

March 22, 2016

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Board of Governors of the Federal Reserve System
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Mr. Robert E. Feldman
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Federal Deposit Insurance Corporation
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Office of the Comptroller of the Currency
400 7th Street, SW
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Re: *Fourth Published Request for Comments Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (December 23, 2015)*

Dear Sir or Madam:

The American Bankers Association¹ appreciates the opportunity to provide comments on regulatory burden through the review required under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). In the first decennial EGRPRA review, ABA provided a lengthy list of highly detailed recommendations for regulatory relief. Very few were acted upon by the federal banking agencies (Agencies). Since the last EGRPRA review, banks have faced a substantial increase in regulatory burden, which finding is supported by Appendix A and the data upon which it relies.²

ABA believes that excessive bank regulatory burden will never be properly addressed if regulatory burden is added each year but reconsidered only every decade. Instead, the Agencies should work to reduce regulatory burden whenever outdated regulations become apparent, issues arise, or conditions in the industry and its markets change. Regulatory burden reduction should be an ongoing part of supervision that adds value to bank customers and the institutions that serve them, more meaningful than just a mandated decennial review.

¹ The American Bankers Association is the voice of the nation's \$16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$12 trillion in deposits and extend more than \$8 trillion in loans.

² Appendix A is a graph drawn from publicly available data compiled by the RegData project of George Mason University's Mercatus Center. The RegData project tracks "restrictions" found in the regulatory requirements of the Federal Register for a range of federally regulated industries. RegData provides a helpful measure for regulatory burden that goes beyond calculating total Federal Register page numbers issued by regulating agencies. Further explanation of the methodology for measuring regulatory "restrictions" is available at: <http://regdata.org/data/>.

We recognize and applaud the stated commitment of the Agencies to making the EGRPRA process a meaningful exercise during the current decennial review.³ Consistent with the Agencies' willingness to accept comments at any time on any regulations during an open comment period, this letter will cover the topics presented in the fourth published request as well as other issues that were covered in prior EGRPRA request for comments.⁴

I. SPECIFIC COMMENTS

State-Chartered Institutions Need Parity with Nationally Chartered Institutions Under the Liquidity Coverage Ratio

Under section 21 of the final Liquidity Coverage Ratio (LCR) rule, banks must adjust their High-Quality Liquid Asset (HQLA) amounts to reflect eligible HQLA “upon the unwind of any secured funding transaction (other than a collateralized deposit).”⁵ The Agencies' rationale for excluding collateralized deposits from the unwind is that, among other things, these deposits are not gathered for the purpose of “manipulating the composition of its HQLA amount by engaging in transactions such as repurchase or reverse repurchase agreements that could ultimately unwind within the 30 calendar-day stress period.”⁶

While section 21 of the final rule explicitly carves out “collateralized deposits” from the unwind, section 3 defines “collateralized deposits” as (1) public deposits, or (2) “[a] deposit of a fiduciary account held at the [BANK] for which the [BANK] is a fiduciary and sets aside assets owned by the [BANK] as security under 12 C.F.R. § 9.10 (national bank) or 12 C.F.R. §§ 150.300-150.320 (Federal savings associations) and that gives the depositor priority over the assets in the event the [BANK] enters into receivership, bankruptcy, insolvency, liquidation, resolution, or similar proceeding.”⁷ However, the second prong of this definition applies only to federally chartered institutions—it fails to address state-chartered institutions holding fiduciary deposits in exactly the same circumstances as their federally chartered counterparts.

a. Background

Financial institutions that wish to exercise fiduciary powers must expressly apply to their state or federal chartering entity for such authority and must meet numerous other requirements, including filing a business plan, employing experienced staff, and establishing a separate trust department—decisions that are not undertaken lightly. Accordingly, fiduciary deposits, whether held in state or federally chartered institutions, are typically derived from long-term relationships where the bank plays a unique role—that of fiduciary subject to legal duties and requirements

³ See Comptroller Thomas J. Curry, statement at the Boston Interagency Outreach Meeting on EGRPRA, May 5, 2015. Available at: <http://www.occ.treas.gov/news-issuances/speeches/2015/pub-speech-2015-67.pdf>. See also Governor Lael Brainard, remarks at the Los Angeles Interagency Outreach Meeting on EGRPRA, December 2, 2014. Available at: <http://www.federalreserve.gov/newsevents/speech/brainard20141202a.htm>. See also FDIC Chairman Martin Gruenberg's remarks at the Chicago Interagency Outreach Meeting on EGRPRA, October 19, 2015. Available at: <https://www.fdic.gov/news/news/speeches/spoct1915.pdf>.

⁴ 80 Fed. Reg. 32043.

⁵ 79 Fed. Reg. 61530.

⁶ Id. 61473-61474.

⁷ Id. 61530. We note further that “a deposit of a fiduciary account” includes deposits derived from any type of fiduciary relationship, including personal and corporate trusts, estates, and guardianships.

over and above traditional deposit relationships.⁸ Such deposits are not gathered to manipulate an institution's HQLA, but rather are gathered as part of the institution's fiduciary business plan.

Generally, national banks are prohibited from collateralizing private deposits. However, in recognition of the unique role that banks play as a fiduciary, national banks are authorized to collateralize fiduciary deposits under 12 U.S.C. § 92a and 12 C.F.R. § 9.10. State-chartered institutions, depending on the state of jurisdiction, may either be required or permitted to collateralize fiduciary deposits under statute or regulation.⁹ Moreover, due to the robustness of the framework of the Office of the Comptroller of the Currency (OCC), many states look to 12 C.F.R. § 9.10 for their own fiduciary regulations. Thus, in those states where collateralization is required under "applicable law," there is no inherent difference in the nature and characteristics of a collateralized fiduciary account at a federally chartered or a state-chartered institution.

b. Consequences of the Failure to Give State-Chartered Institutions the Ability to Exempt Fiduciary Deposits from the Unwind

Because section 21 has no comparable reference to state law, collateralized fiduciary deposits held by state-chartered institutions are treated as secured funding mechanisms and as such are subject to the unwind. As the Agencies are aware, subjecting collateralized deposits to the unwind distorts an institution's LCR. The very complications and unintended consequences that led the Agencies to exempt public funds from the unwind are present if collateralized fiduciary deposits held by state-chartered institutions are similarly subject to the unwind. As with public funds, the problem is particularly acute when the institution either (1) collateralizes its fiduciary deposits with level 2 securities (but for LCR calculation purposes has already reached the level 2 cap), or (2) collateralizes its fiduciary deposits with non-HQLA assets. In both cases, if an institution is required to unwind its collateralized deposits, it is in effect trading a level 1 asset for an asset that is not HQLA eligible, resulting in a significant downward impact on an institution's LCR.

We are aware of no policy reason that the LCR should disadvantage state-chartered banks and savings associations that engage in fiduciary businesses. ABA strongly believes that a state-chartered institution collateralizing fiduciary deposits pursuant to applicable state law stands in the same position as federally chartered institutions whose fiduciary deposits fall squarely into the exception from the unwind calculation in section 3. ABA believes that state-chartered institutions should qualify for the exception to the unwind calculation if their fiduciary deposits are required or permitted to be collateralized under "applicable law" (i.e. state law).

Accordingly, ABA asks the Agencies to amend the LCR so that fiduciary deposits held at state-chartered institutions are considered "collateralized" under section 3.

⁸ There is a large, longstanding body of law regarding fiduciary duty and activities, which includes OCC rules, ERISA, state laws, and common law. These duties include the duty of loyalty and its corollary duty to avoid self-dealing (see [FDIC Trust Examination Manual Section 8 B](#) and [Section E 3](#)).

⁹ Some states, such as New York, do not allow collateralization of fiduciary deposits, but many states either require or permit such collateralization.

The FDIC Should Revisit its Approach to Brokered Deposits

ABA asks the FDIC to review its approach to brokered deposits to ensure that its rules¹⁰ and interpretations reflect both Congressional intent and modern banking practices. We understand and acknowledge the FDIC's concerns regarding the use of unstable deposits to fuel excessive growth of risky assets, allowing a troubled bank to rely on high cost funding that adds little to the value of the franchise, or some combination thereof. Brokered deposits, however, are not *ipso facto* unstable or used for imprudent purposes. It is important that the FDIC take a balanced view of brokered deposits that aligns with congressional intent and modern safe and sound banking practices. An overly conservative approach to brokered deposit classification discourages healthy, well capitalized banks from using certain types of stable funding. Additionally, broad classification of deposits as "brokered" creates unnecessary costs, as the penalty for holding "brokered" deposits flows through to other regulatory initiatives, such as those for deposit insurance and liquidity supervision.

Section 29 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) restricts the use of brokered deposits by institutions considered to be less than well capitalized.¹¹ This provision of FDICIA was included in response to the savings and loan crisis of the 1980s, during which thrift institutions used expensive and volatile deposits to fuel rapid asset growth. While the term "brokered deposit" is not defined under Section 29, the section defines a "deposit broker" as "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties." What constitutes a brokered deposit, then, relies on the FDIC's interpretation of who or what it considers a "deposit broker."

In early 2015, the FDIC issued a set of Frequently Asked Questions (FAQs) aimed at providing clarification on identifying, accepting, and reporting brokered deposits.¹² The FAQ's took an extremely broad approach, capturing a much wider universe of deposits than Congress intended or that the FDIC had previously addressed and, as a result, created significant confusion. The FDIC issued a revised set of FAQs in November 2015, which provided some narrowing of the scope of what it considered a brokered deposit.¹³ Such consequential revisions should go through the formal notice and comment process.

ABA appreciates the FDIC's efforts to clarify the definition of brokered deposits and acknowledgement that "brokered deposit determinations are very fact specific."¹⁴ We remain concerned, however, that the FDIC's approach is outdated and overly broad. For example, because the FAQs are primarily based on advisory opinions from the 1990s and early 2000s, the FAQs do not take into account the technical and structural changes that the banking industry has

¹⁰ 12 C.F.R. § 337.6.

¹¹ Pub. L. No. 102-242. (Codified at 12 U.S.C. § 1831f).

¹² FIL-2-2015. FDIC Issued Guidance on Identifying, Accepting, and Reporting Brokered Deposits. Available at: <https://www.fdic.gov/news/news/financial/2015/fil15002.pdf>.

¹³ On December 28, 2015, ABA submitted a comment letter, jointly with other trade associations, which provides a detailed discussion of the industry's concerns. <http://www.aba.com/Advocacy/commentletters/Documents/cl-BrokeredDeposits-2015.pdf>.

¹⁴ FIL-2-2015. FDIC Issued Guidance on Identifying, Accepting, and Reporting Brokered Deposits. Available at: <https://www.fdic.gov/news/news/financial/2015/fil15002.pdf>.

undergone in the intervening years. These changes include an increased diversity of commercial bank affiliations and significant growth in online, mobile, and digital banking, which allow banks to gather stable deposits from outside of their branch networks. Moreover, Congress explicitly exempted certain entities and activities from the definition of “deposit broker,” including those whose “primary purpose” is not the placement of deposits. The FAQs, however, appear to limit severely the use of this exemption and require FDIC pre-approval.

We urge the FDIC to undertake a thorough review of its brokered deposit regulation and guidance, including surveys and analysis of bank customer behavior, and propose regulatory revisions through formal notice and comment, as well as legislative amendments if warranted. Additionally, we encourage the FDIC to make public its recent advisory opinions.

Bank Board and Management Responsibilities are Misaligned

Though also subject to certain federal laws and regulations, the core requirements that apply to U.S. corporate directors originate from state law. Many of these expectations come from Delaware, which is the leading domicile for more than 50% of all publicly-traded companies in the United States.¹⁵ Though expectations placed upon directors vary from state to state, certain basic tenets of corporate governance are widely shared. One of those basic tenets is the proper assignment of responsibilities between a firm’s board and its management.

Directors are not expected to, and should not, manage the day-to-day affairs of a company. Instead, the board must first of all devote time and resources to developing a considered strategic vision for the future direction of the enterprise. The board is also responsible for carefully selecting a management team that is competent to assume these day-to-day responsibilities. Equally important, the board must oversee the management team it selects and hold management accountable for the company’s results, including assuring that the company has appropriately robust risk management processes.

This fundamental division of responsibilities is recognized for companies generally, including banks. However, bank boards have become subject to a growing list of expectations and guidance from bank supervisors that have arguably compromised this recognized division of responsibilities and, importantly, threatened in some respects the abilities of bank boards to play their proper role. Too often, duties better left to management appear to be placed upon the board by the federal banking regulators. This misallocation diverts the board’s focus away from strategy and oversight, which in turn undermines good corporate governance.

Just some typical examples of bank board responsibilities that threaten to involve directors in management include the following:

- **Vacation Policies:** In the event that bank vacation policies do not require all officers and employees to be absent from their duties for an uninterrupted period of not less than two consecutive weeks, examiners are expected to discuss this with management and the *board of directors* and encourage them to review annually and approve the bank’s

¹⁵ See State of Delaware, Division of Corporations. “About the Agency.” Available at: <http://www.corp.delaware.gov/aboutagency.shtml>

vacation policy. (emphasis added). (FDIC Risk Management Manual of Examination Policies, Section 4.2)

- **Controls for Retail Insurance Sales:** For retail sales conducted through a networking arrangement with a third party vendor, the board is tasked to approve the written agreement that controls the arrangement. (FDIC Compliance Manual, Section IX-2.1)
- **Voice over Internet Protocol (VoIP) Risks:** The risks of VoIP should be evaluated as part of a financial institution's periodic risk assessment, with status reports submitted to the board of directors. (FDIC's FIL-69-2005)
- **Vault Custodian Designation:** Bank boards are tasked specifically to designate vault custodians for fiduciary assets. (Comptroller's Handbook – Asset Management: Operations and Controls)
- **Contingency Plans for Computer Services:** The board is responsible for developing, implementing, and testing contingency plans that will ensure the “continued operation of the institution's critical information systems.” (Federal Reserve Commercial Bank Examination Manual, Section 4060.2)

Commentators raised concerns about the proper role of bank directors in the previous EGRPRA review. Unfortunately, the prudential regulators did not address this problem, giving it only cursory review in their final EGRPRA report to Congress, mentioning the issue once with no discussion of whether the Agencies intended to take responsive action.¹⁶ In subsequent years, the problem has only become worse, further distorting the proper role of bank board members. Some have offered that EGRPRA's limited scope, by reviewing regulations but not guidance, explains agency inaction.¹⁷ Regardless, the list of expectations for bank boards emanating from the federal banking regulators is remarkably extensive, with one estimate that there are in excess of eight hundred federal banking laws, regulations, and guidance provisions that impose separate responsibilities on bank boards of directors.¹⁸

ABA asks the Agencies to review their formal and informal expectations of bank board members, making changes where necessary, to ensure that the board obligations imposed comport with well-developed corporate law principles that expect boards to focus on strategy and management oversight, not the routine task of running an enterprise. The Agencies should also augment their examiner training and materials to assist both banks and examiners to identify examiner expectations that deviate from these principles.

Public Disclosure of Midsize Bank Stress Tests Risks Confusion (Regulation YY)

In October 2012, the Agencies issued rules applicable to midsize banks implementing the Dodd-Frank Act stress test (DFAST) requirements that include the annual public disclosure of company-run test results. Companies subject to these rules include banks, federal and state

¹⁶ Joint Report to Congress, Economic Growth and Regulatory Paperwork Reduction Act. July 31, 2007. Page 176. (“Some commenters recommended that all the Agencies review their operations in the following areas... Conduct a study of exam reports to evaluate whether examiners are appropriately distinguishing management from board obligations in their exam findings, conclusions, and recommendations.”) Available at: <http://egrpra.ffcic.gov/docs/egrpra-joint-report.pdf>.

¹⁷ See David Baris and Loyal Horsley. Bank Director Regulatory Burden Report. The American Association of Bank Directors. 2014 Edition.

¹⁸ *Id.*

savings associations, and bank holding companies that range between \$10 billion and \$50 billion in assets.

Under the stress test rules, these banks must assess the potential impact of a minimum of three macroeconomic scenarios on their consolidated losses, revenues, balance sheet (including risk-weighted assets), and capital. In addition, midsize banks must publicly disclose DFAST results.¹⁹

We believe the disclosure requirements are problematic and should be removed to the extent possible by regulation. Additionally, the statutory basis for this requirement should be removed by Congress. ABA is concerned that midsize bank disclosures could be misinterpreted, and in times of financial stress add unwarranted pressure on the banking system. There are several reasons why this may be the case:

- **Midsize banks results are not comparable to CCAR results.** Banks above \$50 billion in assets, for purposes of managing systemic risk are subject to a stress testing framework that is often referred to as the Comprehensive Capital Analysis and Review or CCAR. The CCAR includes a company-run stress test, a supervisory stress test, and review of a bank's capital plan, which can be rejected by the Federal Reserve (thereby restricting dividends). Midsize banks are subject to a very different stress testing framework for a very different purpose. They do not present systemic risk. Their stress testing regime is part of their supervisory examination process, focusing on issues of safety and soundness for each bank. They are not required to submit an annual capital plan, and they are not subject to a supervisory approval or denial of their stress test results. Although midsize banks and larger CCAR banks are subject to a company run stress test, the regulatory expectations and methodologies vary greatly between the two groups. Therefore, the results for a midsize bank are not comparable with a CCAR bank's results.
- **Midsize bank results cannot be compared with other midsize bank results.** The results for a midsize institution are not comparable with those of another midsize institution because of "different geographic markets, exposures, activities, methods, and assumptions across companies", which is recognized by the banking agencies.²⁰
- **Midsize bank results are based on hypothetical scenarios.** Midsize bank results are the product of a forward-looking regulatory exercise using hypothetical macroeconomic assumptions that are far more adverse than currently expected by the Federal Reserve. They do not represent a forecast of future capital levels or anticipated economic conditions.

¹⁹ Under 12 U.S.C. § 5365(i)(2)(C)(iv), the banking agencies are required to issue regulations that "require companies subject to [company run stress tests] to publish a summary of the results of the required stress tests."

²⁰ See Federal Reserve, FDIC, and OCC Joint Press Release from June 2, 2015. Agencies Reiterate Annual Public Disclosure Requirements for Medium-Sized Financial Companies Under Dodd-Frank Company-Run Stress Tests. ("The agencies will not make any public statements about the results of company-run stress tests for these medium-sized companies nor comment on the public disclosures of their results. Questions the public may have regarding the disclosures should be directed to that company. *The agencies note that DFA stress test results may reflect distinctly different geographic markets, exposures, activities, methods, and assumptions across companies.* Also, the DFA stress tests produce projections of hypothetical results and are not intended to be forecasts of expected or most likely outcomes." (emphasis added)) Available at:

<http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20150602a1.pdf>.

We ask the banking agencies and Congress to undertake a careful reconsideration of the benefits of this public disclosure, which appears to be just the type of unnecessary regulation that the EGRPA review seeks to identify and change.

Clarify Required Notice Filings for Bank Transfer Agents

The Agencies have invited comments on their respective transfer agent rules.²¹ By operation of these rules, bank transfer agents are required to comply with rules of the Securities and Exchange Commission (SEC), implementing Section 17A of the Securities and Exchange Act of 1934 governing the operational and reporting requirements for the domestic activities of bank transfer agents.²² SEC Rule 17Ad-16, Notice of Assumption, is one of those operational regulations.

ABA strongly believes that a clarification of the scope of the rule is both warranted and necessary. Subsection (b) of the rule states:

A registered transfer agent that changes its name or address or that *assumes* transfer agent services on behalf of an issuer of securities, including a transfer agent that assumes transfer agent services on behalf of an issuer of securities because of a merger or acquisition of another transfer agent shall send written notice of such to the appropriate qualified registered securities depository on or before the later of ten calendar days prior to the effective date of such *change in status*... (emphasis added).]

On its face, the language of this subsection appears to be clear. The notice must be sent when there is a change in status, and the assuming transfer agent is a successor to the previous transfer agent. In addition, the section on *Burden on Competition*, that accompanied publication of the rule in the *Federal Register*, states, “Transfer agents only have to send a notice when there is a change of transfer agent providing services on behalf of an issuer or a name or address change.”²³ Nonetheless, SEC staff and the FDIC have interpreted the rule as requiring transfer agents to provide the notice to the Depository Trust Company (DTC) for every *new* engagement, even though DTC already receives information identifying the transfer agent on new transactions from the underwriter, financial advisor, or clearing DTC participant.²⁴

Based on ABA conversations with DTC staff, such notices from transfer agents pursuant to Rule 17Ad-16 are disposed of. Thus, requiring transfer agents to provide the notice on new transactions is a waste of both time and money.

ABA, therefore, asks the Agencies to make clear that Rule 17Ad-16 is intended only to require filing the notice with DTC (1) in cases in which the filing transfer agent is the successor to a previous transfer agent or (2) where there is a change of name or address. In response to the SEC’s Transfer Agent Concept Release,²⁵ ABA will seek directly from the SEC an identical interpretation of the scope of Rule 17Ad-16.

²¹ See 12 C.F.R. § 9.20; 12 C.F.R. § 208.31 (Regulation H), and 12 C.F.R. Part 341.

²² E.g., 12 C.F.R. § 9.20.

²³ 59 Fed. Reg. 235 (December 8, 1994).

²⁴ See, “The Depository Trust Company (DTC) Eligibility Questionnaire.”

²⁵ 80 Fed. Reg. 81948, available at <https://www.gpo.gov/fdsys/pkg/FR-2015-12-31/pdf/2015-32755.pdf>.

Recordkeeping and Confirmation of Securities Transactions Effected by Banks—Reduce Frequency of Securities Transaction Statements

Under 12 C.F.R. § 12.5(c), 12 C.F.R. § 208.34(e)(3), 12 C.F.R. § 344.6 (c)(1), and 12 C.F.R. § 151.100 (e), banks that effect securities transactions in an agency capacity are required to send itemized statements at least every three months to their customers specifying the securities in the custody of the bank at the end of the reporting period, as well as debits, credits, and transactions during the period. Many bank customers have requested that they receive these statements less frequently, because they do not wish to be inundated with paper statements and feel that they already receive too many from various sources. We, therefore, ask that the Agencies consider amending this provision to allow for lengthier reporting periods, for example an annual statement, if selected by the customer.

Agencies Should Better Coordinate Information Sharing Arrangements

Post-enactment of the Dodd-Frank Act, some of the permissible activities of banks and bank holding companies have become the purview of multiple non-bank regulators, making the need for coordination among the federal financial agencies increasingly important. For example, sometimes the information requested by a market regulator is confidential supervisory information (CSI), subject to the legal protections afforded to such records. Banks and their primary regulators are unable to share this information without potentially waiving attorney-client privilege for such documents. To reduce the burden on banks and bank holding companies that may be asked to produce CSI to non-bank regulators, we urge the banking and other financial regulatory agencies to work collectively and agree to information-sharing arrangements that recognize traditional jurisdictional prerogatives, while confirming that such records are protected by attorney-client privilege.

Revisit Application and Clarify Examination of the Volcker Rule

The Federal Reserve, FDIC, OCC, Commodity Futures Trading Commission, and Securities and Exchange Commission (Volcker Agencies) each have rule-writing authority, as well as separate supervision and enforcement authority, over the Volcker Rule. The language of the statute is imprecise, to say the least, and leaves much to interpretation. To ensure that Volcker Rule expectations are applied consistently to banks subject to one or more of these regulators, ABA believes that banks need to receive examination guidance, which to date has been lacking.²⁶

Further, the current Volcker Rule definition of “covered fund” is too broad, which has led to unintended consequences and considerable uncertainty for banks. ABA asks the Volcker Agencies to clarify the definition of a “covered fund” to be either a “hedge fund” or “private equity fund” and set clear definitions for both. This change would also enable banks to have or continue relationships with ordinary corporate vehicles and other entities that cannot fairly be considered “covered funds” that the Volcker Rule was intended to regulate. This simplifying change would permit banks to manage their permissible trading and investment activities more

²⁶ This guidance could also provide an opportunity to clarify that certain activity is *not* within scope of the rule, such as a banking entity correcting a securities trade that was made in error on behalf of a customer. Without such guidance, banks of all sizes that offer fiduciary services would need to create an entire rebuttable presumption regime for an infrequent occurrence.

effectively, outside the clearly drawn boundaries of Volcker Rule prohibited activity, with the necessary degree of certainty and with a minimum of disruption to their routine banking operations on which their banking customers have come to rely.

ABA has been pleased to see the federal banking agency principals lend their support to improving and narrowing the scope of the prohibitions in Section 619, recognizing that achieving the intent of the Volcker Rule does not require universal application.²⁷ While we welcome this conversation on narrowing the proper scope of the Volcker Rule, we believe that the focus should not be on changing or creating arbitrary asset thresholds, but rather on properly set risk-based measures. In short, the Volcker Rule has always been defended as an important measure for addressing systemic risk. There is no need to apply it where systemic risk is not present.

The OCC's Money Laundering Risk System (MLR) Is a Step Beyond Necessary

When the banking agencies collaborated on a uniform approach to examining for compliance with Bank Secrecy Act (BSA) mandates, they introduced an examination manual in 2005 that has been praised as a model of interagency cooperation that would benefit depository institutions, examiners, and law enforcement efforts to identify, investigate, and prosecute financial crime. However, despite the importance of the banking agencies approaching BSA examinations uniformly, OCC introduced its own risk assessment survey that no other agency has replicated.

For a number of years, ABA has questioned OCC's use of the MLR for community banks.²⁸ Unfortunately, OCC has yet to respond to any of the concerns that we have raised. ABA questions whether the MLR provides any of the benefits claimed by OCC, especially as the agency seeks to revise the form and expand its use to all banks under the agency's supervision. For example, the form does little to help banks identify or control money laundering risks, which many banks conduct using their own methods that obtain better and more useful information. ABA has also questioned how costs for using the form have been calculated. Most importantly, we have criticized the agency's failure to make the proposed survey form (which is the subject of comment) available to the public. We believe that failure is inconsistent with federal guidelines.

Fundamentally, ABA believes that the time and effort required by community national banks to complete the form does little—if anything—to help banks identify potential money laundering or terrorist financing risks. Overall, it is an exercise that unnecessarily consumes resources that could be far better devoted to detecting and deterring potential financial crimes, better supporting law enforcement efforts.

²⁷ See, e.g. Governor Daniel K. Tarullo. "A Tiered Approach to Regulation and Supervision of Community Banks." November 7, 2014. Available at: <http://www.federalreserve.gov/newsevents/speech/tarullo20141107a.htm>. See also Comptroller Thomas J. Curry statement at the Los Angeles Interagency Outreach Meeting on EGRPRA. December 2, 2014. Available at: <http://www.occ.treas.gov/news-issuances/speeches/2014/pub-speech-2014-162.pdf>.

²⁸ See ABA Letter to OCC re: "BSA/AML Quantity of Risk Summary Form." March 4, 2016. Available at: <http://www.aba.com/Advocacy/commentletters/Documents/OCCBSAAMLcommentQualityofRiskSummaryForm030416.pdf>

OCC Horizontal Review Surveys Do Not Comport With Currently Articulated Policies

Not all regulatory burden springs from regulations themselves. A similar impediment to a bank's ability to serve its customers arises if supervisory practices impose burdens that outweigh the value provided to the bank. In particular, we are concerned about the burdens imposed by OCC's frequent and recent use of horizontal review surveys to benchmark compliance and risk-management programs of its midsize banks.

During the last two years, the midsize supervision group has required the banks it supervises to respond to surveys on—

- Consumer compliance
- Bank Secrecy Act/Anti-Money Laundering (BSA/AML)
- Consumer complaint management
- Compliance risk assessment
- Enterprise risk management (ERM)
- Information security risk management

In addition, examiners have indicated plans for future surveys covering fair lending, the Community Reinvestment Act, and Volcker Rule compliance.

These surveys require banks to respond in writing to detailed questions about a particular compliance or risk management program. Questions cover staffing, organizational structure, program components and practices, software and system usage, and risk elements. Unlike examinations, which are scheduled in advance so that institutions can plan and allocate staff resources as needed, banks receive little or no advance warning that they will be asked to complete a survey. In addition, the time provided to respond is short, usually only four weeks. We understand that in December 2015, a time when institutions are busy with year-end budgeting, reviews, and planning for the next year, midsize banks were asked to complete the consumer compliance, BSA/AML, and compliance risk assessment surveys.

a. *A Paperwork Reduction Act Review Would Help Identify Ways to Minimize Burden and Maximize the Utility of the Surveys*

OCC cannot be unaware that the Paperwork Reduction Act (PRA)²⁹ applies to the surveys, and yet the agency has not submitted any of the surveys to the Office of Management and Budget (OMB) for review. As noted above, however, the surveys ask midsize banks to respond in writing to identical questions, which OMB regulations expressly include as “information” subject to the PRA review process when it is sought from 10 or more persons or entities.³⁰

²⁹ Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (codified at 44 U.S.C. § 3501).

³⁰ OMB regulations state, “The PRA applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ‘ten or more persons.’” CASS R. SUNSTEIN, ADMIN., OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, INFO. COLLECTION UNDER THE PAPERWORK REDUCTION ACT 2 (Apr. 7, 2010), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf (quoting 44 U.S.C. § 3502(3)(A)(i)).

Nothing in the PRA suggests that Congress contemplated an exemption for information collections made pursuant to a banking agency's supervisory authority.³¹

The PRA expresses the national commitment to minimizing burdens and maximizing the utility of information collected by the Federal government, improving the quality of information collected while ensuring the greatest possible benefit to the public. This commitment takes on added significance in light of the Agencies' pledge to reduce burden through the EGRPRA review process. ABA believes that accurately quantifying an information collection burden is an essential element in the reduction of overall regulatory burden, and that the failure to assess and understand paperwork burdens will impede agency efforts to reduce regulatory burden through the EGRPRA process.

Had OCC requested comment on the surveys, midsize banks would have had an opportunity to provide feedback on the anticipated hours required to respond, the utility of the information collected, and ways to minimize burden, including whether other less burdensome means exist to collect the information. Simple steps, such as providing a schedule of the surveys planned for the year *and* coordinating that schedule with a bank's exam schedule, could reduce burden. The coordination of survey and exam schedules (as well as the coordination of survey questions and exam request letters) could also reduce burden, particularly if examiners who are reviewing a particular program are responsible for gathering the information.³²

ABA strongly encourages OCC to submit future surveys to the PRA review process to ensure that paperwork burdens are quantified and ways to minimize burdens are explored fully and implemented.

Another important purpose of the PRA is to foster transparency and accountability, or as articulated in the statutory statement of purpose, to "improve the quality and use of Federal information to strengthen decision-making, accountability, and openness in Government and society."³³ Had OCC submitted the surveys to OMB for PRA approval, the banking industry would have been informed in advance of the agency's plan to conduct the surveys, including, significantly, how the agency intends to use the information gathered. Thus, the PRA review process would have provided bankers with the opportunity to comment on the utility of each survey as well as how the data collected should be used—information that must be considered and compared to the costs and burdens imposed by the collection.

However, OCC has not formally, or informally, apprised midsize banks of the intended use of the information collected from these surveys. Moreover, the OCC's practice of sharing the data with its midsize banks has been inconsistent.³⁴ ABA asks OCC to explain—and request public comment on—how the agency intends to use the survey data, how it will support the examination process, and any other benefits that OCC believes will accrue to examiners and the

³¹ See 5 C.F.R. 1320.4 (listing collections of information to which OMB regulations do not apply).

³² We believe that much of the information requested in a survey is available to the agency in bank responses to exam request letters and in examination work papers.

³³ *Id.* (codified at 44 U.S.C. § 3501(4)).

³⁴ It is our understanding that the OCC has shared information and data from its survey of midsize complaint management programs in the form of PowerPoint presentations at the August 2014 Midsize Bank Supervision Compliance Officer Roundtable, but our members are unaware of other survey data being shared with midsize banks.

banks that must provide the information. Such benefits need to outweigh the costs imposed by the survey to be a permitted and justified use of bank and agency resources.

b. Efforts to Quantify and Compare Diverse Programs Undermine the Promise of Risk-Based and Value-Added Supervision

ABA's midsize bank members express concern that survey data may be used in ways that will undermine the promise of tailored supervision and value-added examinations. According to its PowerPoint presentation prepared for an August 2014 Midsize Bank Supervision Compliance Officer Roundtable, OCC used the survey data to identify leading or "best" practices as well as "trailing" practices among midsize bank complaint management programs. In addition, the agency developed a weighted scorecard to quantify and compare midsize bank complaint management practices.

OCC leadership emphasizes in speeches and discussions with bankers the importance of making sure that supervision is tailored to individual banks and the risks presented by their business model, products, and services. The identification of "best" practices, particularly by a bank's regulator, is inconsistent with this promise. It tacitly conveys an expectation that all institutions will work toward those practices notwithstanding the adequacy of the bank's own policies, procedures, and controls for managing risk.

Moreover, the experience of at least two midsize banks shows that the identification of "best" practices, coupled with the assignment of individual bank "scores," emboldens examiners to require banks to implement these procrustean "best" practices. The survey data led to the reopening of consumer complaint management exams and the identification of matters requiring attention. Both had undergone a recent examination of the bank's complaint management program, which examination had concluded was satisfactory; yet each bank's program was subsequently criticized based on benchmarking information derived from the survey.³⁵

Tailored supervision and value-added examinations contemplate a review of a bank's policies, procedures, and controls for managing risk by an examiner team that is familiar with the bank—its management, compliance management system, and products and services—offering customized suggestions for improving only those elements of a compliance program that require attention, not suggestions based on uniform "best" practices. ABA strongly urges OCC to reconsider its practice of using horizontal surveys to quantify, compare, and standardize the policies and practices of unique institutions.

Revisit Management Official Interlocks (Regulation L)

As described in 12 C.F.R. § 212.1(b), the purpose of the Depository Institution Management Interlocks Act (Interlocks Act) and Regulation L is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect. The "major

³⁵ The PowerPoint presentation on Consumer Complaint Management, presented at the August 2014 Midsize Bank Supervision Compliance Officer Roundtable, states, "The bank EIC/FEIC is expected to discuss bank-specific results with bank management. The discussion will focus on the overall conclusions, identified weaknesses and best practices, and expectations for bank actions to address any weaknesses."

assets” prohibition of Regulation L (12 C.F.R. § 212.3(c)) provides that a management official of a depository organization, with total assets exceeding \$2.5 billion (or any affiliate of such an organization), may not serve at the same time as a management official of an unaffiliated depository organization, with total assets exceeding \$1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations.

This prohibition extends to non-U.S. affiliates of such organization, which may have no reasonable nexus to U.S. banking activities and therefore present no legitimate threat to competition. Nonetheless, banks are required, at a minimum, to research any potentially-prohibited interlocks on an international scale. Further, qualified candidates must be excluded if an interlock with a non-U.S. affiliate is identified, regardless of whether such arrangement could produce any anticompetitive outcomes. Therefore, ABA asks the Agencies to develop an exception for depository organizations’ foreign affiliates that are not engaged in business or activities in the United States.

ABA also believes that the thresholds used in the major assets prohibition should be updated. The Interlocks Act, 12 U.S.C. § 3203, provides that “[i]n order to allow for inflation or market changes, the appropriate Federal depository institutions regulatory agencies may, by regulation, adjust, as necessary, the amount of total assets required for depository institutions or depository holding companies under [the major assets prohibition].” The banking industry has changed significantly since adoption of Regulation L in 1996, and it would therefore be prudent to update the thresholds to reflect more accurately the set of institutions appropriately covered by the major assets prohibition.

Unjustifiably Prescriptive Debit Card Regulations Should Be Better Tailored (Regulation II)

Among other things, the EGRPRA review seeks comment on “regulations that impose burdens not required by their underlying statute.”³⁶ Section 920 of the Electronic Fund Transfer Act (EFTA) directs the Board to issue regulations “providing that an issuer or payment card network *shall not...*, by contract, requirement, condition, penalty, or otherwise, *restrict the number of payment card networks* on which an electronic debit transaction may be processed” to one network.³⁷ Thus, in Section 920, Congress required the Board to prohibit issuers and networks from specific conduct, specifically from entering into arrangements or other conduct the result of which would be to restrict the number of networks available for processing debit card transactions.

The Board rules implementing this provision, however, state that an issuer satisfies this requirement only if the issuer enables at least two networks on a debit card.³⁸ This affirmative obligation on issuers to enable multiple networks on a debit card exceeds the statutory requirement to prohibit a “restrict[ion] on the number of payment card networks on which an electronic debit transaction may be processed.”³⁹ In effect, the Board rule requires issuers to deal with at least two payment card networks, regardless of whether doing so is in the interest of the issuer or even whether doing so makes any economic sense.

³⁶ 80 Fed. Reg. 79,724, 79,727 (December 23, 2015).

³⁷ 15 U.S.C. § 1693o-2(b)(1)(A) (emphasis added).

³⁸ 12 C.F.R. § 235.7(a)(2).

³⁹ 15 U.S.C. § 1693o-2(b)(1)(A).

This “must carry” rule adopted by the Board also makes it difficult to deploy innovative technologies to reduce fraud or otherwise improve service as issuers and payment card networks may be required either to forego innovations or share those innovations with their competitors, thereby removing the incentive to innovate in the first place.

Clearly, the Board imposed a burden on issuers not required by the underlying statute. By adopting a “must carry” rule that exceeds the narrow prohibition of Section 920, the Board created regulatory burden on debit card issuers generally, and smaller banks in particular, that is not required by the underlying statute. Because Regulation II “impose[s] burdens not required by their underlying statute,” including by inhibiting innovation, the regulation should be amended to track the statutory prohibition on exclusivity (i.e., that an issuer or payment card network shall not *restrict* the number of payment card networks on which an electronic debit transaction may be processed).

Further, Section 920 provides that “[t]he Board shall prescribe regulations... to establish standards for assessing whether the amount of any interchange transaction fee... is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.”⁴⁰ Regulation II has determined the safe harbor for reasonable and proportional fees to be the sum of 21 cents plus 5 basis points of the value of the transaction.⁴¹

This interchange fee cap reduced the average interchange fee for banks subject to the cap from \$0.50 to \$0.24 per transaction.⁴² Overall interchange fee revenue at banks subject to the cap has been reduced by an estimated \$6.8 billion to \$8 billion per year.⁴³ There is, however, no evidence that the cost savings enjoyed by retailers as a result of the interchange fee cap have resulted in lower prices for consumers. Instead, retailers appear to have absorbed these cost savings. Moreover, as a result of the interchange fee caps, interchange fees have actually increased for small-ticket transactions. Thus, the price control imposed by Section 920 and Regulation II have resulted in a significant wealth transfer to large retailers, funded to some degree by consumers in the form of increased costs to maintain a debit-linked checking account.⁴⁴

The net effect of the price control enacted by statute and implemented by the Board is anti-consumer. Consumers have experienced increased costs of maintaining a checking account, without the offsetting reduction in prices at retailers’ point of sale. Accordingly, it is ABA’s view that, based on the behavioral effects of the statutory price control, Section 920 imposes “unnecessary regulatory requirements,”⁴⁵ and legislation should be enacted to eliminate this price control. We urge the Federal Reserve, as part of its report to Congress under EGRPRA, to recommend this change in the law.

⁴⁰ 15 U.S.C. § 1693o-2(a)(3)(A).

⁴¹ 12 C.F.R. § 235.3(a) and (b).

⁴² See 2011 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions (“2011 Interchange Report”), Board of Governors of the Federal Reserve, at 15, http://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2011.pdf.

⁴³ See Todd Zywicki, Price Controls on Payment Card Interchange Fees: The U.S. Experience, George Mason University Law and Economics Research Paper Series, 6-8 (finding that the average maintenance fee increased from approximately \$6 in 2009 to approximately \$12 in 2013).

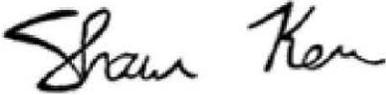
⁴⁴ *Id.*

⁴⁵ 80 Fed. Reg. at 79727.

II. CONCLUSION

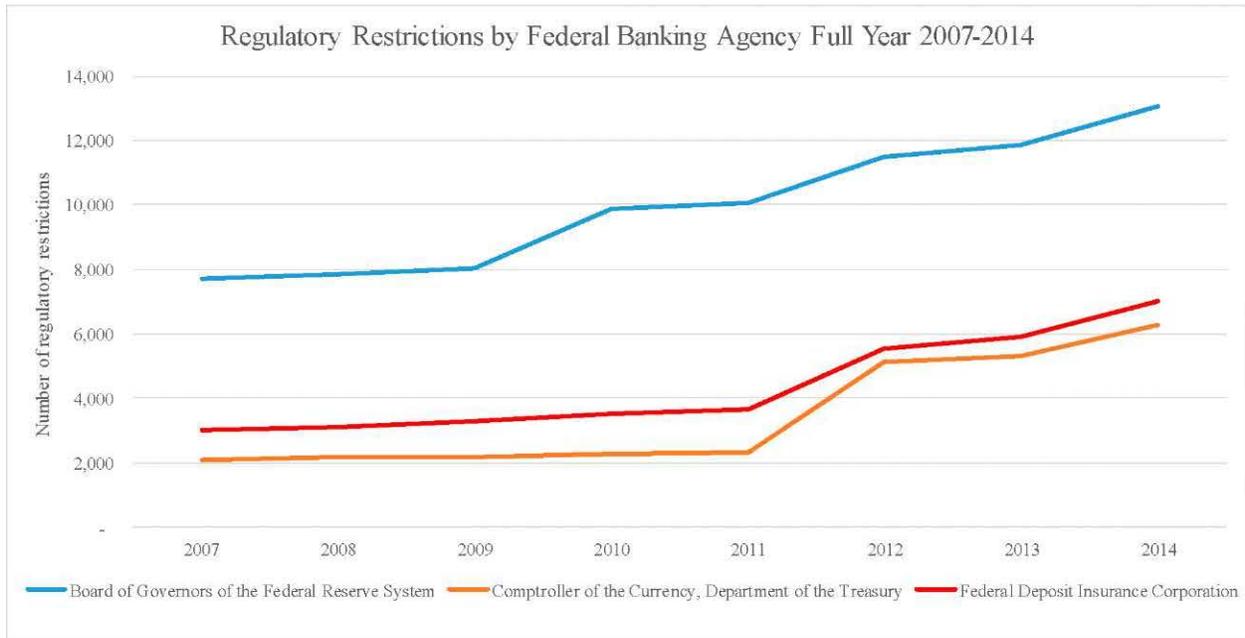
ABA looks forward to working with the Agencies—as part of an ongoing exercise, rather than just a decennial effort—to find ways to reduce regulatory burden consistent with the shared goal of ensuring that bank operations are conducted in a safe and sound manner while enhancing the ability of banks to serve their customers. Should you have any questions, please do not hesitate to contact the undersigned at skern@aba.com or (202) 663-5253.

Sincerely,

A handwritten signature in black ink that reads "Shaun Kern". The signature is written in a cursive, slightly slanted style.

Shaun Kern
Counsel
Center for Securities, Trust & Investments

Appendix A:



<u>Growth in Regulatory Restrictions by Federal Banking Agency (2007-2014)</u>			
	Federal Reserve	OCC	FDIC
Compound Annual Growth Rate of Regulatory Restrictions	7.9%	17.1%	12.9%
Growth Rate 2007-2014	70.0%	202.6%	134.0%

Data Source: RegData project of George Mason University's Mercatus Center.