Banking Regulation: The Pendulum Swings Back (Slowly)

By David L. Glass

I. Introduction

On May 24, President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Act"),[1] two days after it was passed by the House by a broad bipartisan margin (258-159). The Senate had passed the bill in March by a margin of 67-31. Last year the House passed a more far-reaching reform bill, the Financial Choice Act, but that bill had no chance in the Senate, primarily because of Democratic opposition to its reforms of the Consumer Financial Protection Bureau (CFPB) created under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA) and proposed repeal of the eponymous "Volcker Rule," originally proposed by and named for former Federal Reserve Chairman Paul Volcker.[2]

Recognizing this, House Financial Services Committee Chair Jeb Hensarling (R-TX), who is retiring from Congress at the end of the year, agreed to allow the bill as passed by the Senate to be voted on in the House without amendment, on the stipulation that further deregulatory measures would be considered later.

The Act actually had originated in the Senate, as Mike Crapo (R-ID), Chair of the Senate Committee on Banking, Housing and Urban Affairs, was able to negotiate with key moderate Democrats to achieve a bipartisan package (rumors that the word "bipartisan" had been officially outlawed on Capitol Hill apparently were false). The compromises required to achieve Democratic backing were 1) primarily focusing on smaller, community banks, at least one of which every Congressperson has in his or her district; 2) dropping any mention of the CFPB; and 3) preserving the Volcker Rule, sacrosanct to many Democrats, albeit eliminating its application to smaller banking organizations that meet certain criteria (discussed below). Thus, while far from being a "repeal and replace" of the DFA, the Act nonetheless provides significant relief, especially for smaller banking organizations, from some of DFA's more onerous requirements.

Apart from the new legislation, recent developments in the regulatory agencies presage further gradual reshaping of some of the more onerous burdens imposed on the banking industry by the DFA. With Senate confirmation in June of Jelena McWilliams to head the Federal Deposit Insurance Corporation (FDIC), Mr. Trump's appointments now head the three bank regulatory agencies—the FDIC, the Board of Governors of the Federal Reserve System ("Fed"), and the Office of the Comptroller of the Currency (OCC). Predictably, the Democratic left, led by Senator Elizabeth Warren (D-MA), has sounded the alarm, asserting that "Main Street" is about to fall victim to the presumed depredations of "Wall Street." But the reality is more nuanced. The backgrounds of the new regulators, and their actions and pronouncements to date, suggest that their approach will be more a fine-tuning of the current regime than a wholesale deregulation of the protections built into the banking system by the DFA and earlier legislation.

This article reviews the major provisions of the new Act that relieve regulatory burden, especially for smaller banking institutions, and provides some historical context for the changes it makes. The next section reviews the President's new appointees to the three regulatory agencies, and briefly discusses the role of each agency in regulating the banking system. The final section discusses several noteworthy recent actions and statements by regulatory officials, which collectively suggest that regulatory priorities, while no doubt moving toward a less restrictive regulatory environment overall, will continue to maintain a focus on preventing the kinds of excesses that led to the global financial crisis.

II. The Economic Growth, Regulatory Relief, and Consumer Protection Act

The Act is noteworthy in that it was passed with significant support from moderate Democrats as well as substantially all Republicans. By contrast, the DFA was enacted in 2010 along strictly partisan lines, in response to the global financial crisis. With the Democrats in control of both houses of Congress as well as the Presidency, and the recent global financial crisis fresh in memory, in certain respects DFA was something of a high water mark in regulatory overkill—especially in its impact on smaller banking organizations, which do not pose a systemic threat to the US financial system and generally were not implicated in the events that triggered the global financial crisis.

Accordingly, in both the House and the Senate, a principal impetus for reform legislation was the recognition that DFA imposed massive new compliance burdens on substantially all banking organizations, including those that are too small to have any systemic impact on the U.S. financial system, unduly hampering their ability to meet the credit needs of consumers and small businesses. The Act accomplishes this goal in four principal ways:

- Raising the $50 billion threshold that triggers the requirement for "enhanced prudential standards" under DFA;
- Easing capital requirements, borrowing restrictions, and examination schedules for smaller bank hold-

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ing companies (BHCs) and savings and loan holding companies (SLHCs) that meet certain requirements;

- Exempting most banking entities with less than $10 billion in assets from the Volcker Rule, which prohibits "proprietary ["prop"] trading"—i.e., trading by a bank for its own account, rather than to serve the needs of a client—and easing the Volcker Rule's restriction on name sharing between a fund and its sponsor; and
- Creating a "safe harbor" under the "ability to repay" requirement for qualifying banks, thrifts, and credit unions.

The following discussion reviews each of these changes in more detail. It should be recognized that the Act covers numerous additional matters that are less germane to the issue of regulatory burden for banks, and thus are not addressed herein.

A. Relief from Enhanced Prudential Standards

The DFA required that all BHCs and SLHCs with more than $50 billion in assets, along with nonbank companies designated as "systemically important financial institutions" (SIFIs)[3] be subjected to "enhanced prudential standards" (EPS).[4] DFA generally mandates that banking entities that meet the criteria for EPS shall be subject to "more stringent" requirements than those that do not, and that the stringency of these requirements should be ramped up based on a list of considerations.[5] Foreign banks that engage in banking in the U.S. by operating a branch or agency, or by owning a U.S. bank subsidiary (collectively "foreign banking organizations" or FBOs) are deemed to be BHCs for this purpose, and under DFA are subject to EPS if they have more than $50 billion in worldwide assets (albeit the standards are less stringent for those with less than $50 billion in U.S. assets).[6]

As it does in many other areas, the DFA gave very broad discretion to the regulatory authority, in this case the Fed as the regulator of BHCs and SLHCs, to write rules fleshing out the requirements of EPS. In 2014, the Fed published its final rule codifying its expectations for entities subject to EPS.[7] Especially as applied to smaller banking organizations, many aspects of the final rule are quite burdensome. For U.S. bank holding companies with total consolidated assets of $50 billion or more, the final rule incorporates the previously issued capital planning and stress testing requirements as an enhanced prudential standard. It also requires such a U.S. bank holding company to comply with enhanced risk-management and liquidity risk-management standards, conduct liquidity stress tests, and hold a buffer of highly liquid assets based on projected funding needs during a 30-day stress event.[8]

With respect to FBOs, the Fed rule imposed on FBOs with more than $50 billion in U.S. assets a requirement to hold all U.S. assets (other than the branch of the foreign bank itself) under a well-capitalized intermediate holding company (IHC). This reversed a long-standing Fed interpretation, dating from the more laissez-faire regime of Chairman Alan Greenspan, that if an FBO itself was well-capitalized, it did not need to separately capitalize a subsidiary IHC in the US.[9] The result was to compel a number of the largest FBOs to either raise massive amounts of new capital in the U.S., or to reduce assets held in the U.S. or shift them offshore.[10]

The Act ameliorated some of the more draconian effects of EPS as implemented. Immediately upon its enactment, the Act raises the DFA threshold of $50 billion for applying enhanced prudential standards. Going forward, all BHCs with less than $100 billion in assets will now be exempt from EPS, while banking organizations over $250 billion will continue to remain fully subject to the requirements of EPS. As such, the Act adopts the sensible approach of keeping the largest, internationally active banking organizations—those that pose potentially significant risks to the U.S. financial system—fully subject to the DFA EPS regime, while substantially alleviating its impact on smaller, less risky institutions.

What about those organizations between $100 and $250 billion? Again, the Act adopts a more sensible, risk-based approach, with a phase-in. Within 18 months after the Act's enactment, BHCs with assets between $100 and $250 billion will be subject to a revised framework, as follows.

- First, the Fed will retain discretion to "claw back" BHCs in this category into the full EPS, if it determines this is necessary for safety and soundness purposes or to mitigate a threat to the financial system.
- Second, the Fed will be required to undertake periodic "stress testing" of BHCs in this category to determine if they have adequate consolidated capital to absorb losses resulting from adverse economic conditions. Presumably the periodic stress tests will inform the Fed's decision as to whether to continue to subject entities in this size category to EPS. Note that, for this purpose, the definition of a BHC does not include foreign banks, unless they actually own a U.S. domestic bank subsidiary. Thus, those in this size category (globally) with only branches or agencies in the U.S. would be exempt.

Under DFA, banking entities with more than $50 billion in assets were also subject to both company-run and supervisory stress tests, as part of the EPS. The Act raises to $250 billion the threshold at which company-run tests are required, providing welcome relief for smaller entities. Likewise, supervisory stress tests will not be required for banking entities below $250 billion—except that, as noted, the Fed will undertake "periodic" stress tests for those between $100 and $250 billion. Presumably, "periodic" implies a less rigorous schedule than the annual requirement under DFA.

B. The Volcker Rule

The Volcker Rule originated with the testimony of former Fed Chairman Paul Volcker before the House Financial Services Committee early in 2010, as Dodd-Frank was taking shape. As stated by Mr. Volcker, the concept of the rule is easy to grasp and intuitively appealing: banks that benefit from the federal safety net, by having FDIC insurance or access to Federal Reserve credit, should not be allowed to speculate for their own account with deposits and other funds that are implicitly backed by the U.S. Government. Based on the same reasoning, banks should not be allowed to invest in or sponsor hedge funds that engage in risky trading. As enacted in DFA, the Rule provides that, subject to certain exceptions, "a banking entity shall not engage in proprietary trading; or acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund."[11] The term "banking entity" is defined broadly to include all FDIC-insured banks and thrift institutions and their holding companies, as well as FBOs.

Thus, under DFA, all FDIC-insured banks and thrifts, regardless of size, as well as all bank and thrift holding companies and FBOs, were prohibited from engaging in "proprietary ('prop') trading" and from investing in or sponsoring certain hedge funds, known as "covered funds" to distinguish them from ordinary mutual funds which do not engage in speculative trading.[12] The DFA contained an exemption from the Volcker Rule for asset managers that simply manage a fund, which is a permitted activity for banks and BHCs, but the exemption only applied if the covered fund did not share its name with the investment adviser. This restriction, while not eliminated, was softened as discussed below.

There is little, if any, empirical evidence supporting the core thesis of the Volcker Rule, namely that prop trading caused or contributed to the global financial crisis of 2007-2009. (In fairness, Chairman Volcker himself suggested that the Rule was aimed more at the next crisis than at the last one.) Furthermore, there is evidence that it is detrimental to the economy. In 2012, as the agencies were developing the Rule, Douglas Elliot, an economic research fellow at the Brookings Institution, testified before Congress that the Volcker Rule "is fundamentally flawed and will do considerably more harm than good for the economy." Emphasizing that he was generally a supporter of DFA otherwise, Mr. Elliott nonetheless detailed what he saw as the flaws in the Volcker Rule.[13]

- First, it focuses on the *intent* of an investment, rather than the *risk* of that investment, which can be (and is being) better addressed through the risk-based capital requirements applied to internationally active banks. And by focusing on "prop trading," it implicitly assumes that lending risk is preferable to trading risk. Lending is, of course, the bread and butter of most banks and their greatest source of risk in routine course.
- Second, the concept of "proprietary investments" is a very subjective and arbitrary one. In fact, a large part of the final rule as adopted by the five agencies is devoted to attempting to define prop trading in a way that does not interfere with "legitimate" activities such as market-making or making hedging trades on behalf of customers.[14]

In a similar vein, a Fed economic research staff study in 2016 examined the effect of the Volcker Rule on market-makers, particularly in times of stress. In part due to uncertainty as to what trading was and was not considered "proprietary," the study determined that the effect, albeit unintended, of the Rule was to diminish the willingness of market-makers to maintain liquid markets in times of stress, precisely when greater liquidity is most needed. The study concluded that "the illiquidity of stressed bonds has increased after the Volcker Rule."[15]

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While the Democratic left continues to cling to the Volcker Rule, there is nonetheless a widespread awareness that the Rule as promulgated imposes an unnecessary and highly burdensome compliance regime on community banks, even though they do little or no prop trading and were not responsible for the crisis. Accordingly, the Act ameliorates the impact of the Rule as applied to smaller banking entities, by looking at both the size of the banking entity and the extent to which it engages in prop trading. Specifically, banking entities with less than $10 billion in total assets and total trading assets and liabilities that comprise no more than 5 percent of total assets will now be exempt from the Volcker Rule. In a statement released in April, Fed Governor Lael Brainerd—a Democrat appointed to the Board by President Obama—while continuing to support the Rule in principle, voiced her support for relieving smaller firms from its burdens, noting that 98 percent of prop trading is conducted by the largest firms and would continue to be captured under the new regime.[16]

The Act also softened the "name sharing" restriction under the Volcker Rule's asset management exemption. To clarify, while the prohibition under DFA on sponsoring or advising a hedge fund was not meant to preclude banking organizations from acting as advisors or asset managers for traditional funds,[17] the concern was that if the bank and the fund had similar names, the public could conflate the two so that a problem afflicting the advisor or fund could cause reputational damage to the bank. This concern dates back to at least 1979, when a real estate investment trust (REIT) sponsored and advised by Chase Manhattan Bank went bankrupt, causing reputational harm to the bank[18] and leading the Fed to modify its regulation allowing BHCs to sponsor and advise funds.[19] Going forward, a covered fund will not be prohibited from sharing a name with its investment adviser, provided the adviser does not share its name with a banking organization or use the word "bank" in its name.[20]

Apart from the Act, in April the House passed a bill, by a surprisingly wide bipartisan margin of 300-104, to streamline the Volcker Rule by giving exclusive rule-making authority to the Federal Reserve, rather than sharing the authority among five agencies as stipulated by DFA, and giving sole enforcement authority to each trading entity's primary regulator.[21] But this provision was not included in the Senate bill that later became the Act. It is possible it will be reintroduced in the next Congress, but for now all five agencies will have to agree to any regulatory changes to the Rule. As discussed below, in July the agencies released for comment a proposal to further streamline the application of the Rule.

C. Mortgage Relief

In enacting the DFA in 2010, Congress had determined that a principal cause of the housing bubble and subsequent financial crisis was that lenders were using lax lending standards in making mortgages, knowing they could then transfer the risk by selling the mortgages into securitization vehicles. Accordingly, DFA imposed a stringent "ability to repay" (ATR) requirement on mortgage lenders. Under CFPB rules promulgated in 2013, a lender can comply with the ATR requirement in different ways, one of which is by originating a "Qualified Mortgage" (QM). When a lender originates a QM, it is presumed to have complied with the ATR requirement, which consequently reduces the lender's potential legal liability for its residential mortgage lending activities. But QMs are limited in size and must meet certain other requirements. If a particular mortgage does not qualify as a QM, the lender must generally investigate and consider a borrower's assets, employment, credit history, and monthly expenses, and must take into account the impact of the interest rate of a variable rate mortgage going up in later years on ability to pay in order to meet its ATR obligation.[22]

The Act provides an exemption from ATR for banks and other lenders under $10 billion in assets, provided the mortgages are retained in their portfolio. The presumption is that, since the lender will be retaining the risk on the loan, it will have an incentive to apply more conservative lending standards. It thus addresses one of the root causes of the crisis—what economists refer to as "moral hazard," in this example the disconnect between the entity originating a mortgage and the ultimate holder of the mortgage who takes the risk of repayment.

D. Community Bank Relief

Apart from EPS, the Volcker Rule, and the reform of the ATR requirement for mortgages, the Act provides significant relief to community banks in a number of areas.

Capital—banking organizations with less than $10 billion in assets can satisfy their capital requirements and be considered "well capitalized" with a leverage ratio of 8 to 10 percent, unless their primary regulator determines a higher ratio is required, thereby relieving them of the burden of compliance with the extensive requirements under the Basel risk-based capital framework. To clarify, since the original Basel Accord in the 1980s, regulators around the world have adopted a risk-based capital model, whereby the amount of capital a bank was required to hold was based upon the presumed riskiness of the assets it holds. This both required complex calculations and created incentives to hold less-risky assets like U.S. Government bonds, rather than to make loans. The leverage requirement, by contrast, is a simple percentage of the bank's total assets, without regard to the riskiness of any particular asset. For smaller banks that do not pose systemic risk, this reduces an existing disincentive to making loans that serve their local communities.

Small bank and savings and loan holding companies—The Fed has generally disfavored the use of debt in the acquisition of a bank or holding company, since excessive debt at the parent level could compromise the ability of the parent to serve as a "source of strength" to its subsidiary bank or banks. However, the Fed has also recognized that, especially for smaller organizations, the use of debt may be necessary to effect a merger or acquisition. Thus, the Fed has long had a policy statement applicable to small holding companies allowing them to take on greater levels of holding company debt, if their total assets are $1 billion or less and certain other criteria are satisfied.[23] The Act raises this threshold to $3 billion. This change is likely to lead to increased merger and acquisition activity among smaller institutions—a trend that actually has been well underway for years, in part driven by rapidly increasing costs of compliance and the economies of scale inherent in combining smaller institutions.

Exam frequency—currently, regulatory rules require all banking institutions with more than $1 billion in assets to be examined annually. Especially for smaller institutions, on-site bank examinations impose significant costs and other burdens. Assuming the institution is well-capitalized, such frequent examinations seem unnecessary, given that the institution is too small to be a threat to the financial system. Accordingly, the Act raises, to $3 billion from the current $1 billion, the threshold for allowing the exam cycle to be lengthened to 18 months from the current 12 months, provided that the institution is well-capitalized. Again, this change recognizes that smaller institutions do not pose a significant risk to the financial system.

III. The Agencies: Who's in Charge?

In an industry as highly regulated as banking, a key question regarding the future direction of regulation will always be, who is in charge of the agencies? In this regard, President Trump's appointments to date generally suggest that the three bank regulatory agencies are likely to favor ongoing, but gradual and risk-based, reductions in the current regulatory burden. The following discussion reviews his appointments to the agencies to date, and briefly explains the role of each agency in the regulatory process.

A. The OCC

The most obscure of the three agencies to the general public, the Office of the Comptroller of the Currency (OCC), nonetheless plays a key role in the U.S. regulatory system. It was created originally during the Civil War as an office within the Treasury Department; its role was to charter and oversee a new class of federally chartered but privately owned banks, known as "national" (as distinguished from state-chartered) banks. While the majority of banks in the U.S. continue to be state-chartered, the largest banks are almost all national banks, especially since the onset of interstate branching in the 90s[24]—the reason being, of course, that by adopting the national charter they are subject to one set of federal banking law and rules, rather than the laws of each individual state in which they operate. Thus, while they comprise less than 20 percent of the roughly 5,300 banks in the United States, national banks hold 69 percent of the total banking assets.[25]

Of the three agencies, the OCC is the only one that actually charters banks, and it is charged with supervising the national banking system. In order to preclude interference by the states in their affairs, the National Bank Act gives the OCC exclusive "visitorial" powers over national banks.[26] Furthermore, the DFA abolished the separate regulatory authority for federal thrift institutions (savings and loan associations and savings banks), known as the Office of Thrift Supervision (OTS), and transferred its authority to charter and regulate federal thrifts to the OCC.[27]

The officer in charge of the OCC is the Comptroller of the Currency, a somewhat archaic title dating to the original concept of President Lincoln and his Secretary of the Treasury, Salmon P. Chase, that the notes issued by the new national banks would become the nation's currency. The Comptroller is appointed by the President with the advice and consent of the Senate, and he or she serves at the pleasure of the President.

Last November, the Senate confirmed, by a vote of 54-43, President Trump's selection of Joseph M. Otting as Comptroller. Mr. Otting has spent his entire career in banking, including serving as CEO of OneWest Bank, N.A., from 2010 to 2015, during which time it transitioned from being a federal savings bank that primarily made residential mortgage loans to a full-service national bank. Not coincidentally, Mr. Otting worked closely with Steven Mnuchin, the Bank's founder, who is now Mr. Trump's Secretary of the Treasury.

B. The FDIC

The Federal Deposit Insurance Corporation was established in 1934 as part of the New Deal reforms enacted during the term of President Franklin Roosevelt. It serves three primary functions within the regulatory system. First, in its corporate capacity, it insures the deposits in all national banks and substantially all state banks, up to the applicable insurance limit per account, currently $250,000. Second, it is the primary federal regulator of all state-chartered banks and thrift institutions that are FDIC-insured but not members of the Fed (which comprise the majority of state-chartered institutions). Third, it acts as receiver when an FDIC-insured bank or thrift is declared insolvent, with a mandate to marshal the failed bank's assets for the benefit of its creditors.[28]

The FDIC is overseen by a five-member Board of Directors, no more than a simple majority of whom can be from any one political party. In April the Senate confirmed Jelena McWilliams to Chair the FDIC by a broad bipartisan vote of 69-24. Ms. McWilliams was most recently General Counsel of Fifth Third Bancorp in Cincinnati; previously she served on the staff of the House Banking Committee and as a lawyer at the Fed. She replaces Martin Gruenberg, a Democrat appointed by President Obama. Mr. Gruenberg has chosen to remain on the FDIC Board. The other members are Comptroller of the Currency Richard Otting, ex officio, and Mick Mulvaney, director of the CFPB. While one vacancy remains to be filled, it is clear that the three Trump appointees will command a majority that will move away from the strongly anti-deregulation stance taken by Chairman Gruenberg.

C. The Fed

The Fed is the nation's central bank, responsible for formulating monetary policy. In addition, however, the Fed's role as a supervisor of banks has grown over the years, to the extent that it is now the most powerful regulator of all. In addition to supervising those state-chartered banks that are members of the Federal Reserve, its only supervisory role under the original Federal Reserve Act of 1913, the Fed over the years has acquired authority to oversee all BHCs, including FBOs treated as BHCs, and under DFA was given oversight over all SLHCs as well.

The Fed's decision making body at the policy level is the Board of Governors, consisting of seven members appointed for staggered 14-year terms; in theory, the purpose is to limit the power of any president to "pack" the Board with his appointees. In practice, however, most Governors do not remain on the Board for a full term, electing instead to return to academic or private sector positions. Since the 1990s, there have been one or more vacancies on the Board more than 90 percent of the time, largely due to the Senate holding up persons nominated by a president of the opposite party for political reasons. The Chair is appointed by the President for a four-year term.

During the 2016 election the incumbent Chair, Janet Yellen, was subjected to frequent criticism by President Trump, who ultimately decided not to reappoint her when her term as Chair expired in January 2018. Ms. Yellen's 14-year term as a Governor ran until 2022 so in principle she could have remained on the Board of Governors. But as has been the case with past Chairs who were not reappointed, she elected to retire, thereby creating another vacancy on the Board. In addition to Ms. Yellen, Vice Chair Stanley Fisher, a Democrat, and Daniel Tarullo, an Obama appointee who was the Fed's point person on tougher bank regulatory measures following the global financial crisis and the Dodd-Frank Act, have also resigned from the Board within the past year.

The result was to give Mr. Trump a rare opportunity to dramatically reshape the Fed. But the President's nominees to date have been people with solid credentials and backgrounds, suggesting they will take a generally moderate and thoughtful approach to implementing bank regulatory as well as monetary policy. Jerome Powell, appointed as the new Chair to succeed Ms. Yellen, was already a member of the Board, having been appointed by President Obama in 2012. He is considered a moderate Republican with a successful prior career in law and investment banking, and as a Board member generally supported Ms. Yellen's monetary policy positions. Randal Quarles, also a moderate Republican with a successful career in investment banking who served in the Treasury Department under President George W. Bush, has now replaced Daniel Tarullo in the key role of vice chair in charge of bank supervision (Mr. Tarullo was never formally appointed to that role by President Obama but served in that capacity de facto).

Richard Clarida, a moderate Republican economist and monetary policy specialist, has been nominated to serve as vice chairman to Fed Chairman Jerome Powell. Mr. Clarida has taught at Columbia University since 1988 and is a managing director at Pacific Investment Management Co. (PIMCO), a well-known firm specializing in fixed income investment management. He is viewed more as a pragmatist than an ideologue, and is generally well regarded by both conservative and liberal economists. He was the Treasury Department's chief economist under President George W. Bush, and earlier served in the Treasury Department under President George H.W. Bush as well. He will be the highest ranking academic on the Fed board and would serve as the vice chair to Fed Chairman Jerome Powell. As such, he is an ideal complement to Chairman Powell, who is the first Fed chair since G. William Miller, appointed by President Carter in 1978, who does not hold a doctorate in economics.

Another nominee, Michelle Bowman, has been Kansas's bank commissioner since the beginning of last year. Ms. Bowman was previously a vice president at Farmers & Drovers Bank, a Kansas bank that reported $181 million in assets in 2017. One seat on the Fed's seven-member Board is normally reserved for a community banker; Ms. Bowman would fill that seat. She has also served as counsel or adviser to several individual Congress members and congressional committees, followed by stints with the Department of Homeland Security and Federal Emergency Management Agency (FEMA) during the administration of President George W. Bush.

On June 12, the Senate Banking Committee approved both Mr. Clarida and Ms. Bowman, by bipartisan votes of 20-5 and 18-7, respectively.[29] President Trump has also nominated Marvin Goodfriend, a Carnegie Mellon professor and former senior vice president of the Federal Reserve Bank of Richmond. The Senate Banking Committee approved his nomination along party lines in February by a narrow 13-12 margin, but as of this writing Mr. Goodfriend's confirmation by the full Senate was in doubt. He is currently opposed by every Democrat, primarily because he was an outspoken inflation "hawk" beginning in 2008, advocating that the Fed should raise interest rates in the post-global financial crisis environment, and because he was considered to have performed poorly during his hearing before the Senate Banking Committee in February.[30] In addition, Senator Rand Paul (R-KY), a self-described libertarian who is generally an opponent of the Fed, also has announced his opposition to Mr. Goodfriend.

The nominations of Ms. Bowman and Messrs. Clarida and Goodfriend had not been acted upon by the full Senate as this went to press. While Mr. Goodfriend's confirmation remains in doubt for the reasons stated, however, it appears likely Ms. Bowman and Mr. Clarida will eventually be confirmed, and that the Board accordingly will be comprised largely of moderate, well-qualified and generally non-dogmatic Governors. Pending confirmation of these nominees, there are only three currently sitting members of the Board, which is worrisome in the event major policy decisions are called for in a crisis scenario. The Fed has changed its quorum rules to allow for a simple majority of the sitting Governors to act, thereby averting a quorum issue. But this also creates the anomaly that even a casual conversation between two Governors could constitute an official "meeting" requiring public disclosure.[31]

IV. Recent Regulatory Developments

While it is obviously too early to make broad predictions regarding likely changes in bank regulation, a number of recent regulatory actions and pronouncements reinforce the notion that wholesale deregulation is not in the offing. Rather, these actions suggest continuity in existing regulatory approaches, with fine-tuning to lessen unnecessary regulatory burden and focus on areas of actual risk to the financial system. This section discusses three of the more significant such developments: 1) The Fed's surprisingly strong actions taken against the management of Wells Fargo & Co., one of the largest BHCs; 2) Governor Quarles' recent testimony before Congress setting forth the Fed's regulatory agenda; and 3) the proposed simplification of the Volcker Rule recently announced by the five agencies charged with its enforcement.

A. The Wells Fargo Case

Earlier this year the Fed took a series of unusual actions against Wells Fargo Corporation (WFC), one of the Big Four U.S. bank holding companies (along with Citigroup, JPMorgan Chase, and BankAmerica Corporation).[32] The actions are the culmination of the Fed's review of the well-publicized scandal at Wells Fargo Bank which came to light in 2016. The underlying facts involved the opening of some 3.5 million fake accounts, apparently as a result of setting unrealistic sales targets and a culture that induced employees to believe that their compensation, and indeed their jobs, would be dependent on attaining these targets. The bank also allegedly purchased insurance for some 570,000 auto loan customers, and charged them for it, without their knowledge—including, in some cases, where the customer already had purchased his or her own insurance.[33]

The bank had already been fined for these violations, and its CEO had resigned under pressure. With a new chair, CEO and general counsel, WFC apparently believed it was "out of the woods." Thus, the Fed following up with these additional actions—characterized as "unprecedented" and "no slap on the wrist"—was noteworthy and apparently caught the bank by surprise, in addition to causing WFC's stock to drop by 9 percent.[34] Following is a summary of the Fed's additional actions and their significance.

In common with the other bank regulators, the Fed has power to impose a wide range of remedies through Cease and Desist (C&D) Orders.[35] However, the party receiving such an order has specific legal remedies, including the right to a hearing and judicial review. Thus, it is common for such orders to be issued "on Consent" as in this case—the equivalent of a plea bargain in the criminal context—whereby the charged party gives up its right to invoke these remedies in return for negotiations over the terms of the Order. In this case, the Order has two principal components:

1) WFC's assets are effectively capped at their current level, just under $2 trillion, until the Fed lifts the cap. It is estimated that this will cost WFC about $400 million in reduced net earnings this year.

2) WFC is required to undertake substantial improvements in its risk management structure, particularly in compliance. The Order requires a Board plan for enhanced governance, a firm-wide plan for strengthening compliance and operational risk, and independent third party reviews of both plans and how they are implemented. The asset cap will not be lifted until the Fed is satisfied.[36]

Apart from the Order itself, the Fed took two highly unusual actions.

First, it sent (and publicly released) strongly worded letters to the former CEO, John Stumpf, and the former lead independent director, Stephen Sanger, under the signature of the Fed's head of supervision. Both letters explicitly state that the individual did not competently perform his job and fundamentally failed in his oversight responsibilities.[37]

The Fed could have sought to have each individual barred from the banking industry, either permanently or for some period of time. However, to do so through the mechanism provided by law is a lengthy and uncertain process.[38] The courts have held that, in order to impose a lifetime ban, the regulator must show egregious and self-serving conduct that goes beyond mere negligence.[39] The Fed thus apparently chose to issue these letters instead, both to "shame" the individuals involved and to make clear to the banking industry that it regards them as unsuitable to fill similar roles in the future—thereby largely achieving the objective of a ban without going through the legal process.

Second, while WFC had already replaced a number of directors, as well as its CEO, as has been widely reported three additional directors agreed to depart immediately and one more before the end of the year. This is not required by the Order itself but apparently was part of the negotiations preceding the Order. Had the Fed tried to do this through the Order, it would have triggered the legal process discussed above and could not have been accomplished before Janet Yellen's term ended. So apparently these departures were part of the negotiations.

These departures appear to have been intended to underscore the regulators' increased emphasis on "culture" and improved governance. Last fall the Fed published for comment a guidance regarding its supervisory expectations for the Board of Directors of banking organizations.[40] Around the same time, Jerome Powell, the new Fed Chairman, spoke publicly on this subject.[41] The WFC case thus gave the Fed a vehicle to send the message that directors will have personal consequences for failure to supervise. On the political side, the Fed has been under fire, particularly from Senator Elizabeth Warren (D-MA), for not compelling the dismissal of directors in general and WFC directors in particular.

With her term as Chair expiring, this was something of a legacy item for Ms. Yellen, and no doubt the timing of these actions reflects her impending departure. Still, they would not have happened without the support of new Chairman Powell. While Mr. Powell's concurrence in the action implies continuity in the Fed's approach, at the same time the completion of this action in the Yellen regime presumably gives him more flexibility in any future case. But together with his earlier statements on governance, it appears that Chairman Powell will continue to favor an approach of coming down hard on individual bad actors, rather than enacting new rules that penalize the innocent as well as the guilty.

B. Governor Quarles' Testimony

Last fall President Trump appointed Randal Quarles to be Vice Chairman of the Federal Reserve Board for Supervision, filling the vacancy created by the departure of Daniel Tarullo (discussed above). In April, Mr. Quarles had his first opportunity to present the semiannual testimony of the Vice Chairman for Supervision. Whereas Mr. Tarullo was an aggressive regulator, Mr. Quarles took the occasion to outline a number of measures aimed at reducing regulatory burden.[42] Following is a summary of the key points, with the *caveat* that pointing the Fed bureaucracy in a new direction is like turning around a battleship—it does not happen overnight.

The *key principles* underlying Fed regulatory policy are safety and soundness and financial efficiency. These are seen as not in conflict but as "mutually reinforcing." Mr. Quarles cited such factors as the 120 percent increase in common equity capital ratios of the largest banks since the crisis, reduction in short term debt, and increased holdings of liquid assets in support of the thesis that the regulatory burden can be reduced without compromising safety and soundness.

Another key principle is *transparency*—avoid needlessly complex regulations. He took particular aim at the Volcker Rule, which in its final form comprises 297 pages of three-column fine print, noting that it is "unarguable" that the Rule has hurt capital-raising, especially for smaller companies (as noted above, a study by the Fed's independent economic research staff earlier had reached this conclusion). He noted that the Fed is discussing with the other four regulators (SEC, CFTC, OCC, FDIC) how to reduce its burden, especially on institutions that do minimal prop trading and are not seen as presenting systemic risk; the actual proposal was released in July and is discussed below.

Capital/Leverage

The Fed and OCC recently proposed an "enhanced supplementary leverage ratio" (eSLR) to apply to systemically important bank holding companies and their lead bank subs (which are all national banks, and thus under the OCC).[43] Basically, the proposal applies a leverage ratio requirement in addition to the risk-based capital framework. While not proposing to drop this requirement, Governor Quarles noted that leverage should serve only as a "backstop" to risk-based capital, and that too much emphasis on leverage can encourage risky behavior, since it does not distinguish based on the riskiness of different asset classes. Thus, while the Act allows smaller banking organizations to rely on the leverage ratio rather than on more complex risk-based calculations, for larger organizations it seems clear the regulators will continue to emphasize the risk-based approach.

"The proposed rule seeks to 'tailor' the requirements of the Volcker Rule to the nature of the entity, so that its more onerous requirements would apply only to entities with significant trading assets and activity."

"Controlling Influence"

One specific proposal likely to prove welcome, especially to investment funds and others that may want to invest in bank shares, is to clarify the Fed's "opaque" and highly restrictive approach to determining "control" under the Bank Holding Company Act (BHCA). The BHCA provides that a company "controls" a bank, and thus is deemed to be a BHC, if 1) it owns 25 percent or more of the voting equity; or 2) it has the power to appoint a majority of the directors; or 3) the Fed determines, under all the facts and circumstances, that the company exercises a "controlling influence" over the management of the bank.[44] The first two are irrebuttable presumptions—they constitute control as a matter of law, regardless of whether the investor actually controls the bank's decision-making processes. The third ostensibly puts the burden on the Fed to demonstrate "control," but as a matter of administrative law, given how vague this standard is, the Fed really only has to show that it reasonably interpreted the law, not that it was "right" in any absolute sense.[45]

Over the years the Fed has taken a highly restrictive approach to the latter standard—basically, any investment over 5 percent is going to be scrutinized.[46] Generally speaking, investments of not more than 10 percent of a bank's equity, including not more than 5 percent of its voting equity, will pass muster, provided that there are no other indicia of control, such as the power to appoint directors or executive officers.[47] But in practice, the Fed will often require parties to enter into "passivity commitments"—specific, enforceable undertakings designed to assure that they cannot exercise control.[48] The need to make such commitments will often deter a non-bank investor, such as a hedge fund, from making an otherwise attractive investment in a banking organization. Standards that are both more transparent and less restrictive thus could be quite helpful in future investment scenarios and could assist smaller banking organizations in raising capital.

For example, to conserve cash a small BHC might want to pay an advisory fee in stock to its investment bank; but the latter will be unable to accept stock representing more than a de minimis percentage of the bank, for fear of being deemed to "control" the bank and thus inadvertently becoming a BHC. By providing clearer guidelines as to what might be deemed a "controlling interest," the Fed can significantly enhance the ability of nonbank investors to invest in banks. In turn, this could help the regulators to dispose of troubled banks by broadening the base of prospective investors to acquire them.

C. Volcker Rule Simplification

On June 5, the five agencies charged with enforcement of the Volcker Rule (the Fed, OCC, FDIC, CFTC and SEC) issued a press release confirming their intention to simplify the application of the Volcker Rule.[49] The timing was hardly coincidence; the announcement came less than a week after the confirmation of Jelena McWilliams as FDIC Chair. The outgoing FDIC Chair, Martin Gruenberg, had been publicly and adamantly opposed to any changes in the Volcker Rule; it would be unusual for a major regulatory initiative to proceed if one of the regulators was not on board. So Ms. McWilliams' confirmation essentially provided the green light to move forward.

The agencies published the proposed rule for comment on July 17.[50] In broad outline, the proposed rule seeks to "tailor" the requirements of the Volcker Rule to the nature of the entity, so that its more onerous requirements would apply only to entities with significant trading assets and activity. For this purpose, it would divide all trading entities into three categories: those with "significant," "moderate," or "limited" trading assets and liabilities. Among other things, those in the "moderate" category would no longer need to establish elaborate compliance programs with respect to market-making and underwriting activities. They would, however, have to provide an annual CEO attestation of compliance—a requirement which, at present, would only apply to banking entities with more than $50 billion in assets. Those in the "limited" category would be entitled to a presumption of compliance, effectively alleviating them from compliance with the Rule entirely, except that the presumption could be rebutted by the regulator. The proposed rule would also eliminate entirely the existing, and highly prescriptive, "enhanced compliance program" required for entities with more than $50 billion in assets or more than $10 billion in trading assets.[51] The enhanced compliance program, contained in an Appendix to the existing regulation, contains literally hundreds of specific requirements, and has been widely criticized as unnecessarily complicated and costly to implement.

The proposed rule makes other noteworthy changes. It would eliminate entirely the so-called "intent" prong of the current definition of a trading account, which defines a "trading account" to include an account held for the purpose of purchasing or selling financial instruments with an intent to generate short-term profits. The "intent" prong has been widely criticized as subjective and impractical to apply. And it would eliminate entirely the existing rebuttable presumption that any position held less than 60 days is deemed to be in a trading account (and thus to encompass potentially illegal prop trading). Under the existing Rule, in effect the only way to rebut the presumption would be to "prove" that short-term profit-related intent was not, in fact, the basis for the transaction—as noted, a subjective and impractical standard at best.

IV. Conclusion: The Pendulum Swings Back (Slowly)

Major changes in banking regulation generally occur in response to crisis conditions. The national banking system was a product of the Civil War; the Federal Reserve of the monetary panic of 1907; the FDIC of the Great Depression, during which one-third of the nation's banks closed their doors. The Dodd-Frank Act of 2010 was no exception; it was enacted as a direct response to the global financial crisis of 2007-2009. But DFA differed from the earlier enactments in one significant respect: much of its prescriptive content consisted of broad and sometimes vaguely worded mandates, calling upon the regulators to flesh out its substance through the rule-making process.

Given the nature of the crisis and the political climate at the time, it is not surprising that the regulatory pendulum swung to an extreme. The Volcker Rule, to cite one prominent example, evolved from a few simple sentences to nearly 300 pages of three-column fine print in the Federal Register. So it is also not surprising that, a decade after the crisis and with Republicans now in control, the pendulum has begun to move in the opposite direction. The good news is that, both in the new Act and in the pronouncements of the regulators to date, the reaction has been thoughtful and measured. The reforms enacted and proposed to date have several common elements.

First, they reflect a risk-based approach—not abandoning the safeguards of DFA, but rather recognizing that it is neither necessary nor productive for them to be applied indiscriminately. As Governor Brainerd noted in her recent remarks, relieving smaller banking entities that do little or no prop trading from the compliance requirements of the Volcker Rule still insures that 98 percent of the actual prop trading will be captured. Similarly, the Act retains the concept of enhanced prudential standards, but applies a risk-based approach by narrowing its application to capture only the largest, internationally active institutions.

Second, they move away from one-size-fits-all regulatory mandate toward an approach of tailoring regulatory requirements more specifically to the nature of the particular institution. The proposed regulatory changes to the Volcker Rule are a good example. Apart from the size of the institution, they distinguish among those that engage in trading to a "significant" extent from those that do so to a "moderate" or "limited" extent. And they eliminate the wooden application of a 60-day holding period to define what is meant by a "trading" account.

Third, they reflect a greater focus on personal, rather than just institutional, responsibility. To the extent individual bad actors are not held responsible, penalties for noncompliance with law can come to be seen as a cost of doing business. In the Wells Fargo case, the Federal Reserve went beyond the usual panoply of fines and remedial actions, to calling out individual executives by name and compelling resignations from the bank's Board of Directors. In a similar vein, the proposed changes to the Volcker Rule, while alleviating the need for a bank in the "moderate" trading category to implement an enhanced compliance program, would call for the CEO of the bank to attest to its compliance.

The safety of the banking system has always been based on a balance between regulation—rules of general applicability—and supervision—after-the-fact oversight of a bank's actual conduct through the bank examinations process. In reaction to the financial crisis, the pendulum swung quite far in the direction of regulation. The reforms to date reflect a welcome, if moderate, swing back in the direction of more emphasis on supervision, recognizing that individual banking institutions can and do present very different risk profiles.

Endnotes

1 Pub.L. 115–174, S. 2155 (May 24, 2018).

2 Pub.L. 111–203, H.R. 4173, commonly referred to as the Dodd–Frank Act, was signed into law by President Barack Obama on July 21, 2010, and is codified in various sections of the United States Code pertaining to banking, securities, and commodity futures.

3 The DFA created a new super-regulatory body, the Financial Stability Oversight Council (FSOC), with the authority among others to designate certain non-bank financial institutions as SIFIs. Three companies—AIG, Prudential, and GE Capital—were initially so designated; the FSOC's attempt to designate MetLife to date has been defeated in court. AIG and GE Capital have subsequently restructured their operations to get out from under the SIFI designation, leaving Prudential as the only nonbank company to which the EPS apply. *See* "As FSOC rethinks SIFIs, will any nonbanks remain on the list?" American Banker, Dec. 28, 2017, p.a. at https://www.americanbanker.com/news/as-fsoc-rethinks-sifis-will-any-nonbanks-remain-on-the-list.

4 Dodd-Frank Act § 165, codified at 12 U.S.C. § 5365.

5 12 U.S.C. § 5365(a)(1).

6 Federal Reserve Press Release dated February 18, 2014, p.a. at https://www.federalreserve.gov/newsevents/pressreleases/bcreg20140218a.htm. On behalf of the FBOs, the Institute of International Bankers (IIB) argued for an interpretation that EPS would apply only if the FBO had $50 billion in U.S. assets; however, the Fed's final rule applies EPS to all FBOs with worldwide assets of $50 billion or more, obviously a much larger group.

7 Federal Reserve Press Release dated February 18, 2014, p.a. at https://www.federalreserve.gov/newsevents/pressreleases/bcreg20140218a.htm.

8 *Id.*

9 Board of Governors, Supervision & Regulation (SR) Letter 01-1, Jan. 5, 2001.

10 *See* Kreicher, L., and McCauley, R., "The new US intermediate holding companies: reducing or shifting assets?," BIS Quarterly Review, March 2018, p.a. https://www.bis.org/publ/qtrpdf/r_qt1803u.htm.

11 Dodd-Frank Act § 619, codified at 12 U.S.C. § 1851.

12 12 CFR § 248.10(b).

13 Elliott, Douglas J., *The Volcker Rule and Its Impact on the US Economy*, April 12, 2012 (p.a. at https://www.brookings.edu/testimonies/the-volcker-rule-and-its-impact-on-the-u-s-economy/).

14 The Volcker Rule as promulgated appears at 12 CFR Part 248. A large portion of Subpart B of the Rule, which defines proprietary trading, is devoted to attempting to define exceptions for market-making, hedging, and other permitted activities. *See* 12 CFR §§ 248.4-248.7.

15 Bao, Jack, O'Hara, Maureen, and Xing Zhou, *The Volcker Rule and Market-Making in Times of Stress*, Finance & Economics Discussion Series (FEDS), September 2016, p.a. at https://www.federalreserve.gov/econresdata/feds/2016/files/2016102pap.pdf.

16 Federal Reserve Press Release, *Statement on the Volcker Rule Proposal by Governor Lael Brainard*, May 30, 2018, p.a. at https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20180530.htm.

17 In general, providing investment advice is an activity long determined by the Fed to be "so closely related to banking . . . as to be a proper incident thereto," within the meaning of the BHC Act, and thus permissible for non-banking subsidiaries of BHCs. 12 CFR § 225.28(i).

18 *See Chase REIT Files Plans for Bankruptcy*, https://www.washingtonpost.com/archive/business/1979/02/23/chase-reit-files-plans-for-bankruptcy/6492028b-9c10-45a2-ac24-95a25b30eab9/?noredirect=on&utm_term=.81654aa32fd7.

19 12 CFR § 225.28(i).

20 Act § 204.

21 https://www.reuters.com/article/us-usa-congress-volcker/house-passes-bill-to-streamline-volcker-rule-idUSKBN1HK2QY.

22 https://www.consumerfinance.gov/ask-cfpb/what-is-the-ability-to-repay-rule-why-is-it-important-to-me-en-1787/.

23 12 CFR Part 225, Appendix C.

24 The Riegle-Neal Interstate Banking and Branching Efficiency Act, signed into law by President Clinton in 1994, for the first time authorized banks to branch across state lines. P.L. 103-328, Sept. 29, 1994.

25 FDIC, Statistics at a Glance, Historical Trends, p.a. at https://www.fdic.gov/bank/statistical/stats/2015dec/fdic.pdf .

26 12 U.S.C. § 484(a).

27 DFA § 312, codified at 12 U.S.C. § 5412.

28 *See generally* Felsenfeld and Glass, Banking Regulation in the United States (Juris, 3d Ed., 2011), at 165 *et seq.*

29 *Fed nominees Clarida, Bowman clear U.S. Senate panel hurdle*,p.a. at https://www.reuters.com/article/us-usa-fed-nominees/fed-nominees-clarida-bowman-clear-u-s-senate-panel-hurdle-idUSKBN1J81TL (June 12, 2018).

30 "Goodfriend Facing Close Vote for Fed After Senate Grilling," Bloomberg online, Feb. 7, 2018 (p.a. at https://www.bloomberg.com/news/articles/2018-02-07/goodfriend-faces-close-vote-for-fed-after-rough-senate-grilling).

31 *See* "Fed Changes Quorum Rules as It Deals With Vacancies," Nov. 17, 2017, p.a. at https://www.wsj.com/articles/fed-changes-quorum-rules-as-it-deals-with-vacancies-1511294061.

32 Although they are comparable in size and have been regulated as bank holding companies since the financial crisis in 2008, Goldman Sachs and Morgan Stanley have only small proportions of their assets devoted to commercial banking and thus are not directly comparable to these four.

33 *See* CNNMoney, p.a. at http://money.cnn.com/2017/08/08/investing/wells-fargo-auto-insurance-scandal/index.html?iid=EL.

34 *No Slap on the Wrist: Wells Fargo Plunges After Federal Reserve Bars Lender's Growth*, Feb. 5, 2018, p.a. at https://www.forbes.com/sites/antoinegara/2018/02/05/no-slap-on-the-wrist-wells-fargo-plunges-after-federal-reserve-bars-lenders-growth/#867d79b5f089.

35 12 U.S.C. § 1818(b).

36 Board of Governors of the Federal Reserve System, *In the Matter of Wells Fargo & Company*, Docket No. 18-007-B-HC, Order to Cease and Desist on Consent ("Order"), p.a. at https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm.

37 Letter dated Feb. 2, 2018 to John Stumpf from Michael Gibson, p.a. at https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a4.pdf; Letter dated Feb. 2, 2018 to Stephen Sanger from Michael Gibson, p.a. at https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a3.pdf.

38 12 U.S.C. § 1818(e).

39 *See, e.g.*, *Kim v. Office of Thrift Supervision*, 40 F. 3d 1050 (9th Cir. 1994).

40 Federal Reserve System, *Proposed Guidance on Supervisory Expectation for Boards of Directors*, 82 FR 37219 (Aug. 9, 2017).

41 "The Role of Boards at Large Financial Firms," remarks of Chairman Powell at the Large Bank Directors Conference, August 30, 2017.

42 Vice Chairman for Supervision Randal K. Quarles, Semiannual Supervision and Regulation Testimony, before the House Committee on Financial Services, April 17, 2018 (identical remarks were presented before the Senate Committee on Banking, Housing and Urban Affairs, April 19).

43 83 FR 17317 (Apr. 19, 2018).

44 12 U.S.C. § 1841(a)(2).

45 This is basic administrative law, tracing to the Supreme Court's 1984 decision in *Chevron Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in which the Court held that, unless the meaning of a statutory term is clear and unambiguous as applied to the facts at issue, a court must defer to the interpretation of the statute by the agency charged with its enforcement, as long as it is reasonable. Subsequently the Court has unanimously upheld the decisions of the bank regulators on several occasions, in each case based on the decision being a reasonable and rational interpretation of the statute at issue. *See NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995); *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735 (1996).

46 The BHC Act contains a *de minimis* exemption, essentially allowing a BHC to own up to 5 percent of the voting stock of any entity. 12 U.S.C. § 1843(c)(6).

47 *See* Glass, D.L, *So You Think You Want to Buy a Bank?*, 73 Albany Law Rev. 447 (2010), for a discussion of the "controlling influence" test and how it has been applied by the Fed.

48 Policy statement on investments in banks and bank holding companies, 12 CFR § 225.144.

49 *Agencies ask for public comment on proposal to simplify and tailor the "Volcker Rule,"* June 5, 2018, p.a. at https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180605a.htm.

50 83 FR 33432 (July 17, 2018).

51 12 CFR Pt. 248 App. B, *Enhanced Minimum Standards For Compliance Programs*.