New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(5)C
Corporation Tax
March 23, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C000210A

On February 10, 2000, a Petition for Advisory Opinion was received from PricewaterhouseCoopers LLP, 1177 Avenue of the Americas - 26th Floor, New York, New York 10036-2798.

The issue raised by Petitioner, PricewaterhouseCoopers LLP, is whether the election to become a "financial holding company" under the Gramm-Leach-Bliley Act of 1999, (P.L. 106-102, referred to as "GLB"), by a foreign parent corporation which owns a foreign bank doing a banking business in New York State and New York City, and also owns other corporations, which are not banks, also doing business in New York City, will cause such foreign parent corporation to become or be treated as a corporation "registered under the federal bank holding company act of nineteen hundred fifty-six, as amended" for purposes of section 1452(a)(9) of Article 32 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

The Parent Company is a corporation organized and existing under the laws of a foreign country, with its headquarters in that country, and does not have any office or employees in the United States. The Parent Company owns 100 percent of the stock of a Bank organized, existing and licensed as a bank by the same foreign country. The Bank carries on a banking business in New York City through a branch. In addition, the Parent Company owns stock of both domestic and foreign corporations which are not banks, that carry on business in New York City. Note that for purposes of this advisory opinion it is assumed that the Bank is a banking corporation under section 1452(a)(2) of the Tax Law, and is subject to franchise tax under Article 32 of the Tax Law. Further, this advisory opinion does not express any opinion on the issue of whether any of the other corporations whose stock the Parent Company owns come within the ambit of section 1452(a)(9) of the Tax Law because they are principally engaged in a business which might be lawfully conducted by a bank or that is so closely related to banking or managing or controlling banks as to be a proper incident thereto.

Discussion

Section 1452(a)(9) of the Tax Law provides that any corporation 65 percent or more of whose voting stock is owned or controlled, directly or indirectly, by, among others, a corporation registered under the federal bank holding company act of nineteen hundred fifty-six, as amended (referred to as "BHCA"), is a banking corporation provided that the corporation whose voting stock is so owned or controlled is principally engaged in a business, regardless of where conducted, which (i) might be lawfully conducted by a corporation subject to Article 3 of the Banking Law or by a national

banking association or (ii) is so closely related to banking or managing or controlling banks as to be a proper incident thereto, as set forth in section 4(c)(8) of the BHCA.

A "corporation ... registered under the federal bank holding company act of 1956, as amended" means a bank holding company. Section 1844 of Title 12 of the U.S. Code imposes a specific registration requirement only on bank holding companies. A bank holding company is defined as a company which has control over any bank (12 USCS §1841(a)(1)). Since a foreign bank operating a branch in the United States is specifically excluded from the definition of the term "bank" for purposes of the definition of a bank holding company (12 USCS §1841(c)(2)(A)), any company that owns such a bank is not a bank holding company and is not required to register as such under section 1844. Therefore, in this case, the Parent Company currently is not included within the phrase "corporation ... registered under the federal bank holding company act of 1956, as amended" in section 1452(a)(9) of the Tax Law.

Section 1843(l)(1) of Title 12 of the U.S. Code, as added by section 103 of the GLB, provides that, to become a financial holding company, a bank holding company must file a declaration with the Federal Reserve Board that the company elects to become a financial holding company and certifies that all its depository institution subsidiaries are well capitalized and well managed. While this provision refers only to bank holding companies making the election to become financial holding companies, section 1843(l)(3) provides that, for purposes of section 1843(l) (1) (containing the requirements to become a financial holding company), the Federal Reserve Board shall apply comparable capital and management standards to a foreign bank that operates a branch or agency in the United States. In the Federal Reserve Board's interim rule on financial holding companies, it states that:

> [a] foreign bank that operates a branch or agency or owns or controls a commercial lending company in the United States, and any company that owns or controls such a foreign bank, will be treated as a financial holding company if:
>
> (1) The foreign bank is and remains well capitalized and well managed; and
>
> (2) The foreign bank, or the company that owns the foreign bank, has made an effective election to be treated as a financial holding company under this subpart. 12 CFR §225.90(a); 65 Fed. Reg. 3793.

The terms "financial holding company" and "bank holding company" are not synonymous. Not all bank holding companies will become financial holding companies; only those bank holding companies that file the declaration required by section 1843(l)(1) will do so. In addition, the declaration required to be filed to elect to be a financial holding company is not the equivalent of a

registration. Section 116 of the GLB, amending 12 USCS § 1844(a), states that "[a] declaration filed in accordance with [section 1843(l)(1)(C)] shall satisfy the requirements of this subsection with regard to the registration of a bank holding company ...." It is determined that this provision means only that a bank holding company otherwise obligated to register is permitted to forego the duplicative filing of a separate registration if it files a declaration electing to become a financial holding company. It does not mean that a foreign bank operating a branch in the United States or a company that owns such a foreign bank becomes a bank holding company obligated to register as a consequence of filing a declaration electing to be treated as a financial holding company. Thus, the declaration filed by a foreign bank operating a branch in the United States or a company that owns such a foreign bank electing to be treated as a financial holding company is not considered to be a "registration" under the BHCA for purposes of section 1452(a)(9) of the Tax Law.

Accordingly, in this case, the Parent Company would not be considered to be a corporation "registered under the federal bank holding company act of 1956, as amended," as that phrase is used in section 1452(a)(9) of the Tax Law if it elects to be treated as a financial holding company under the current facts and circumstances. However, if the Parent Company should acquire, in the future, a subsidiary bank in the United States, it would become a bank holding company, and it would fall within the scope of the phrase "registered under the federal bank holding company act of 1956, as amended".

DATED: March 23, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.