

# Banking Law

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## Time to Put Your 10-K on a Diet: Banks Could Trim Much Boilerplate in 10-K "Sup & Reg" Sections

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**Another Form 10-K Annual Report filing season has ended for most U.S. banking organizations. This means that publicly traded banks and bank holding companies have filed 10-Ks with Supervision and Regulation ("Sup & Reg") sections, along with a corresponding set of regulatory risk factors, which describe the basic regulatory framework of banking as well as recent significant legislative and regulatory developments in an effort to meet their disclosure obligations to shareholders and potential investors. However, "sup & reg" sections are mostly boilerplate disclosures that read much the same year after year. They could be greatly reduced to a general description of the core banking laws and regulations with emphasis instead on developments that are most relevant to the banking organization filing the 10-K.**

### Blueprint for simplification

Typically several pages of 10-Ks are annually devoted to restating the details of some, but not all, of the many laws and regulations which are intended to ensure banks operate in a "safe and sound" manner. It would seem sufficient to present a shorter summary of this ocean of laws and regulations within which banks navigate. The format could be something like the following:

- Banks face competition from larger banks, mortgage and insurance companies, brokerages, and credit unions in a consolidating industry.
- Banking organizations are generally restricted to engaging only in deposit-taking and lending and other activities considered closely related to banking (such as auto leasing, investment advisory, trust, and insurance agency services).
- Banks are supervised and regularly examined by their state and/or federal bank regulatory agencies.
- Many banks remain subject to formal or informal enforcement orders primarily resulting from the nonperformance of loans made before the recent recession.
- Banks pay FDIC insurance assessments which are intended to cover the costs of the failure of their less-astute competitors.
- Bank holding companies are required to serve as a source or financial and managerial strength to their subsidiary banks.
- Banks are subject to many risks, including credit, liquidity, interest rate, and reputation risk.
- Banks are subject to capital and allowance for loan loss requirements, loan limits, restrictions on dividends and affiliate

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transactions, operations and deposit regulations, and reserve requirements.

- Bank expansion and acquisitions generally require regulatory approval or nonobjection.
- Banks are subject to consumer compliance, customer privacy protection, and anti-money laundering legislation and regulations.

A succinct summary like this could include the identification, without excessive detail, of the primary laws and their implementing regulations for reference, such as the Federal Deposit Insurance Act, the Bank Holding Company Act, applicable state laws, Regulation O, the Bank Secrecy Act, the Community Reinvestment Act, or the plethora of consumer compliance statutes (Truth-in-Lending, etc.).

However, laws now long-imbedded in those statutes need not be perennially identified, such as FIRREA, FDICIA, Riegle-Neal, and even the Gramm-Leach-Bliley and the PATRIOT Acts. It also is unnecessary to set out the minutiae of some regulations, such as the calculation of Risk-Based Tier 1 capital ratios or all of the Prompt Corrective Action categories and restrictions, *unless* they are material to presenting the bank's current situation.

#### **Time to file dusty things away**

Additionally, sup & reg sections are often not updated well. Many filed in 2012 still focus on the economic decline that started in 2006-2008, rather than on 2010 and 2011 changes in the banking environment. Similarly, many recent filings still restate the full history of the various Basel capital initiatives as well as FDIC insurance assessment changes going back to 2009.

The coverage of the Dodd-Frank Act is an example of another common pattern of sup & reg sections to highlight provisions that may not impact the particular bank immediately, if ever (such as designation of large institutions as systemically significant), without acknowledging that FDIC assessments now will likely be less for most banks and that expanding into other states may now be easier and cheaper as a result of provisions in Dodd-Frank.

#### **Rethinking your sup & reg section**

The current boilerplate approach to sup & reg sections emanates from the general requirements of SEC Regulation S-K, which require that 10-K filers briefly describe their business, including the need for any government approval of principal products and services and the effect of existing or probable government regulations on the business. A much less redundant sup & reg text in 10-Ks would still comply with Reg S-K, I believe.

Instead of just rehashing basic banking laws and regulations in detail, as is traditional, I believe that sup & reg sections should emphasize recent developments which are directly relevant to the particular banking organization issuing the 10-K.

For example, if the bank is subject to an enforcement action and has adopted corrective policies and procedures, or is attempting to raise capital in order to repay TARP and resume paying dividends, these and other particularly pertinent supervisory and regulatory developments should be the drivers of the sup & reg section.

Recent or proposed legislation and regulations such as Dodd-Frank *should* be discussed, but in the context of identifying those aspects that are most likely to affect the filing bank, such as the evolving best practices of stress testing, establishing board risk committees, or embracing enterprise risk management.

### **Opportunity for evolution**

The President recently signed the Jumpstart Our Business Startups (“JOBS”) Act into law. The JOBS Act deletes or defers the amount of information “emerging growth companies” will be required to include in capital offerings.

The Act also directs the SEC to conduct a review of Regulation S-K and submit a report to Congress within 180 days to determine how such requirements can be updated to modernize and simplify the registration process and reduce the costs and other burdens associated with these requirements for such companies.

This required SEC review offers an opportunity to also address how the sup & reg sections of 10-Ks may be simplified to similarly reduce the associated costs and other burdens for registered issuers that are banking organizations.

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