

**Meeting Between Staff of the Federal Reserve Board
and Representatives of the American Bankers Association
November 8, 2019**

Participants: Alison Thro, Mark Buresh, Brian Phillips, Sheryl Hudson, Melissa Clark, and Markas Puidokas (Federal Reserve Board)

Timothy Keehan, Michael Gullette, and John Kinsella (American Bankers Association)

Summary: Staff of the Federal Reserve Board met with representatives of the American Bankers Association to discuss the proposal to amend the Board's regulations relating to determinations of whether a company has the ability to exercise a controlling influence over another company for purposes of the Bank Holding Company Act of 1956 and the Home Owners' Loan Act. These representatives expressed concerns regarding aspects of the proposal including the presumption of control for a company that consolidates another company on its financial statements under U.S. GAAP, the scope of contractual limitations and rights that would trigger a presumption of control under the proposal, potential extraterritorial applications of the proposal, and concerns related to the proposal's limitations on business relationships.

Attachment

ABA Meeting with Federal Reserve Staff

Friday, November 8, 2019

Federal Reserve Proposal on Control and Divestiture Proceedings

Outline of ABA Comment Letter

- I. Background.
- II. The Proposal and Its Benefits.
- III. Issues Raised and Proposed Revisions.
 - A. Meaning of “Exercise a Controlling Influence.”

ABA Ask: Exclude from the presumption of control certain holdings of securities (such as options, warrants and convertible instruments) that do not amount to an investor’s actual exercise of controlling influence over a company’s management or policies. At a minimum, do not apply a “look-through” approach to options, warrants, and convertible instruments unless, as of any date, they (i) could be freely exercised by the investor within 60 days, (ii) are in the money, and (iii) are not subject to the satisfaction of a condition outside the control of the investor.
 - B. Business Relationships Revenue Test.

ABA Ask: Modify the proposed 2%, 5%, and 10% revenue/expense thresholds as follows: (i) place no restrictions on the size or nature of the business relationship, where the investor controls less than 10% of the voting interest in the company; and (ii) create a presumption of non-control, where (A) the investor controls between 10% and 14.99% of the voting interest in the company, and less than 20% of the company’s revenues are attributable to the business relationship with the investor, or (B) the investor controls between 15% and 24.99% of the voting interest in the company, and less than 10% of the company’s revenues are attributable to the business relationship with the investor.

In addition, increase the revised 20% company revenue threshold to 30% (i.e., for investor holdings of 10%-14.99%), and the revised 10% company revenue threshold to 20% (for investor holdings of 15%-24.99%), where an unaffiliated investor holds a majority voting interest in the company, or where a majority of the company’s total annual revenues or expenses is attributable to such investor.
 - C. Section 4(c)(6) Investments.

ABA Ask: Confirm that the presumption of non-control applies also to any investment described under section 4(c)(6) of the BHCA (i.e., nonbanking investments).
 - D. Voting Interests Held in a Fiduciary Capacity.

ABA Ask: Confirm that the requirement that any voting interest held by an investor in a fiduciary capacity must be held, in order to avoid triggering a presumption of control, “without sole discretionary authority to exercise voting rights,” applies only to banking investments and not to nonbanking investments.

E. Accounting Consolidation Requirement.

ABA Ask: Eliminate accounting consolidation requirement, beginning with the exclusion of Variable Interest Entities (VIEs) and similar special-purpose vehicles from the presumption.

F. Total Equity Calculation.

ABA Ask: (i) eliminate retained earnings from the total equity calculation, and (ii) exempt start-up companies entirely from the total equity calculation (or at least for a minimum of five years).

Regarding frequency of calculation: (i) require the percentage calculation of total equity only at the time of an investor's acquisition or divestiture of control of the company's equity instruments, and (ii) exclude recalculation based on a divestiture in those cases where the investor has a non-controlling stake at the time of divestiture.

Regarding treatment of debt instruments as equity, consider issuing a safe harbor that could be used to conclude that a particular debt instrument or other interest would not be considered the functional equivalent of equity.

G. Seeding Period.

ABA Ask: Extend the seeding period in a manner consistent with the Federal Reserve's guidance under the Volcker Rule regulation and with industry practice.

H. Regulatory Consistency of "Control" Framework.

ABA Ask: Apply the same revised framework under Regulation Y for controlling influence determinations to Regulation O (regulating credit extensions to directors, executive officers, and principal shareholders), Regulation W (regulating transactions with affiliates), and the Volcker Rule regulation.

I. Impact on Current Non-Controlling Investments.

ABA Ask: Add a grandfathering provision that preserves existing investment arrangements and allows investors to modify these investment arrangements to leverage the relief provided under the Proposal's reforms.

J. Calculation for Control of Non-Corporate Entities.

ABA Ask: Issue guidance that would provide a clear roadmap for investment in a non-corporate entity (e.g., partnership, LLC) that generally would align with the corresponding levels of investment in a corporate entity.