consolidated assets, but no “nonbank” subsidiaries (as the term is used in the BHC Act and the forms), would be required to go through the burdensome process of producing financials for its consolidated subsidiaries on a nonconsolidated basis solely for the purpose of verifying what is determinable from the depository institution’s call reports (i.e. that the institution does not meet the criteria for treatment as a Category III institution). Alternatively, if a depository institution without a holding company holds certain assets that are eligible for investment by a national bank or a state bank under Part 364 of the FDIC’s rules that are not consolidated in the reports of the depository institution, such as investments in small business investment companies and CRA investments, the primary federal bank supervisor could use the amount reported in the bank’s call report Schedule RC, Item 8 (Investments in unconsolidated subsidiaries and associated companies) for purposes of measuring these assets.

⁶ Instructions for Preparation of Parent Company Only Financial Statements for Large Holding Companies (FR Y-9LP), Board of Governors of the Federal Reserve System, PC-B-7 (Sept. 2018).

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We appreciate the opportunity to comment on the proposal. If you have any questions,
please contact the undersigned at 202-942-5745 or by email at david.freeman@arnoldporter.com.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David F. Freeman, Jr.", written over the typed name below it.

David F. Freeman, Jr.

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Addendum
Proposed Reporting Template: Risk Based Factors Under NPR for Applicability Thresholds for Regulatory Capital and Liquidity Requirements

1. Total Assets

Please refer to the Call Report FFIEC 031, *Schedule RC – Balance Sheet*.

2. Cross-Jurisdictional Activities

Schedule E—Cross-Jurisdictional Activity Indicators

U.S. Dollar Amounts in Thousands	RISK	Amount	
Cross-Jurisdictional Claims			
1. Foreign claims on an ultimate-risk basis	M422		1.
Cross-Jurisdictional Liabilities			
2. Foreign liabilities (excluding local liabilities in local currency)	M423		2.
a. Any foreign liabilities to related offices included in item 2	M424		2.a.
3. Local liabilities in local currency	M425		3.
4. Total cross-jurisdictional liabilities (sum of Items 2 and 3, minus item 2.a)	M426		4.

4. Off-Balance Sheet Exposure

Schedule A—Size Indicator

	U.S. Dollar Amounts in Thousands	RISK	Amount	
Total Exposures				
1. Derivative exposures:				
a. Current exposure of derivative contracts		M337		1.a.
b. Potential future exposure (PFE) of derivative contracts		M339		1.b.
c. Gross-up for derivatives collateral		Y822		1.c.
d. Effective notional amount of written credit derivatives		M340		1.d.
e. Cash variation margin included as an on-balance sheet receivable		Y823		1.e.
f. Exempted central counterparty legs of client-cleared transactions included in items 1(a) and 1(b) ..		Y824		1.f.
g. Effective notional amount offsets and PFE adjustments for sold credit protection		Y825		1.g.
h. Total derivative exposures (sum of items 1.a. through 1.d., minus the sum of items 1.e through 1.g)		Y826		1.h.
2. Securities financing transaction (SFT) exposures:				
a. Gross SFT assets		M334		2.a.
b. Counterparty credit risk exposure for SFTs		N507		2.b.
c. SFT indemnification and other agent-related exposures		Y827		2.c.
d. Gross value of offsetting cash payables		Y828		2.d.
e. Total SFT exposures (sum of items 2.a through 2.c, minus item 2.d)		Y829		2.e.
3. Other on-balance sheet exposures:				
a. Other on-balance sheet assets		Y830		3.a.
b. Regulatory adjustments		M349		3.b.
4. Other off-balance sheet exposures:				
a. Gross notional amount of items subject to a 0% credit conversion factor (CCF)		M342		4.a.
b. Gross notional amount of items subject to a 20% CCF		M718		4.b.
c. Gross notional amount of items subject to a 50% CCF		M346		4.c.
d. Gross notional amount of items subject to a 100% CCF		M347		4.d.
e. Credit exposure equivalent of other off-balance sheet items (sum of 0.1 times item 4.a, 0.2 times item 4.b, 0.5 times item 4.c, and item 4.d)		Y831		4.e.
5. Total exposures prior to regulatory deductions (sum of items 1.h, 2.e, 3.a, and 4.e)		Y832		5.

Total Consolidated Assets (Call Report, FFIEC 031 Schedule RC – Balance Sheet, Item 12)	
Total Off-Balance Sheet Exposure (Total Exposures prior to Regulatory Deductions minus Total Consolidated Assets)	

5. Nonbank Asset Indicator Data

[Name of reporting institution] has no “nonbank” subsidiaries as defined for purposes of Regulation Y and no “financial” subsidiaries. [Name of reporting institution] engages in

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permissible activities directly and through “bank eligible” operating subsidiaries and partially-owned subsidiaries and holds certain assets that are eligible for investment by a national bank or a state bank under Part 362 of the FDIC’s rules, such as investments in small business investment companies and CRA investments. Please refer to the Call Report FFIEC 031, Schedule RC, Item 8 for information related to investments in unconsolidated subsidiaries of the institution.