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July 15, 2019

By Electronic Mail

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Notice of Proposed Rulemaking Regarding Control and Divestiture Proceedings: Federal Reserve Docket No. R-1662 and RIN 7100-AF 49

The Institute of International Bankers ("IIB") appreciates the opportunity to comment on the notice of proposed rulemaking by the Board of Governors of the Federal Reserve System (the "Board") regarding revisions to the regulations governing 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, as amended (the "BHCA") and the Home Owners' Loan Act.[1]

The IIB represents internationally headquartered financial institutions from over 35 countries around the world doing business in the United States. The IIB's members consist principally of international banks that operate branches and agencies, bank subsidiaries and broker-dealer subsidiaries in the United States.

The Board's BHCA control framework has been especially vexing for international banks. The unwritten and evolving guidance and "lore" that Board staff has applied over decades has been opaque to many institutions and investors, but especially so for internationally headquartered institutions. Compounding the challenge, the Board's control principles have far-reaching consequences for international banks in view of the extraterritorial reach of the BHCA and the application of BHCA control doctrines in a variety of contexts affecting non-U.S. and cross-border activities and investments.

Difficult BHCA control questions arise for international banks in relation to the BHCA's investment and activity restrictions, intermediate holding company ("IHC") structural requirements, Board reporting requirements, and other standards that incorporate the Board's control rules. International banks seeking to structure investments outside the United States in other banking organizations, non-bank financial companies or commercial firms often need to apply these control principles to comply with the BHCA. And, from a non-U.S. perspective, the way in which Board staff has determined that one company "controls" another for BHCA purposes has seemed at times inscrutable and illogical.

1 84 Fed. Reg. 21634 (May 14, 2019) (the "Proposal").

Applying the Board's control principles abroad also has been challenging because they frequently need to be adapted to relationships and investment structures based on customary non-U.S. commercial practices or governance arrangements permitted or required by non-U.S. law. Because the control determination framework affects investments in and by any international bank with U.S. banking operations, in practice it has wide-ranging implications for corporate governance arrangements and investment structures globally.

For these reasons, we welcome the increased transparency and predictability that the Board's Proposal is designed to achieve. We also support the general direction of the Proposal—to make the Board's control framework more practical and more flexible to accommodate customary governance and commercial practices. At the same time, the IIB believes the Proposal can be meaningfully improved to achieve its stated objectives and to address issues that present unique challenges for international banks.

The IIB endorses the comments submitted by other trade organizations, including those in comment letters submitted by the Bank Policy Institute (the "BPI Letter"), the American Bankers Association, the Structured Finance Association (the "SFA Letter") and the joint letter submitted by the Securities Industry and Financial Markets Association and Financial Services Forum (collectively, the "Trade Letters"). We write separately to highlight several key issues of importance to international banks. Specifically:

- **The final rule should revise the presumptions framework to include safe harbors under which non-controlling investments could be made, particularly with respect to investments made outside of the United States.** For the reasons described in the BPI Letter, we support a framework that is based on presumptions of non-control. While the IIB supports clarity and transparency, our members expect that the Board's presumptions of control will (like the existing ones in Regulation Y) be effectively irrebuttable as a practical matter, creating a perhaps unintended rigidity in the proposed framework. Rigid rules create much more onerous burdens for international banks, particularly with respect to non-U.S. investments, with very little benefit from a U.S. bank regulatory or supervisory perspective. Applying these presumptions to investments by international banks in non-U.S. companies is burdensome for international banks and does not serve the Board's policy goals. Historically, the Board's implementation of the BHCA, including Section 4(c)(9), has limited the impact of U.S. banking laws outside the United States.[2] Broad exemptions for non-U.S. activity appropriately limit unwarranted extraterritorial application of U.S. banking laws to international banks and accord appropriate deference to home-country bank supervision. International bank investments in non-U.S. entities under the authority provided in the Board's Regulation K merit applying a different interpretation of "controlling influence" than for investments by U.S. entities or into U.S. entities.[3] In this circumstance, the controlling influence prong should not be the tiered presumptions included in the Proposal, but should be a sharper concept of *actual control* along the lines of the clear Congressional intent to capture investments that give rise to *actual control* but that are not captured in the other two prongs of the statutory control definition.[4] In other jurisdictions,

[2] 12 U.S.C. §1843(c)(9).

[3] 12 C.F.R. § 211

[4] As described in more detail in the BPI Letter, the legislative history is clear that this standard was not designed to expand significantly the basic concept of control but was instead intended to allow the Board to determine that certain investments resulted in actual control of a

corporate legal structures and practices may not directly translate into the Proposal's framework. Practices that may indeed result in a "controlling influence" in U.S. markets may not even present the possibility of a controlling influence in other jurisdictions. The Board's proposed presumptions are too narrow and would result in presumptions of control in cases where actual control is not present. The final rule should include safe harbors under which an investment in a non-U.S. entity made by an international bank from outside the United States will be presumed to be non-controlled if the investment is within the parameters of the final framework. If such investment is outside of those parameters, then a determination of control should be a facts and circumstances analysis taking into account the corporate legal and regulatory practices and customs in the relevant jurisdiction to determine if actual control exists.[5]

- **The final rule should not include consolidation under U.S. GAAP or any other financial accounting standards in other jurisdictions as a rebuttable presumption of control.** The Proposal would create a new presumption of control for any entity that a company consolidates on its financial statements under U.S. GAAP, apparently, even in the absence of actual control or any other indicia of control between the company and the consolidating entity (e.g., in the absence of an equity investment).[6] This would result in rebuttable presumptions of control for a wide array of variable interest entities ("VIEs"), conduits, special purpose vehicles, and similar structures that neither U.S. nor international banks previously considered or reported as controlled.[7] Control of such structures would have significant implications for international banks. As an example, an international bank that is required by Regulation YY to form an IHC is required to hold all of its ownership interests in any U.S. subsidiary (defined based upon BHCA control) under the IHC. For international banks with an IHC, the U.S. GAAP consolidation presumption (or a presumption under any other financial accounting standard) would require that all the international bank's interest in a consolidated VIE be moved into the IHC, increasing both regulatory costs and complexity and, in some cases, defeating the business purpose. In many cases, sponsoring banks hold no ownership interest in these vehicles. Deeming these structures to be controlled because of consolidation under any accounting standards would create confusion and complexity for no apparent regulatory, supervisory or safety and soundness benefit.

  This issue is particularly concerning for international banks with respect to asset-backed commercial paper conduits ("ABCP Conduits"), which are an important mechanism for U.S. corporates to manage receivables and provide U.S. investors with diversified, high quality, liquid investment

banking organization where the investment did not meet one of the other, more straight-forward, standards. See H.R. Rep. No. 91 1747, at 12 (1970); 115 Cong. Rec. 33141, 91st Cong. (1st Sess.) (statement of Rep. Ashley)

5 Whether an international bank exerts actual control over a company has been taken into consideration in the Board's orders exempting certain foreign banking organizations from the Regulation YY requirement to hold ownership interests in U.S. subsidiaries, particularly in cases where a foreign banking organization is a minority shareholder of a non-U.S. company and does not have the ability to compel the transfer of its indirect ownership interest in a U.S. subsidiary established by such company. See, e.g., BNP Paribas (Feb. 18, 2016), available at https://www.federalreserve.gov/supervisionreg/files/bnp-regyy-20160218.pdf; Banco Santander, S.A. (Feb. 18, 2016), available at https://www.federalreserve.gov/supervisionreg/files/santander-regyy-20160218.pdf; Deutsche Bank AG (Dec. 8, 2017), available at https://www.federalreserve.gov/supervisionreg/files/deutsche-bank-regyy-20171208.pdf.

6 The Board should maintain the current presumption under its Regulation Y that any company that directly or indirectly owns, controls, or has power to vote less than five percent of the outstanding shares of any class of voting securities of a bank or other company does not have control over that bank or other company. (12 C.F.R. §225.31(e)). This implements the statutory presumption of non-control codified at 12 U.S.C. §1841(a)(3) and applies regardless of any other presumptions of control.

7 In the structure reporting context, the Board has provided that VIEs generally are not controlled. See Federal Reserve, Instructions for Preparation of Report of Changes in Organizational Structure: Reporting Form FR Y-10 at NBK-2 (updated Feb. 2018).

options. As described in more detail in the SFA Letter, ABCP Conduits issue commercial paper notes ("ABCP") and use the proceeds of those notes to fund financial assets. Generally, an ABCP Conduit sponsored by a commercial bank does not directly or indirectly own, control or have the power to vote any class of equity securities of the ABCP Conduit nor does any individual affiliated with the sponsor bank sit on its board. For international banks it, typically, is a U.S. branch that sponsors an ABCP Conduit. The activities of these branches are already regulated extensively by the federal bank regulators and the ABCP Conduit are reported on a U.S. Branch's call report. As with U.S. bank sponsors, commercial paper conduits sponsored by international banks generally consolidate into the top-tier entity, through their U.S. branches, and are subject to parent-level capital and liquidity requirements under what is generally equivalent to the advanced approaches. Consolidation under U.S. GAAP or any other financial accounting standards in other jurisdictions as a rebuttable presumption of control could make it exceedingly difficult for commercial bank sponsors to continue to operate ABCP Conduits. The result would be to drive more structured financing activity out of the regulated banking sector. As noted in the SFA Letter, ABCP Conduits have a long history as a vital source of low-cost working capital for consumer and commercial businesses of all kinds both in the United States and globally. The ABCP Conduit market allows for increased lending to important segments of the economy and would not be easy to replace. Given the level of potential disruption, not only for international banks but also for financing within the U.S. markets, the Board should not include this presumption in the final rule. Likewise, for the reasons described in more detail in the Trade Letters**, the final rule should not create a presumption of control because of equity accounting.** The alternative would again be particularly problematic for international banks, which would be required to place all companies for which they equity account under their IHCs.

- **Alternatively, if the final rule includes a presumption of control over entities subject to accounting consolidation, the Board should make clear that only common equity interests in VIEs are "ownership interests" for IHC purposes.** As discussed in more detail in the Trade Letters, variable interests in VIEs could not be moved under the IHC or could only be moved at significant costs to the banking organization. For the reasons discussed above and in the Trade Letters, such costs and the increased complexity this presumption would create are not warranted and would be unduly burdensome.

- **The proposed methodology for calculating a company's total equity investment is fundamentally flawed, particularly with respect to the standards for treating debt or other interests as equity.** The Proposal would provide that, for purposes of determining total equity, debt instruments or other instruments would be treated as equity if they are "functionally equivalent to equity." The Proposal then provides a list of equity-like characteristics that would be used to determine whether an instrument may be treated as equity, but ultimately each instrument would be subject to a facts and circumstances analysis. This approach would create significant uncertainty and risk of recharacterization for a broad range of instruments that would normally be considered straightforward debt issuances. For international banks, this methodology would artificially increase the size and composition of IHCs and thereby increase the regulatory burdens for international banks disproportionate to their U.S. peers. The Board should not include the existence of instruments that are "functionally equivalent to equity" in the calculation of total equity. If, however, the Board decides to retain this standard in the final rule, the IIB supports the alternative methodologies proposed in the Trade Letters.

- **The presumptions of control should be revised to permit a multi-year seeding period for all investment funds, including foreign funds.** The IIB supports the Proposal's definition of investment fund, which appears to be designed to allow seeding of funds to occur equally whether they are retail funds or other types of investment funds, and whether they are domestic or foreign. However, as discussed in the Trade Letters, the Proposal falls short of defining an appropriate seeding period. Seed capital is necessary to organize and offer new investment funds. As the Board has recognized in other contexts, the need to retain seed capital in a fund can, and often does, exceed one year.[8] For the reasons discussed in the Trade Letters, the Board should permit a multi-year seeding period for all investment funds.[9]

- **Foreign funds authorized to offer and sell ownership interests to retail investors should be given treatment comparable to that provided to registered investment companies ("RICs") based on the fund's regulatory status under foreign law.** Under the Proposal, there would be a limited exception, post-seeding, from all of the presumptions of control when the investment is made in an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (the "1940 Act") and certain other criteria are satisfied. Foreign funds are structured in a variety of ways in different jurisdictions depending upon the law, regulations and determinations of the regulators in the home jurisdiction.[10] We endorse the recommendations in the Trade Letters with respect to the Proposal's treatment of investment funds. However, in addition, the final rule should include an explicit exclusion for foreign funds based on the fund's regulatory status under foreign law as a fund qualified for sale to retail investors rather than imposing specific criteria which may conflict with the structure of such funds in other jurisdictions.[11] One example of a difference in structuring between RICs and regulated foreign retail funds is requirements for independent directors. A RIC is required under the 1940 Act to have a board comprised of at least 40% "disinterested" directors that are unaffiliated with the investment advisor. Undertakings for Collective Investment in Transferable Securities ("UCITS") is the harmonized regime governing the management and sale of European mutual funds. Although the UCITS regulation does not require the appointment of disinterested or unaffiliated directors, UCITS are subject to a number of regulatory

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8 *See, e.g.,* Federal Reserve, Application of Volcker Rule to Foreign Public Funds, Volcker Rule Frequently Asked Questions, No. 16 (2015).

9 The IIB also supports the view expressed in the BPI letter and the Volcker Rule that seed capital provided to exchange traded funds ("ETF") by dealers who are not acting as investment advisers to such ETFs (so-called "authorized participants" or "participating dealers") is critical for the functioning of ETF markets around the globe and that therefore such ETF seeding should be afforded similar treatment under the proposal (subject to the modifications described in this letter and the Trade Letters).

10 *See, e.g.*, Federal Reserve, *Application of Volcker Rule to Foreign Public Funds*, Volcker Rule Frequently Asked Questions, No. 14 (2015) ("FAQ 14") ("Staffs of the Agencies understand that, unlike in the case of U.S. registered investment companies, sponsors of foreign public funds in some foreign jurisdictions select the majority of the fund's directors or trustees, or otherwise control the fund for purposes of the [BHCA] by contract or through a controlled corporate director. These and other corporate governance structures abroad therefore have raised questions regarding whether foreign public funds that are sponsored and distributed outside the U.S. and in accordance with foreign laws are banking entities by virtue of their relationships with a banking entity.").

11 This approach would be consistent with the treatment of foreign public funds under the Volcker Rule based on the rationale that allows U.S. banking entities and their foreign affiliates, as well as international banks, to continue to carry on their traditional asset management businesses outside of the United States. *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, Final Rule, 79 Fed. Reg. 5536 at 5678 (Jan. 31, 2014). *See also* FAQ 14 ("By referring to characteristics common to publicly distributed foreign funds rather than requiring that foreign public funds organize themselves identically to U.S. mutual funds or other types of U.S. regulated investment companies, the final rule recognized that foreign jurisdictions have established their own frameworks governing the details for the operation and distribution of foreign public funds."); Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33432 at 33443-33444 (July 17, 2018) ("2018 Volcker Reproposal").

requirements that are similar to, and vindicate the policies for, the protection of retail investors as reflected in the 1940 Act, including restrictions on permissible investments to transferable securities and liquid investments, investment concentration limits, and the need for authorization by the relevant European securities regulator before commencing activity (as well as requiring ongoing regulatory reporting). Additionally, as recommended in the Trade Letters, we request the threshold for voting equity after a seeding period to be increased to 24.9%, to ensure consistency with longstanding precedent that has been cited in guidance to regulations that incorporate the concept of "control" under the BHCA.[12]

- **Private Funds that meet certain corporate governance requirements should be subject to the 24.9% post-seeding threshold.** In addition to raising the voting equity threshold to 24.9% for investors that serve as advisors to RICs and foreign public funds, we also request such threshold to apply to private funds if the corporate governance structure of the fund aligns with the 1940 Act requirements that were taken into consideration by the Board in its orders approving director and officer interlocks with mutual funds that a bank holding company advises and administers or align with foreign equivalent requirements within the jurisdiction in which the fund is located.[13]

- **Shares of nonbanking companies held in a fiduciary capacity for the benefit of third parties should not be treated as controlled by, or attributed to, the fiduciary.** For the reasons described in the Trade Letters and to ensure consistency with current and historical regulatory reporting instructions and guidance, the definition of "control" should be revised to clarify that a bank or other company that serves in a fiduciary capacity is *not* deemed to control securities of nonbanking

[12] *See* FRB Letter dated June 24, 1999, to H. Rodgin Cohen on behalf of First Union Corporation the "First Union Letter" (permitting ownership of up to 24.9% of mutual funds' voting securities after their seeding periods). The First Union Letter was cited in the Volcker Rule context as precedent supporting the 24.9% post-seeding period threshold for purposes of determining whether a fund is controlled by a banking organization and accordingly treated as a banking entity subject to the prohibitions and restrictions of the Volcker Rule. *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, Final Rule, 79 Fed. Reg. 5536 at 5676 (Jan. 31, 2014) (cited by FAQ 14 and 2018 Volcker Reproposal, 83 Fed. Reg. at 33443 at n. 44. The First Union Letter was also cited in the context of qualified financial contracts ("QFCs") for purposes of determining the scope of subsidiaries that are subject to restrictions on QFCs. *See* Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions, at 42893 at n. 91 and accompanying text ("As covered entities are subject to the activity restrictions and other requirements of the [BHCA], they should already know all of their [BHCA]-controlled subsidiaries and be familiar with [BHCA] control principles [. . .]. For example, a covered entity may own more than five percent (and less than 25 percent) of the voting shares of a RIC for which the covered entity provides investment advisory, administrative, and other services, and has a number of director and officer interlocks, without controlling the fund for purposes of the [BHCA].") (citing First Union Letter and 12 C.F.R. §225.86(b)(3)).

[13] *See, e.g.*, Mellon Bank Corp., 79 Fed. Res. Bull. 626 (1993) ("The policy-making functions rest with the board of directors of the fund, which is responsible for the selection and review of the major contractors to the fund, including the investment advisor, and under certain circumstances, the administrator. The [1940 Act] requires that these contracts be reviewed at least annually by the board of directors of the mutual fund, and that these contracts be terminable by the board of directors on no more than 60 days written notice. In addition, the 1940 Act requires that at least 40 percent of the board of directors of a mutual fund be comprised of disinterested individuals who are not affiliated with the investment advisor, with any person that the SEC has determined to have a material business or professional relationship with the fund, with any employee or officer of the fund, with any registered broker or dealer, or with any other interested or affiliated person. These unaffiliated board members must approve the fund's contracts with its investment advisor, underwriter, and often its administrator."). *See also* Unicredito Italiano S.p.A., 86 Fed. Res. Bull. 825 (2000); Bankers Trust, 83 Fed. Res. Bull. 780 (1997); Commerzbank AG, 83 Fed. Res. Bull. 678 (1997).

companies held in a fiduciary capacity, *unless* held for the benefit of the fiduciary or its affiliates or employees.[14]

- **Contractual provisions designed to ensure compliance with law should not trigger a presumption of control.** The Proposal provides a non-exclusive list of examples of contractual provisions that would and would not give rise to a presumption of control. As discussed in the Trade Letters, the scope of contractual limitations that would result in a presumption of control are too broad, and could capture contractual terms that, for example, international banks include in their contracts to ensure that their investments comply with the BHCA. For international banks, this is of concern when making investments outside of the United States to ensure that those investments continue to comply with Section 4(c)(9) or 2(h)2 of the BHCA.[15] As such, the IIB strongly supports the modifications to the definition of "limiting contractual rights" proposed in the Trade Letters.

- **The final rule should confirm that the rule applies only to prospective investments made after the final rule's effective date.** The IIB strongly supports the analyses in the Trade Letters asserting that the final rule should apply only prospectively to investments made after the final rule's effective date. As noted in the Trade Letters, application of the proposed framework retroactively to investments that were determined in good faith to be non-controlling would have significant adverse effects on international banks and their investees, resulting in considerable time and expense to reevaluate existing investments after international banks have only recently expended considerable resources to evaluate these same investments in the context of forming their IHCs. For this reason and the reasons described in the Trade Letters, the final rule should include a statement that it would

[14] *See, e.g.*, FR Y-7 Instructions at RI-2 n. 2 ("In general, a Reporter is considered to control all shares which it or its subsidiaries have the power to vote, but not shares held in a fiduciary capacity. However, shares held by a Reporter (or its subsidiary) as fiduciary are deemed controlled by the Reporter if the shares are held for the benefit of employees, shareholders, members, or affiliates of the Reporter or any Reporter subsidiary, *or if the shares are of a BHC, IHC, or bank organized under U.S. law and* the Reporter has directly or indirectly had the sole power to vote the shares for more than 2 years.") (emphasis added). *See also* FR Y-6 Instructions at GEN-6, n. 4; FR Y-10 Instructions at NBK-9. Moreover, shares of nonbanking companies held under a trust that constitutes a company should not be attributed to a banking organization serving as trustee, unless such company is itself a bank holding company. *See* Proposed Revision of Regulation Y, 48 Fed. Reg. 23520 at 23529 (May 25, 1983) (the "1983 Proposal") ("Under the [BHCA], [section 4(c)(4)] does not permit a bank holding company subsidiary to acquire nonbank securities and activities as fiduciary for a trust that is a "company" (as defined in section 2(b) of the BHC Act). The legislative history of this provision suggests this limitation is intended to apply only where the trust is also a bank holding company. Thus, if the trust itself is not a bank holding company, the exemption is available to the bank holding company subsidiary that acts as fiduciary."); *id* at 23542 ("A bank holding company or subsidiary may, without the Board's prior approval, acquire: [. . .] securities or assets acquired by a company in good faith in a fiduciary capacity, if they are: (i) Held in the ordinary course of business; and (ii) Not acquired for the benefit of the company or its shareholders, employees, or subsidiaries."); *But see* Revision of Regulation Y, 49 Fed. Reg. 794 at 823-824 (Jan. 5, 1984) (Board approval is not required for "voting securities or assets acquired by a bank or other company *(other than a trust that is a company)* in good faith in a fiduciary capacity [. . .]") (emphasis added). To conform with the 1983 Proposal, we propose the deletion of the foregoing italicized language, which currently appears in the fiduciary exemption related to control of nonbanking companies (12 C.F.R §225.22(d)(3)), to effect the Board's intention to adopt the exemption as proposed. *See id.* at 807 ("There were no substantive comments concerning [. . .] paragraph (c)(3) ("Fiduciary investments"), [. . .] and these paragraphs are being adopted as proposed."). Additionally, to align with the rationale discussed in the 1983 proposal (i.e., that shares of nonbanking companies held in a fiduciary capacity under a trust that constitutes a "company" are not attributed to the banking organization serving as trustee, unless the trust is itself a bank holding company), the Board should amend the proposed rebuttable presumption at 225.32(b) to clarify that a banking organization does not control a trust that is a "company" for which it serves in a fiduciary capacity pursuant to a management contract or similar agreement, unless the trust itself is a bank holding company, or if 5% or more of the trust is held for the benefit of the banking organization. We also request that such changes be reflected in the FR reporting instructions to allow banking organizations to continue to carry on their traditional fiduciary and administrative businesses, and to ensure that confidential client information related to fiduciary relationships need not be publicly disclosed in the organizational chart of a banking organization (for example, personal trusts that are nonetheless deemed to be "companies" because they do not, by their terms, terminate within 25 years, or within 21 years and 10 months after the death of individuals).

[15] 12 U.S.C. §1843(c)(9); 12 U.S.C. §1841(h)(2).

apply only to future investments but would allow banks the option to treat an existing investment as non-controlled if it meets the presumptions of non-control under the final rule.

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We appreciate your consideration of our comments on the Proposal. If we can answer any questions or provide any further information, please contact the undersigned (646-213-1149, swebster@iib.org).

Very truly yours,

Stephanie Webster

Stephanie Webster
General Counsel