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**By Electronic Submission**

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

**Re: Control and Divestiture Proceedings (Docket No. R-1662; RIN 7100-AF 49)**

Dear Ms. Misback:

I lead the global financial services policy practice at K&L Gates LLP,[1] a law firm that represents capital markets participants, including a broad range of investors and investment advisors such as registered funds, alternative funds, institutional investors, pension funds, and family offices. We thank the Board of Governors of the Federal Reserve System ("Board") for the notice of proposed rulemaking on Control and Divestiture Proceedings (the "NPR" or "proposed rule") and appreciate the Board's consideration of this important issue.

We fully support the Board's objective of fostering capital formation through the promulgation of clear and consistent rules. In our view, the proposed rule is a significant step toward assuring that the Board receives the information it needs to fulfill its oversight mandate and that the Board, regulated companies, and their investors are relieved of burdensome and unnecessary disclosure, filing, and review requirements as well as other regulatory burdens that arise from unclear and inconsistent standards. In short, we agree with Vice Chairman for Supervision Randal Quarles' view that "[t]he process [for determining control under the Bank Holding Company Act] can be burdensome and time-consuming both for the requester and Federal Reserve staff."[2]

In the comments below, we encourage the Board to build on the NPR's proposed standards and to make consistent changes to standards made applicable under other banking regulations administered by the Board. For example, the presumptions for determining control under the

[1] The comments that follow reflect only the views of a group of attorneys in our financial services policy practice, and do not necessarily reflect the views of our clients, other members of our financial services practice, or the firm generally.

[2] Randal Quarles, "Early Observations on Improving the Effectiveness of Post-Crisis Regulation" (Jan. 19, 2018).

Bank Holding Company Act ("BHC Act") and the Home Owners' Loan Act ("HOLA")[3] in the proposed rule differ from the presumptions applied by the Board under the Change in Bank Control Act ("CIBC Act"). The NPR provides specific indicia of presumed control, calibrated to ownership levels, whereas the regulations adopted under the CIBC Act (but not the CIBC Act itself) require notice and background filings at 10% ownership regardless of whether any indicia of control are present. Consistent application of the control analysis across the BHC Act and CIBC Act's regulations would ensure clarity and reduce burdens on capital formation.

As discussed below, the negative effects on capital formation are compounded when applied to other regulations that hinge on control determinations, such as the "Volcker Rule."

In short, these regulatory inconsistencies and their consequences for regulated entities and the investment community ultimately discourage capital formation. As the Board develops a final rule, please consider the following observations and suggestions, which are drawn from our experiences representing a range of capital markets participants.

## I. The Volcker Rule

The proposed changes, including under Regulations Y and LL (discussed below), are consistent with the Treasury Department's report on Asset Management and Insurance issued pursuant to Executive Order 13772 (the "Treasury Report"). The Treasury Report states that "the Volcker Rule's application on affiliates and subsidiaries of 'banking entities' is predicated on the Bank Holding Company Act's definition of 'control', which may not be appropriate for certain funds." The Treasury Report goes on to make the following recommendation:

> *Congress should revise the definition of "banking entity" to encompass only insured depository institutions, their holding companies, foreign banking organizations, and affiliates and subsidiaries of such entities, defined as those in which there is 25% or more voting equity or voting power on the investment committee.*

The Treasury Department's recommendation makes clear that the definition of "banking entity" should only be applied to (1) an entity that engages in banking activities or (2) an entity that exercises "control," at the statutory 25% level, over an entity engaging in banking activities. Notably, the current definition of a banking entity under the Volcker Rule is not limited to such entities. For example, a manufacturing company with a subsidiary industrial loan company (an "ILC") is exempt from the definition of a "bank holding company" under the BHC Act but is simultaneously deemed a "banking entity" for the purposes of the Volcker Rule.

To illustrate the confusion created by this inconsistency, we are aware of certain non-financial companies that have lost material investment opportunities from investors that considered making

[3] In light of the NPR's application to both the BHC Act and HOLA, references in this letter to the BHC Act apply equally to HOLA.

additional investments only to later withdraw for fear of triggering "control" of a subsidiary ILC. Unfortunately, the investors approaching the 10% threshold had, in fact, confused the CIBC Act's regulatory 10% threshold with the BHC Act's control regime, which does not have a 10% threshold. Investors' confusion between the BHC Act's control provisions and those under the CIBC Act's regulations effectively results in reduced access to capital for these non-financial companies. The proposed rule does not resolve this confusion.

Since enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, the Board and the other relevant agencies have issued several proposals to improve the Volcker Rule. The NPR will resolve much of the confusion about control and the scope of the meaning of "banking entity" in a manner consistent with the Treasury Department's recommendation. However, the inclusion of entities that are not banking entities with respect to the BHC Act within the scope of the Volcker Rule will remain an issue for parents of subsidiary ILCs as discussed above.

## II. The CIBC Act and the Board's Implementing Regulations

Under the CIBC Act, "control" is defined as "the power, directly or indirectly, to direct the management or policies of an insured depository institution or to vote 25 per centum or more of any class of voting securities of an insured depository institution." In other words, the statutory threshold under the CIBC Act is 25% of voting securities or controlling influence.

However, the Board's regulations under the CIBC Act are far more stringent than both the CIBC Act's statutory thresholds and the principles of control under the BHC Act, as applied by the Board today and as proposed in the NPR. Under the CIBC Act's regulations, a rebuttable presumption of control is triggered if "immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution." In other words, the presumption is triggered not necessarily by any indicia of actual control, but instead merely by owning or controlling 10% of the voting securities. In effect, an investor with 15% of the voting securities could be presumed non-controlling and controlling, simultaneously, when viewed under the Board's inconsistent standards under the NPR and the current CIBC Act's regulations, respectively. This inconsistency between the proposed rule and the current CIBC Act's regulations frustrates the Board's efforts in the NPR to reduce confusion and burdens to investors. Indeed, an investor would still be required to file extensive and intrusive disclosures under the CIBC Act's regulations despite the absence of indicia of control that would trigger the BHC Act's regulation under the NPR's tiered approach.

Furthermore, the CIBC Act's regulations require disclosures by investors in non-financial companies that do not engage in traditional banking activities, but that instead have relatively small ILC or savings and loan subsidiaries that accommodate customer purchases of company goods. Accordingly, these non-financial companies are subjected to inconsistent treatment under the BHC Act and the CIBC Act's regulations, and investors that have no intent or desire to control a bank are unnecessarily discouraged from investing in these non-financial companies. The result is a chilling effect on capital formation. Moreover, requiring disclosure under the CIBC Act's regulations for investments in non-financial companies, such as an energy utility or manufacturer, exceeds the intended scope and policy goals behind disclosures designed for bank oversight.

While we commend the Board for revising the regulations under the BHC Act as proposed, not making the corresponding revisions to the rebuttable presumption of control under the CIBC Act regulations would perpetuate, and possibly exacerbate, existing regulatory inconsistencies and capital formation disincentives.

## III. Suggested Solutions

To encourage investment in non-financial companies, promote capital formation, and foster economic growth, we suggest that the Board revise the CIBC Act's regulations to (i) be consistent with the principles of the proposed rule, (ii) adopt an appropriate level of oversight (*i.e.*, at the banking entity level) for companies that are predominantly non-financial in nature, and (iii) require for investments in such non-financial public companies only those ownership and control disclosures already required by the Securities and Exchange Commission ("SEC"). To implement these suggestions, we ask that the Board consider the following regulatory proposals for inclusion in the final rule. These suggestions seek to reform the incentive structure faced by potential investors without compromising the integrity, safety, or soundness of subsidiary insured depository institutions.

### *a. Revise the CIBC Act's Regulations to be Consistent with the Principles of the Proposed Rule*

As discussed above, the current disclosure requirements under the CIBC Act's regulations are triggered simply by an investor seeking to acquire or otherwise exceed (*e.g.*, through company buybacks) 10% of the voting securities of a company. Simply revising the regulation to state that "the acquiring person (or persons acting in concert) will control the institution, as 'control' is defined under the Bank Holding Company Act" (see Appendix A) would resolve the inconsistent presumptions of control under the NPR's proposed BHC Act regulations and the current CIBC Act's regulations.

This approach also would implement the Treasury Department's recommendation for consistent regulatory treatment of covered banking entities, as discussed above.

### *b. Revise the CIBC Act regulations to apply only to entities "predominantly engaged in financial activities"*

In addition, the Board should narrow the scope of companies subject to the notice and disclosure requirements under the CIBC Act's regulations. In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), as described below, Congress directed the prudential regulators to limit their oversight to entities engaged in financial activities. We believe this narrow tailoring was appropriate in the aftermath of the Credit Crisis in 2008 and 2009 and remains so more than ten years later.

First, tailoring the scope of the notice and disclosure requirements would harmonize the CIBC Act with the requirements of the Financial Stability Act of 2010 (Title I of the Dodd-Frank Act), which focuses on entities that are "predominantly engaged in financial activities." This approach would preserve the Board's CIBC Act oversight for banking entities, alleviate investors' confusion, and restore confidence in their investment decisions with respect to non-financial companies that own financial subsidiaries constituting a minor aspect of their business.

Second, this approach would be consistent with Congress' intent and the prudential regulators' understanding with respect to grandfathered unitary savings and loan holding companies ("GUSLHCs") as expressed in Section 626 of the Dodd-Frank Act. A colloquy on the House Floor between Congressmen Barney Frank and Jim Himes established that Section 626 was designed such that a single intermediate holding company ("IHC") would be the regulated savings and loan holding company and subject to regulatory oversight with limited oversight of the IHC's parent.[4] This structure would allow the parent to "engage in any commercial activities, notwithstanding the [BHC Act's] limitations on nonbank activities, but would have to file reports with the [Board], and would be subject to enforcement action by the [Board]."[5] It is clear that Congress intended for the Board's oversight responsibility of certain GUSLHCs to be limited to financial activities and not to the entire network of an organization's non-financial affiliates. Six years after the passage of the Dodd-Frank Act, a report jointly issued by the Board, the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC") states, "[t]he purpose of segregating a GUSLHC's financial activities from its nonfinancial activities is to ensure appropriate supervision and regulation of the former while also ensuring that such regulation does not extend to the latter."[6]

Taken together, Congress recognized the need for bright lines distinguishing financial and non-financial activities. Until the rulemaking directed by Section 626 is adopted, we think it would be appropriate to exempt the controlling, non-financial companies from the notice and disclosure requirements of the CIBC Act regulations.

### *c. Reliance on Existing Regulatory Disclosures*

As discussed above, at a 10% ownership level, the CIBC Act's regulations currently require invasive and extensive disclosures via the Interagency Biographical and Financial Report ("IBFR"). However, these disclosures are not required to determine whether an investor controls a banking entity. The majority of the required disclosures relate solely to information regarding

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[4] House Congressional Record (June 30, 2010), available at https://www.congress.gov/crec/2010/06/30/CREC-2010-06-30-pt1-PgH5223-2.pdf.

[5] Rebecca Laird, et al., "A New Era: Depository Institutions and Their Holding Companies Face a Deluge of Regulatory Changes" (July 22, 2010), available at http://www.klgates.com/a-new-era-depository-institutions-and-their-holding-companies-face-a-deluge-of-regulatory-changes-07-22-2010/#_ednref14.

[6] "Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act" (Sept. 2016), available at https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20160908a1.pdf.

the suitability of a particular investor to control a banking entity, a determination relevant only after the Board makes a control determination. This is an unnecessary burden on investors and the Board's review resources (and the resources of the OCC and FDIC in cases in which the CIBC Act's regulations are triggered for institutions regulated by them).

Investors' compliance with the IBFR's requirements would be even more unnecessary, and even less useful to a control determination, if the NPR's control framework is adopted and investors that are presumed to be non-controlling under the BHC Act and HOLA are still subjected to these disclosure requirements. While we recognize the Board's concerns with respect to controlling investors and the safety and soundness of financial institutions, we believe the underlying risks to a subsidiary financial institution's safety and soundness are minimal when non-controlling investments are made in non-financial parent companies. Regulatory oversight should be appropriately tailored to address the risks at issue; absent such risks, the costs of such oversight outweigh the benefits provided.

When an investor seeks a substantial investment in a bank, the investor assumes a responsibility to the bank's depositors, the Deposit Insurance Fund, and the bank's other shareholders. Accordingly, the Board should have access to information necessary for determining whether the investor can adequately act as a source of strength for the bank and does not pose a risk to its safety and soundness. When an investor seeks a substantial investment in a non-financial company, such as a motorcycle manufacturer or an energy utility, the larger concerns involve ensuring the fairness of the capital markets. In the case of non-financial parents of ILCs and GUSLHCs, the subsidiary ILC or thrift is often a small and unsubstantial portion of the parent company's operations and would be immaterial to a potential investor's decision to provide capital. In our experience, the outsized regulatory burdens arising from these minor subsidiary institutions are more likely to discourage investment in non-financial parents than attract it.

Fortunately, we believe an appropriately tailored regulatory regime already exists for disclosures regarding material investments (non-controlling or otherwise) in public companies (non-financial or otherwise). In particular, the SEC requires disclosure of substantial investments, typically at 5% and 10% thresholds. A number of the non-financial companies discussed above are publicly traded and, thus, are subject to the periodic and continuous disclosure requirements imposed by federal securities laws and the SEC. For example, Schedule 13D, the "beneficial ownership report," is required within ten days of an investor's acquisition of 5% or more of a public company's voting or investment power. Beneficial owners are also listed in a company's periodic disclosures. At 10%, the beneficial owner becomes a corporate insider and is subject to periodic disclosures on Forms 3, 4, and 5. The SEC also has a large body of Compliance and Disclosure Interpretations that clarify the reporting requirements.

If the Board is unwilling to limit the CIBC Act's IBFR requirements to controlling investors as defined under the NPR's proposed framework, we ask that the Board consider acceptance of the SEC's beneficial ownership and corporate insider disclosures in lieu of the IBFR for non-controlling investors in non-financial companies. Investors are already familiar with the SEC's reporting regime, and this approach could alleviate investors' concerns about inadvertently triggering banking disclosures. Reliance on disclosures already provided to the SEC could alleviate duplicative filing burdens resulting from multiple, inconsistent regulatory disclosure regimes. This would significantly reduce the burden on investors, companies, and the Board staff, and would have a positive effect on capital formation opportunities for non-financial public companies.

In sum, investors require legal certainty and transparency sufficient to make informed investment decisions. In the latter regard, we note that during and after the Credit Crisis, hundreds of U.S. banks were placed into FDIC receivership. It was not uncommon for a bank to look healthy based on its financial disclosures in one quarter, only to fail in the next quarter. A primary reason is that, despite the fact that bank management knew about their nonperforming loans, they were reporting these bad loans only when they were realized under an incurred loss accounting standard. For that reason, we see the pending current expected credit loss ("CECL") standard as a welcome step toward providing appropriate transparency for investors.

## IV. Responsive Comments to Specific NPR Questions

> ***Question 3: Should the committee presumption be modified to take into account the different scope of authority that may be exercised by different committees? For example, some committees might be empowered to make only very specific decisions on behalf of the company—such as an audit committee selecting the outside auditor—while other committees might be empowered generally to make decisions on behalf of the company—such as some executive committees. Should the presumption take this or any similar considerations into account and, if so, what standard should the Board use to differentiate committees with sufficient powers to raise control concerns from committees with more limited powers?***

We support the Board's proposed presumption that an investor's director representatives exercise control if they hold more than a quarter of the positions on any committee that has the authority to bind the company. This is consistent with the Board's precedent in that regard. Moreover, we concur with the Board's proposal to limit the application of this presumption to decision-making committees, regardless of their size.

In order to clarify and reinforce the Board's approach in the NPR, we propose that the Board modify the committee presumption to include an express exemption for service on an advisory committee, regardless of committee size or the number of an investor's director representatives serving on such a committee. Under the Board's precedent, a committee with less than four members, including an advisory committee, was effectively equated to a committee with decision-making authority. However, many small committees are not granted significant discretionary control over the company. Rather, such committees are formed to address specific concerns solely in an advisory capacity. For instance, many companies designate an advisory committee to study a request from shareholders to address environmental, social, and governance issues and to make recommendations with respect to the request, which may or may not be consistent with the initial suggestion. Such committees, by definition, provide advice to the whole company board or one of the board's decision-making committees, and neither such an advisory committee nor any director representative acting as a member of such an advisory committee has the authority to bind the company to any decision.

By allowing director representatives to participate in advisory committees without risking a Board determination of control, the Board will encourage shareholder engagement and remove an unnecessary barrier to capital formation.

> ***Question 12: Should the Board include a presumption that a company controls a second company if the first company controls 10 percent or more of any class of voting securities of the second company and solicits proxies on any issue presented to the shareholders of the second company for a vote?***

The Board's decision to break from historical practice with respect to proxy solicitations is consistent with its proposal discussed in Question 3 above. Soliciting a proxy is an intentional decision to not exert controlling influence or to obtain special access privileges afforded on the basis of the investor's material holdings. Fundamentally, proxy solicitation is an effort to effect change through the democratic shareholder voting process because any proxy can only be adopted via majority vote. Similarly, subsequent adoption of a failed proxy could simply reflect the board of director's recognition that it should respond to a common interest of a substantial percentage of its shareholders. Such an action is undertaken for the benefit of a large contingent of shareholders, not just the investor who submitted the proxy. Accordingly, this change would provide investors and companies greater latitude to engage on meaningful issues.

> ***Question 13: Should the Board include a presumption that a company is presumed to control a second company when the first company has a significant voting stake in the second company, such as 10 percent or more, and threatens the second company with disposing its shares in order to induce action or inaction by the second company?***

We agree with the Board's decision not to propose a presumption of control based upon threats to dispose of securities. An otherwise non-controlling investor that is displeased with management should be able to exit its position without triggering a control concern. Further, our experience confirms the Board's perspective that the possibility of a shareholder exit can impose important discipline on management.

> ***Question 26: Is it necessary or appropriate to have an exception to the control presumptions for registered investment companies? Should the proposed presumption provide a different standard than the Board's investment company precedents contain, such as a longer seeding period, different business relationships, or different levels of ownership?***

The proposed exception to control for registered investment companies ("RICs") is necessary and appropriate. Specifically, business development companies ("BDCs") are important vehicles for capital formation, particularly for small- and medium-sized companies ("SMEs"). Any changes that would add complexity to the current framework could undermine the ability of RICs to invest in SMEs. BDCs are subject to comprehensive regulation promulgated by the SEC, which has announced efforts to revisit the BDC regulatory regime within the next 12 months.

According to the Spring 2019 Unified Agenda of Regulatory and Deregulatory Actions, the SEC intends to release a second notice of proposed rulemaking regarding the Use of Derivatives by RICs and BDCs in April 2020, although no more specific date has been announced. The SEC first issued a proposed rule on this topic in December 2015, and collected public comments through March 2016. The SEC lists a proposed rule on Offering Reform for Business Development Companies Under the Small Business Credit Availability Act and Closed-End Funds Under the Economic Growth, Regulatory Relief, and Consumer Protection Act for release in September of this year, but we note that it contains the same regulatory ID and description as the proposed rule released in April on Securities Offering Reform for Closed-End Investment Companies. The SEC's timetable appears to have changed after the agenda was submitted to the Office of Management and Budget, which collects and reports the semiannual Unified Agendas.

Additionally, the SEC will take final action on its proposed Fund of Funds Rule in April 2020. The Fund of Funds Rule would raise the caps on registered investment companies' authority to invest in (and to be acquired by) other funds under Section 12(d)(1) of the Investment Company Act. The proposed rule would replace the current system of individual exemptive relief and would rescind all previously issued exemptive relief letters.

To ensure that changes from the Board and the SEC do not stall capital formation by creating unnecessary confusion, we suggest that the Board consider developing a joint rulemaking with the SEC to provide a clear and comprehensive understanding for BDCs. As discussed below, much of the confusion stems from investors' lack of understanding of the federal banking regulatory regime. Such confusion is unsurprising because investors are, as one might expect, highly focused on compliance with the SEC's regulatory regime, not the prudential regulators' regime.

> ***Question 31: Should the Board presume noncontrol in all cases where neither a statutory standard nor a regulatory presumption of control applies?***

Yes. We believe the Board should adopt a presumption of non-control, as it would provide clarity for all interested parties. Investors who intend to avoid control would have clear guidance for how to structure their investments and relationships with regulated companies. This approach would minimize the cost and delay of unnecessary filings and review, and decrease barriers to capital formation.

> ***Question 34: Should the Board revise the definition of "first company" or "second company" to incorporate subsidiaries or affiliates of the first company or second company?***

No. The Board should not revise the proposed definitions in this manner because including subsidiaries could complicate the formation of joint ventures, such as a BDC as noted above. Moreover, the inclusion of subsidiaries could discourage investment in companies that were not intended to be regulated by the BHC Act. We represent certain non-financial companies that have wholly-owned ILCs. These ILCs are insured depository institutions but, unlike other insured depository institutions, they are exempt from the BHC Act's definition of a bank. As a result, their non-financial parent companies are not bank holding companies. Nevertheless, investors in the non-financial parent companies are wary of triggering the Board's control presumptions and, thereby, becoming subject to the attendant requirements under the Volcker Rule because of the subsidiary ILCs. Our clients have lost material investment opportunities because investors have determined the risk and consequent burden of controlling the subsidiary to be too great.

Many investors believe the regulatory burdens triggered by such investments are too great because the required disclosures are too costly or invasive. Furthermore, investors likely are not as aware of the intricacies of the federal banking regulatory regime. Investors who are unwilling to bear these regulatory costs are forced to maintain investments at or below the margins of the control presumption thresholds. Investment, therefore, is dictated by such non-market concerns rather than generally accepted investment principles and prudent investment judgment. Non-financial public companies are acutely disadvantaged by this regulatory barrier to investment because many of them compete in capital-intensive industries such as manufacturing. This unfortunate dynamic occurs in connection with potential investors in non-financial parent companies of ILCs and Grandfathered Unitary Savings and Loan Holding Companies, who fear triggering application to such investors of the Volcker Rule or the CIBC Act's disclosure regimes. The result is neither intentional nor desirable, but is a common byproduct of the current regulatory framework.

> ***Question 40: The proposal would add a new section to Regulation Y and Regulation LL that would define control over securities for all purposes in Regulation Y or Regulation LL (including, for example, in the context of notices pursuant to the Change in Bank Control Act of 1978), as applicable. Should the proposed new section apply for all purposes under the regulations or should it only apply for purposes of determining control due to controlling influence?***

The proposed new section should apply for all purposes, including under Regulations Y and LL. Applying the same definition of control for all purposes would resolve some confusion surrounding the application of the Volcker Rule. As discussed above, the Board also should address the confusion arising from inconsistent control standards applicable to notices required pursuant to the CIBC Act's regulations.

Failure to harmonize the proposed control framework for all purposes, particularly in the context of notices pursuant to the CIBC Act, would perpetuate a chilling and discriminatory effect against investors that otherwise might be a significant (albeit non-controlling) source of capital. The IBFR requirements may act as a type of "poison pill" that discourages significant investors while protecting entrenched management who perceive such investment to be a threat. Indeed, some banks may seek to preserve the current inconsistency, or even call for more stringent disclosures and review, as a means of discouraging "activists" and other investors who may not be controlling but who might exercise their voting rights to encourage management discipline.

Such discriminatory tactics provide no benefit to a bank's customers, the regulators, or our capital markets, and they perpetuate the very real costs associated with restricting access to capital. Furthermore, this discrimination against investors, whether or not they are activist investors, is inconsistent with a clear principle expressed in the NPR: "the Board also has recognized that noncontrolling shareholders may exercise certain of their core rights as shareholders and that it is important that the Board's standards balance normal shareholder activities with controlling influence concerns." In sum, we ask that the Board adhere to the principles expressed in the NPR and extend the proposed framework for all purposes under Regulations Y and LL.

## V. Conclusion

Investors must evaluate a myriad of potential consequences under the BHC Act and the CIBC Act regulations every time they consider whether to increase their ownership stake in certain financial and non-financial companies. These considerations are unnecessarily complicated by the inconsistent application of "control" in different regulatory contexts. Regrettably, the end result is a reduction in the availability of capital for these companies across various industries as well as lost investment opportunities for investors. This patchwork regulatory regime is also inconsistent with Executive Order 13772, which seeks to "identify any laws . . . regulations, guidance . . . and other Government policies that inhibit Federal regulation of the United States financial system in a manner consistent with the Core Principles." We applaud the Board for working to address these issues and for proposing a rule that will effectuate welcome reform in a manner consistent with the goals of the Trump Administration. We caution, however, that while the NPR is a welcome step forward, it is just one step because it does not address all of the inconsistencies surrounding the meaning of control. We encourage the Board to resolve these inconsistencies.

We hope these observations and suggestions will assist the Board as it addresses the incentives and disincentives for access to and formation of capital. We ask that they be considered for inclusion in the final rule. Please do not hesitate to contact me if you have any questions.

Best regards,

K&L Gates LLP

Daniel F. C. Crowley
Partner

Enclosure

**Appendix A**

Proposed Change

**12 C.F.R. § 225.41**

**Transactions requiring prior notice**

(c) Acquisitions requiring prior notice—

. . .

(2) Rebuttable presumption of control.

The Board presumes that an acquisition of voting securities of a state member bank or bank holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if both, immediately after the transaction, the acquiring person (or persons acting in concert) will ~~own,~~ control~~, or hold with power to vote 10 percent or more of any class of voting securities of~~ the institution, as "control" is defined under the Bank Holding Company Act (12 U.S.C. 1841)~~,~~ and ~~if~~:

(i) The institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(ii) No other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.