ACQUISITION OF CONTROL OF A STATE MEMBER BANK, BANK HOLDING COMPANY, OR SAVINGS AND LOAN HOLDING COMPANY PURSUANT TO THE CHANGE IN BANK CONTROL ACT

MARK B. GREENLEE AND BRIAN P. KNESTOUT*

Table of Contents

* Mark B. Greenlee is a Vice President and Counsel at the Federal Reserve Bank of Cleveland. Brian P. Knestout is a Vice President and Associate General Counsel, The Goldman Sachs Group, Inc. Mr. Knestout served as an attorney in the Legal Division of the Board of Governors of the Federal Reserve System from 2006 to 2018. The views expressed herein are those of the authors individually and are not those of the Federal Reserve Bank of Cleveland, Board of Governors of the Federal Reserve System, or The Goldman Sachs Group, Inc., and should not be construed as official pronouncements of the Board, the Federal Reserve Bank of Cleveland, the Federal Reserve System in general, or The Goldman Sachs Group, Inc. or its subsidiaries or affiliates.

I. Introduction

The Change in Bank Control Act of 1978 (CIBCA)[1] prohibits any person from acquiring control of an insured depository institution, or a company that controls an insured depository institution, unless the person has provided the appropriate federal banking agency with prior written notice of the transaction and the banking agency has not disapproved the proposed transaction.[2] The statute defines the term "control" to mean "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."[3] Control can arise by the actions of any one person individually, or through actions of multiple persons.[4]

The appropriate federal banking agency depends upon the nature of the institution whose voting stock is proposed for acquisition, which for banks or savings associations depends on the charter and membership of the institution.[5] Currently, the Board of Governors of the Federal Reserve System (Board) is the appropriate federal banking agency for the acquisition of control of a bank incorporated or organized under the law of any state that is a member of the Federal Reserve System (also known as a state member bank or SMB), a bank holding company (BHC), or a savings and loan holding company

[1] Change in Bank Control Act of 1978, Pub. L. 95-630, Title VI, 92 Stat. 3641, 3683–87 (codified at 12 U.S.C. § 1817(j) (2012)).
[2] 12 U.S.C. § 1817(j)(1) (2012).
[3] 12 U.S.C. § 1817(j)(8)(B) (2012).
[4] 12 U.S.C. § 1817(j)(1) (2012) ("No person, acting directly or indirectly or through or in concert with one or more other persons . . . ").
[5] 12 U.S.C. § 1813(q) (2012).

(SLHC).[6] The Comptroller of the Currency (OCC) is currently the appropriate federal banking agency for banks chartered by the United States and for federal savings associations.[7] Finally, the Federal Deposit Insurance Corporation (FDIC) is currently the appropriate federal banking agency for state-chartered banks that are not members of the Federal Reserve System and for state-chartered savings associations.[8]

Each federal banking agency has issued regulations to implement the CIBCA.[9] To a significant degree, the regulations of each banking agency are identical; however, there are subtle differences between the agencies' regulations that are beyond the scope of this article. The regulations are the same, however, with respect to the two instances in which the agencies require prior notice.[10] First, a prior notice is required if an acquiring person will own, control, or hold with the power to vote twenty-five percent or more of any class of voting securities of an institution.[11] Second, the regulations establish a rebuttable presumption of control for the acquisition of ten percent or more of the voting securities of an institution if the institution has securities

---

[6] 12 U.S.C. § 1813(q)(3) (2012).
[7] 12 U.S.C. § 1813(q)(1) (2012).
[8] 12 U.S.C. § 1813(q)(2) (2012).
[9] Regulation Y, 12 C.F.R. §§ 225.41–.44 (2018) (detailing regulation of BHCs and SMBs); Regulation LL, 12 C.F.R. §§ 238.31–.33 (2018) (detailing regulation of SLHCs). *See also* 12 C.F.R. § 5.50 (2018) (issuing change in control regulation for national banks);12 C.F.R. §§ 303.80–.99; 391.40–48 (2018) (issuing change in control regulation for state nonmember banks and state savings associations); Policy Statement on Act of 1978, F.R.R.S. 4-801 (Jan. 24, 1979), 2011 WL 1895977; Board, *Regulation Y: Policy Statement and Revision*, 65 FED. RES. BULL. 139 (1979). The OCC published guidance for its processing of CIBCA notices. U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, *Comptroller's Licensing Manual, Change in Bank Control* (Sept. 2007), https://www.occ.gov/publications/publications-by-type/licensing-manuals/cbca.pdf [https://perma.cc/JD4W-6MWX] (last visited Mar. 28, 2019) [hereinafter *OCC Licensing Manual*]. The OCC revised its regulations governing CIBCA effective July 1, 2015. 80 Fed. Reg. 28,346 (May 18, 2015) (enacting final rule revising licensing rules of national banks and federal savings associations). The FDIC revised its regulations governing CIBCA notices effective Jan. 1, 2016. 80 Fed. Reg. 65,889 (Oct. 28, 2015) (enacting final rule for change in control procedures for state nonmember banks and state savings associations).
[10] Regulation Y, 12 C.F.R. § 225.41 (2018); Regulation LL, 12 C.F.R. § 238.31 (2018).
[11] Regulation Y, 12 C.F.R. § 225.41(c)(1) (2018); Regulation LL, 12 C.F.R. § 238.31(c)(1) (2018).

registered under section 12 of the Securities Exchange Act of 1934 (Exchange Act) or if no other person will own a greater percentage of the same class of voting securities of the institution immediately after the transaction.[12] The rebuttable presumption reflects the agencies' interpretation of the first prong of the statute's definition of control: the power to direct the management or policies of an institution.[13] The regulations also establish rebuttable presumptions of concerted action by certain persons, such as between an individual and the individual's immediate family or between a company and any controlling shareholder of that company.[14]

The CIBCA requires the appropriate federal banking agency to investigate the competence, experience, integrity, and financial ability of acquiring persons.[15] As a result, CIBCA notices include the following: (i) the identity, personal history, business background and experience of each acquiring person; (ii) the assets and liabilities of each acquiring person; (iii) the identity, source, and amount of funds for the acquisition; and (iv) any plans for major changes in the business, corporate structure, or management of the insured depository institution.[16] The agency may disapprove an acquisition of the voting securities if it finds adverse effects with respect to any of the factors set forth in the CIBCA (i.e., competitive, financial, managerial, incompleteness of information, or adverse impact on the deposit insurance fund).[17]

The regulations exempt certain types of transactions from the notice requirement, such as acquisitions subject to approval under the Bank Holding Company Act (BHCA),[18] Bank Merger Act (BMA),[19]

---

[12] Regulation Y, 12 C.F.R. § 225.41(c)(2) (2018); Regulation LL, 12 C.F.R. § 238.31(c)(2) (2018). *See generally* Securities Exchange Act of 1934, Pub. L. No. 73-291, § 12, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a–78kk (2012)).
[13] 12 U.S.C. § 1817(j)(8)(B) (2012).
[14] Regulation Y, 12 C.F.R. § 225.41(d) (2018); Regulation LL, 12 C.F.R. § 238.31(d) (2018).
[15] 12 U.S.C. § 1817(j)(2)(B)(i) (2012).
[16] 12 U.S.C. § 1817(j)(6) (2012).
[17] 12 U.S.C. § 1817(j)(7) (2012).
[18] Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (codified at 12 U.S.C. §§ 1841–1850 (2012)).
[19] Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129 (May 13, 1960) (codified at 12 U.S.C. § 1828(c) (2012)).

or Home Owners' Loan Act (HOLA),[20] and an increase in a previously authorized acquisition.[21] Certain other acquisitions, while not entirely exempt from some form of notice, are exempt from the prior-notice requirement. For instance, notice may be provided ninety days after certain acquisitions through inheritance or *bona fide* gifts.[22]

This article focuses on implementation of the CIBCA by the Board. It summarizes the Board's regulations, decisions, policy statements, interpretations, and practice over the forty years since enactment of the CIBCA. Section II provides the legislative and regulatory history. Section III covers important definitions and presumptions. Section IV identifies the acquisitions of voting securities that require prior notice. Section V deals with exemptions from notice or prior notice requirements. Section VI summarizes procedures related to the filing, publication, processing, and disposition of notices. Section VII addresses the Board's investigative and enforcement authority. Section VIII summarizes steps taken by supervisors to monitor the safety and soundness of institutions after a change in control, such as reporting requirements and increased examination frequency. Finally, section IX addresses the Board's treatment of specific situations, such as employee stock ownership plans, private equity firms, and investment advisors.

While this article provides a general summary of actions by the Board and its staff involving the CIBCA, the analysis of control depends upon specific facts and circumstances. Furthermore, many policy and interpretative questions remain unresolved by the Board and its staff. As an additional caveat, the opinions summarized or expressed in this article are those of the authors alone and not those of the Board, any Reserve Bank, or The Goldman Sachs Group, Inc., or its subsidiaries or affiliates. Only the Board provides determinations regarding acquisitions of the voting securities of SMBs, BHCs, and SLHCs. Persons seeking to acquire control of a SMB, BHC, or SLHC may consult with Board or appropriate Reserve Bank staff for guidance related to any particular transaction.

---

[20] Home Owners' Loan Act of 1933, Pub. L. No. 73-43, Ch. 64, § 10, as added Aug. 9, 1989, Pub. L. No. 101-73, § 301, 103 Stat. 183, 318–343 (codified at 12 U.S.C. §§ 1461–1470 (2012)).

[21] Regulation Y, 12 C.F.R. § 225.42(a)(2) (2018); Regulation LL, 12 C.F.R. § 238.32(a)(2) (2018).

[22] Regulation Y, 12 C.F.R. § 225.42(b)(1) (2018); Regulation LL, 12 C.F.R. § 238.32(b)(1) (2018).

II. Legislative and Regulatory History

In 1978, Congress enacted the CIBCA[23] to address two major concerns: (i) the inability of federal banking agencies to review the transfer of ownership of banks to individuals or groups of individuals; and (ii) concern about foreigners making investments in U.S. banks. At the same time, Congress enacted the Change in Savings and Loan Control Act (CSLCA) to cover the acquisition of control of savings and loan associations.[24]

A. Prior Law

1. Bank Control Law

Prior to the CIBCA, the BHCA required review of the acquisition of financial institutions by corporate organizations, but natural persons were permitted to acquire banks or a chain of banks without review by federal bank agencies.[25] Congress viewed the acquisition of banks by corporations as requiring more regulation than the acquisition of banks by natural persons because of ownership in perpetuity by corporations.[26] Furthermore, Congress did not want to unduly restrict changes in control of banks controlled by individuals.[27]

---

[23] CIBCA, 12 U.S.C. § 1817(j) (2012).

[24] Change in Savings and Loan Control Act, Pub. L. No. 95-630, Title VII, 92 Stat. 3641, 3687–90 (Nov. 10, 1978) (codified at 12 U.S.C. § 1730 (1988)).

[25] *Statement of Philip E. Coldwell, Board of Governors, Federal Reserve System: Hearings before Subcommittee on Financial Institutions, Regulation and Insurance of the Committee on Banking, Finance and Urban Affairs*, H.R. 9086, 95th Cong. (Sept. 28, 1977), 63 FED. RES. BULL. 891, 894 (1977) [hereinafter *Coldwell Statement*] (expressing concern at potential legislation requiring prior regulatory notice for individuals acquiring control of insured banks); *Acquisitions, Changes in Control, and Bank Stock Loans of Insured Banks*, Staff Analysis for the Subcomm. on Domestic Finance of the H. Comm. on Banking and Currency, H.R. 12267, 88th Cong. 35 (June 29, 1967) (detailing burdens, costs, and delays from proposed regulation of individual control of banks).

[26] S. REP. NO. 84-1095, at 6–7 (July 25, 1955) ("By way of contrast, corporations and similar organizations may have perpetual existence.").

[27] *Coldwell Statement*, *supra* note 25, at 894 (explaining Congress' careful distinctions between corporate and individual ownership of banks). *See also* Letter from Philip E. Coldwell, Bd. Member, Fed. Reserve Sys., to Fernand J. St. Germain, Chairman, Subcomm. on Fin. Insts. Supervision, Regulation and

In 1964, Congress amended the Federal Deposit Insurance Act (FDIA) to require the president or chief executive officer of an insured bank to promptly report to the appropriate federal banking agency any change in control of the bank known to them, defined to exclude a change involving less the ten percent of the outstanding voting stock.[28] Doubts about a change in control were to be resolved in favor of filing a report.[29] In addition, when an insured bank made a loan secured by twenty-five percent or more of the outstanding voting stock of an insured bank, the president or other chief executive officer of the lending bank was required to report such fact to the appropriate federal banking agency of the bank whose voting stock secured the loan.[30] Furthermore, a bank subject to a change in control was required to report to the appropriate federal banking agency any change in its chief executive officer or directors occurring in the twelve months following a change in control.[31] The Financial Institutions Supervisory Act of 1966 established similar reporting requirements for the acquisition of control of an insured savings and loan association.[32]

Ins. of the Comm. on Banking, Fin. & Urban Affairs, U.S. House of Representatives, at 2 (Oct. 25, 1977) in *The Safe Banking Act of 1977: Hearings Before the Subcomm. on Fin. Insts. Supervision, Regulation, & Ins. of the H. Comm. on Banking Fin. & Urban Affairs*, H.R. 9086, 95th Cong., 1st Sess. Part IV at 2532–33 (1977) ("Ownership by individuals or groups of individuals . . . poses far less threat for concentration of resources, major and long-term integration of banking and commerce and anti-competitive behavior.").

[28] Act of Sept. 12, 1964, Pub. L. No. 88-593, 78 Stat. 940 (codified at 12 U.S.C. § 1817(j) (2012)).

[29] Act of Sept. 12, 1964, Pub. L. No. 88-593, 78 Stat. 940, 941. *See Notice of Change in Control of Management of Insured Banks*: *Hearing on H.R. 12267 and H.R. 12268 Before H. Comm. on Banking and Currency, 88th Cong.* (1964). *See also* H.R. REP. NO. 88-1792, 10, 48 (1964) (summarizing the changes made to control provisions following committee hearings). *See also* Michael Benson, *Congress Seen Receptive to Barr Proposal on Bank Control Changes*, AM. BANKER, JULY 24, 1964, at 1, 11.

[30] Act of Sept. 12, 1964, Pub. L. No. 88-593, 78 Stat. 940, 941.

[31] *Id*.

[32] Fin. Inst. Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028, 1042 (establishing reporting requirements for savings and loan associations similar to change in control requirements applicable to banks).

2. Federal Securities and Antitrust Laws

Apart from federal banking laws, federal securities and antitrust laws imposed disclosure requirements on the acquisition of the voting stock of certain companies, which included an insured depository institution or any company that controlled an insured depository institution.[33] In 1964, the Williams Act required public disclosure when a person or connected group of persons acquired or intended to acquire five percent or more of the outstanding stock of any corporation with 500 or more shareholders and at least $1 million in assets.[34]

Federal antitrust laws also governed the mergers, acquisitions, and other combinations of business organizations, including banks, savings and loans, and their holding companies.[35] The Sherman Act prohibited certain restraints of trade or commerce and monopolistic business practices[36] and the Clayton Act prohibited certain anti-competitive mergers and acquisitions.[37] Furthermore, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSRA) required notification to the Federal Trade Commission (FTC) and Department of Justice (DOJ) prior to certain acquisitions based on the asset size of the parties to the transaction and purchase price of the transaction.[38]

B. Congressional Findings

During the 1970s, there was growing concern over the inability of banking regulators to review the fitness of a natural person to

---

[33] *See* Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m–78n (2012)).
[34] 15 U.S.C. §§ 78m–78n (2012).
[35] *See* Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7 (2012)) (codifying antitrust provisions into the United States Code). *See also* Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27 (2012)) (codifying provisions against anti-competitive mergers into the United States Code).
[36] Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7 (2012)).
[37] Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27 (2012)).
[38] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 18a (2012)) (codifying amendments to the Clayton Act). *See* 16 C.F.R. § 802.8(b) (2018) (providing exemptions for certain supervisory acquisitions that would otherwise have filing requirements).

acquire a bank or savings and loan association.[39] Many banks failed after transactions involving the transfer of bank ownership in what became known as the "Texas-Rent-a-Bank-Scheme."[40] This prompted Congress to enact the CIBCA,[41] which amended the FDIA, and the CSLCA,[42] which amended the National Housing Act (NHA).

1. Texas-Rent-a-Bank Scheme

In 1976, the Senate Subcommittee on Financial Institutions conducted hearings concerning a series of bank failures in Texas.[43] Later, Representative St. Germain pointed to these and other bank failures as the basis for better bank control legislation:

> The quickie sale of Citizens State Bank of Carrizo Springs . . . to various control groups, financed by easy bank credit, was a major factor in the ultimate collapse of that institution. Through the years, a number of bank failures have followed the takeover of institutions by speculators whose entry was financed through low down payment and no down payment loans. It is clearly time for the Congress to take action to prevent this easy moving in and out of speculators more intent on milking banks for their own self-dealing purposes rather than providing for community needs.[44]

---

[39] See H.R. REP. NO. 95-1383, at 20 (1978) ("For example, one individual acquired six banks in less than a year financed primarily with borrowed money.").

[40] H.R. REP. NO. 95-1383, at 20 (1978).

[41] Fin. Inst. Reg. and Int. Rate Control Act of 1978, Pub. L. No. 95-630, Title VI, (amending § 7 of the FIDA), 92 Stat. 3641, 3683–87 (codified at 12 U.S.C. § 1817(j) (2012)).

[42] Fin. Inst. Reg. and Int. Rate Control Act of 1978, Pub. L. No. 95-630, Title VII, (amending § 407 of the NHA), 92 Stat. 3641, 3687–90 (codified at 12 U.S.C. § 1730 (1988)).

[43] *See generally The Failure of Citizens State Bank of Carrizo Springs, Texas, and Related Financial Problems: Hearings Before the Subcomm. on Fin. Insts. Supervision, Regulation, & Ins. of the H. Comm. on Banking, Currency & Housing*, 94th Cong. (1977) (reporting on the hearing process regarding numerous bank failures in Texas).

[44] 123 CONG. REC. H8857-27275 (daily ed. Aug. 5, 1977). *See* 124 CONG. REC. H11190-32670 (daily ed. Sept. 29, 1978) (statement of Rep. St.

The House report supporting enactment of the CIBCA provided a similar justification for legislation governing changes of control of depository institutions:

> One of the most glaring gaps in the regulatory structure for our depository institutions is the lack of control over transfers of ownership of banks and savings and loans between individuals or groups of individuals. . . . [B]anks were bought and sold like used cars and the regulators considered themselves powerless to do anything about what became known as the "Texas Rent-A-Bank Scheme."[45]

2. Foreign Investment in Domestic Financial Institutions

Foreign investment in domestic financial institutions also raised congressional concerns based on lack of information about acquiring persons, lack of regulatory jurisdiction over acquisitions by foreign nationals, and the failure of a large bank after foreign investment. The House report supporting the enactment of the CIBCA noted the lack of knowledge about the acquiring persons:

> Stories about foreign nationals scouring the countryside for banks and savings and loans to buy have heightened the public's concern. The regulators in these cases find it even more difficult to secure information about acquiring parties since the individuals involved are not U.S. citizens. . . . We believe that it is essential to the effective performance of their responsibilities that supervisory authorities know basic facts concerning persons who control financial institutions. This need is especially acute when

---

Germain) ("The product which we bring to the floor under this rule is an equitable and workable solution to nagging bank regulatory problems—problems which in recent years have threatened to erode the banking industry's number one asset—public confidence."); *see also* 124 CONG. REC. H11414-33303 (daily ed. Oct. 3, 1978) (statement of Rep. St. Germain) ("It is time we delivered without equivocation and more soft-soap without more amendments designed solely to help a few bankers and ignore the broader interest of the public.").

[45] H.R. REP. NO. 95-1383, at 19–20 (1978).

> controlling persons are beyond the jurisdiction of the U.S. Government.[46]

Further impetus for bank control legislation also arose from the failure of Franklin National Bank after foreign investment. The foreign investor was later charged with criminal offenses.[47]

Despite growing concern about investments by foreign nationals, the Board remained committed to the principle of national treatment, or nondiscrimination, toward the operations of foreign banks in the United States. The Board supported federal legislation to "provide foreign banks with the same opportunities to conduct activities in this country as are available to domestic institutions and by subjecting them to the same rules and regulations."[48] The CIBCA and CSLCA reflected the principle of national treatment by applying uniform requirements to investments in banks by foreign nationals and U.S. citizens.

---

[46] *Id*. at 20, 245. *See also Statement by George W. Mitchell, Board Vice Chairman, Federal Reserve System*, *Before the Subcomm. on Fin. Insts. of the Comm. on Banking, Housing, & Urban Affairs*, U.S. Senate, January 28, 1976, 62 FED. RES. BULL. 103, 109–10 (Feb. 1976) [hereinafter *Mitchell Statement*] (discussing concerns about foreign bank operations in the US and the necessity to regulate them); Letter from Theodore E. Allison, Sec'y, to Thomas L. Farmer, 1976 Fed. Res. Interp. Ltr. LEXIS 9 (Jan. 26, 1976) (concerning consortium of foreign banks acquiring 100% of a *de novo* state bank without becoming a BHC).

[47] *Oversight Hearings into the Effectiveness of Fed. Bank Regulation (Franklin National Failure): Hearings Before the Subcomm. on Commerce, Consumer & Monetary Affairs of the H. Comm. on Gov't Operations,* 94th Cong. 34–45 (1976) (providing full text of an article by Sanford Rose, *What Really Went Wrong at Franklin National*, FORTUNE, Oct. 1974 (discussing how the failure occurred shortly after control of the bank was acquired by Michele Sindona, an Italian national, who was later charged with criminal offenses in Italy and the United States)).

[48] *Mitchell Statement*, *supra* note 46, at 104–07 (discussing the rapid growth of foreign banks, the inconsistency of regulation between foreign and domestic banks, and development of long-term regulatory goals as reasons for the Board's support of regulation).

C. CIBCA and CSLCA

1. Original Enactment

The Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA) included the CIBCA[49] and CSLCA.[50] The CIBCA applied to the acquisition of control of an insured bank, or company that controlled an insured bank, by a person. A person was prohibited from acquiring control of an insured bank or company that controlled an insured bank, unless the person filed a notice with the appropriate federal banking agency with specified information at least sixty days prior to a proposed acquisition.[51] The prohibition and notice requirement applied to natural persons and certain companies, but not to transactions subject to the BHCA or BMA.[52] CSLCA imposed the same prohibition and notice requirement on a person who proposed to acquire direct or indirect acquisition of control of an insured savings and loan association, except that the notice was filed with the Federal Savings and Loan Insurance Corporation (FSLIC), and transactions subject to HOLA were exempt from its coverage.[53]

The CIBCA and CSLCA were not intended to be as restrictive as the BHCA and HOLA for several reasons. First, Congress viewed the approval requirements of the BHCA and HOLA for the acquisition of control by a company as "overly stringent" for acquisition of control of an insured depository institution by an individual.[54] Therefore, Congress adopted a notice and disapproval process for individual acquisitions of control.[55] Second, Congress did not limit nonbanking activities of a person acquiring control of an insured depository

---

[49] FIRA, Pub. L. No. 95-630, Title VI, § 602, 92 Stat. 3641, 3683–87 (1978) (amending § 7 of the FDIA and codified at 12 U.S.C. § 1817(j) (2012)).

[50] § 602, 92 Stat. at 3687–90 (1978) (amending § 407 of the NHA and codified at 12 U.S.C. § 1730 (1988)) (creating the CSLCA).

[51] § 602, 92 Stat. at 3642 (adding § 7(j)(1) to the FDIA and codified at 12 U.S.C. § 1817 (2012)) (describing the notice requirements for bank control acquisitions).

[52] *See id*.

[53] § 703, 92 Stat. at 3687, 3690 (inserting a new § 407(q)(1) in the NHA, codified at 12 U.S.C. § 1730(q)(1) (1988)) (requiring written notice for a proposed acquisition within sixty days).

[54] H.R. RPT. No. 95-1383, at 242 (1978).

[55] *Id.* (describing the proposal for a sixty-day period to disapprove an acquisition).

institution.[56] Finally, Congress did not impose any ongoing supervisory requirements on a person acquiring control of an insured institution (e.g., capital, examination, or reporting requirements), which applied to a company that acquired control under the BHCA and HOLA.[57]

As originally enacted, the CIBCA and CSLCA authorized the appropriate federal agency to disapprove a proposed acquisition if:

> (i) the proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States;
>
> (ii) the effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or to tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;
>
> (iii) the financial condition of any acquiring person is such as might jeopardize the financial stability of the bank or prejudice the interests of the depositors of the bank;
>
> (iv) the competence, experience, or integrity of any acquiring person or of any of the proposed management personnel indicates that it would not be in the interest of the depositors of the bank, or in the interest of the public to permit such person to control the bank; or
>
> (v) any acquiring person neglects, fails, or refuses to furnish the appropriate federal banking agency all the information required by the appropriate federal banking agency.[58]

---

[56] *Id.*

[57] *Id.*

[58] FIRA, Pub. L. No. 95-630, Title VI, § 602, 92 Stat. 3641, 3685–86 (1978) (adding § 7(j)(7) to the FDIA and codified at 12 U.S.C. § 1817(j)(7) (2012); FIRA § 703, 92 Stat. 3689 (inserting a new § 407(q)(7) of the NHA and codified at 12 U.S.C. § 1730(q)(7) (1988); Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, Title VII, § 705, 120 Stat. 1966,

The first two considerations focus on the competitive impact of the proposed acquisition.[59] The other considerations address the fitness of the acquiring person or persons to control an insured institution, seeking to prevent felonious, unscrupulous, or incompetent persons from gaining control of a bank.[60]

If the appropriate federal agency disapproved an acquisition of control, the acquiring person had the right to an agency hearing at which all issues would be determined on the record.[61] Any person whose proposed acquisition was disapproved after an agency hearing could obtain judicial review in the specified United States courts of appeals.[62]

The CIBCA and CSLCA carried forward two requirements of previously-existing change in control law: (i) prompt reporting of changes in control by an insured institution; and (ii) reporting changes in chief executive officer or directors for the twelve months after a change in control.[63]

The CIBCA and CSLCA gave the federal agencies the power to issue rules and regulations and take enforcement action.[64] The Acts authorized the federal agencies to assess civil monetary penalties for

---

1987 (2006) (amending the third basis for disapproval, substituting "either the financial condition of any acquiring person or the future prospects of the institution" for "the financial condition of any acquiring person.").

[59] § 602, 92 Stat. at 3685; *see also* 124 CONG. REC. H103492, 10452 (daily ed. Apr. 18, 1978) (statement of Mr. St. Germain) ("The Treasury has come up with a workable compromise which assures the full application of Clayton Act standards to interlocks among depository institutions and other companies, including insurance companies.").

[60] § 602, 92 Stat. at 3685–86. *See, e.g., Federal Response to Criminal Misconduct and Insider Abuse in the National's Financial Institutions*, Committee on Government Operations, H.R. Rep. No. 98-1137, at 39 (1984).

[61] FIRA § 602, 92 Stat. 3641, 3684 (adding § 7(j)(4) to the FDIA and codified at 12 U.S.C. § 1817(j)4) (2012)); *id*. § 703, 92 Stat. 3641, 3688 (inserting a new § 407(q)(4) of the NHA and codified at 12 U.S.C. § 1730(q)(4)(1988)).

[62] *FIRA* § 602, 92 Stat. 3641, 3684 (adding § 7(j)(5) to the FDIA and codified at 12 U.S.C. § 1817(j)(5) (2012); *id.* § 703, 92 Stat. 3641, 3688, inserting a new § 407(q)(5) of the NHA and codified at 12 U.S.C. § 1730(q)(5)(1988)).

[63] *FIRA* § 602, 92 Stat. 3641, 3686 (adding § 7(j)(9) and (12) to the FDIA and codified at 12 U.S.C. § 1817(j)(9), (12) (2012)); *id.* § 703, 92 Stat. 3641, 3689–3690 (inserting a new section 407(q)(9) and (11) of the NHA and codified at 12 U.S.C. § 1730(q)(9) (1988)).

[64] FIRA § 602, 92 Stat. 3641, 3686 (amending § 7(j) of the FDIA); Title VII, § 703, at 3690 (amending § 407(q) of the NHA).

willful violation of the Acts after providing notice and an opportunity to be heard.[65]

The CIBCA and CSLCA also required the appropriate federal agencies to submit reports to Congress within two years after their effective date, and each year thereafter, summarizing the results of their administration of the Acts and making any recommendations as to desirable changes in the law.[66] The Board sent its initial report to Congress on March 10, 1981.[67] In its report, the Board stated that it had disapproved two proposed acquisitions that would not have been in the public interest, one based on financial factors and the other based on competitive considerations.[68] The Board noted that its experience indicated that the CIBCA had "probably achieved to a considerable degree the purposes for which it was enacted."[69] The Board also "presumed" that the CIBCA standards discouraged other "unqualified persons" from seeking to acquire banks and encouraged acquirers to improve the capital and management of banks they sought to acquire in order to ensure that the Board would not object to a notice filed under the CIBCA.[70] The Board noted its initial opposition to the CIBCA and continued to express reservations about the desirability of the legislation based upon the cumbersome, expensive, and time-consuming process that the law imposed, without expressing an opinion as to whether these burdens were justified by public benefits.[71]

The Board report identified several areas where clarification or minor changes would improve administration of the CIBCA.[72] First, the Board stated that it had received unsolicited comments on proposed acquisitions from third parties.[73] While the Board had con-

---

[65] FIRA § 602 at 3686–87 ("The appropriate Federal banking agency shall have authority to assess such a civil penalty, after giving notice and an opportunity to the person to submit data, views, and arguments . . . ."); *id.* § 703, at 3689 ("The Corporation shall have authority to assess such a civil penalty, after giving notice and an opportunity to the person to submit data, views, and arguments . . . .").

[66] FIRA § 602 at 3686, § 703 at 3690.

[67] FED. RESERVE BD., REPORT TO CONGRESS REGARDING THE BOARD'S ADMINISTRATION OF THE CHANGE IN BANK CONTROL ACT OF 1978 (1981) [hereinafter REPORT].

[68] *Id*. at 2–3.

[69] *Id*. at 3.

[70] *Id*.

[71] *Id*. at 7. *See also Coldwell Statement*, *supra* note 25, at 894.

[72] REPORT, *supra* note 67.

[73] *Id.*

sidered timely comments received from third parties, it was the Board's opinion that it was not required to solicit or consider comments from the public.[74] The Board did not believe that third party participation in the notice process was desirable because it delayed processing and securities laws adequately protected the rights of third parties.[75] In its report, the Board sought clarification as to whether third parties lacked standing to participate in the proceedings.[76] Second, third parties had sought copies of change in control notices filed with the Board.[77] The Board did not believe that Congress intended the process to be a public proceeding.[78] In response, the Board only released the name of the bank sought to be acquired and the name of the proposed acquirer pursuant to the Freedom of Information Act (FOIA).[79] The Board sought clarification of this view through amendments to the CIBCA.[80] Finally, the Board requested additional time to process change in control notices when a case required additional information relevant to the statutory factors for disapproval.[81]

Although the Board did not seek any clarification or change regarding the statutory factors themselves, the Board noted the difficulty of making subjective judgments concerning an individual's integrity:

> The Act states that the regulatory agency may disapprove a proposal if the "integrity" of an acquiring person indicates that his association with the bank would be undesirable. Although the term "integrity" is susceptible to several interpretations, the Board believes that the term should be retained because it gives the agencies a reasonable amount of flexibility in administering the Act to achieve the goal of preventing undesirable persons from gaining control of a bank or bank holding company. It is important to recognize, however, that the mere presence of this

---

[74] *Id.*
[75] *Id.* at 5.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id*. at 5–6.
[81] *Id*. at 6.

> term in the Act may not be sufficient, by itself, to allow an agency to disapprove a notice on the basis of unsubstantiated allegations that a proposed purchaser is not a person of good character.[82]

The Board's staff again noted concerns with the CIBCA's integrity factor in a 1984 report submitted to a U.S. House subcommittee that inquired about insider threats to commercial banks:

> With respect to the factor of "integrity", the Federal Reserve's experience thus far under the Act indicates that it is difficult to deny a Change in Bank Control notice on the basis of subjective judgments regarding an individual's integrity when reliable evidence is not available, or allegations have not been proven in a court of law. The Federal Reserve may have obtained information from an investigative agency that may reflect adversely on an individual's character or reputation; however, in many cases, the information may be raw intelligence data, or hearsay information that has not been legally supported by a finding of guilt. While the Federal Reserve is concerned about preventing unqualified or undesirable persons from acquiring or managing banks and bank holding companies, we also believe that care should be taken to avoid actions that would deny an individual's rights or due process under the law.[83]

---

[82] *Id*. at 7. *See also The Safe Banking Act of 1977: Hearings on H.R. 9086 Before the Subcomm. on Fin. Insts. Supervision, Regulation & Ins. of the H. Comm. on Banking, Fin. & Urban Affairs*, 95th Cong. 2300 (1977) (statement of Robert H. McKinney, Chairman, Federal Home Loan Bank Board) ("[I]f you were to establish objective tests as to financial ability, I would feel more comfortable. I feel a little uncomfortable with proposed tests about whether or not a person has good integrity.").

[83] Board Staff Report in response to questions from Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operation, May 3, 1984, at 11, attached to Board, Division of Banking Supervision and Regulation, SR 84-12, May 7, 1984, which appended a copy of the report to testimony by Governor J. Charles Partee before the same subcommittee on May 3, 1984. Commentators also expressed concern about the "character test" imposed by the CIBCA. *See, e.g*., James V. Elliott, *Major Costs Imposed by Change in Bank Control Act*, LEGAL TIMES WASH., Jan. 25,

2. Amendments to the CIBCA and CSLCA

In 1984, a report of the House Subcommittee on Financial Institutions criticized the Board and other federal banking agencies for their reluctance and timidity in implementation of the CIBCA and CSLCA:

> Unfortunately, [the agencies] completely misread the 1978 statute and confer the same rights on an acquirer as they do on a criminal defendant. They are not the same; one does not lose his civil rights and his liberty when denied the right to acquire a financial institution. The change in control statute does *not* require that questionable integrity be proven beyond a reasonable doubt and that the misconduct giving rise to a "lack of integrity" have resulted in a criminal conviction.
>
> . . . .
>
> . . . [N]o reasonable interpretation would require criminal misconduct, let alone an actual criminal conviction, before an agency can disapprove.
>
> . . . .
>
> Assuming that the banking agencies follow correct procedures, the agencies do not have to prove "substantial evidence" or some other higher evidentiary threshold. The initial burden of proof rests with the appealing party, not the agency, and the agency need only show that its finding, that the acquisition would not be in the public interest, was not arbitrary or capricious but rested on some rational basis . . . . The agencies have much more latitude than they are willing to use.[84]

The failure of insured depository institutions after agency review of proposed acquisitions added fuel to the fire of the call for reform. For example, the Subcommittee's report provided a detailed account of

---

1982, at 17 (highlighting the costs and confusion associated with the so-called "character test").

[84] COMM. ON GOV'T OPERATIONS, FEDERAL RESPONSE TO CRIMINAL MISCONDUCT AND INSIDER ABUSE IN THE NATION'S FINANCIAL INSTITUTIONS, H.R. REP. NO. 98-1137, at 47–48 (1984).

how Orrin Shaid, a convicted felon, obtained control over Ranchlander National Bank using his girlfriend to mask his acquisition of the bank without discovery by the OCC.[85] The national bank surreptitiously acquired by Mr. Shaid failed a little over a year after the change in control.[86]

The Anti-Drug Abuse Act of 1986 (ADAA) addressed congressional concerns about the administration of the CIBCA and CSLCA by the federal agencies.[87] It required the agencies to investigate the competence, experience, integrity, and financial ability of each acquiring person, independently verify the accuracy and completeness of information provided in the notice, and prepare a written report of any investigation.[88] Contrary to the Board's recommendation, the amendments also required the appropriate federal agency to publish the name of the institution proposed to be acquired and the name of each acquiring person, as well as to solicit comments from the public in the geographic area where the institution to be acquired is located, unless the federal agency determined in writing that such publication and solicitation would seriously threaten the safety and soundness of institution.[89] However, in line with the Board's recommendation, the amendments allowed the appropriate federal agency to extend the sixty-day time period for disapproval an additional thirty days in the

---

[85] *Id.* at 36–40. *See Federal Response to Criminal Misconduct by Bank Officers, Directors, and Insiders (Part 2), Hearings Before Subcomm. on Commerce, Consumer, and Monetary Affairs of the H. Com. on Gov't Operations*, 98th Cong. 39–41 (1984) (statement of Robert Wortman, U.S. Att'y, Eastern District of Texas) (recounting the embezzlement in testimony before Congress); Andrew Albert, *Bank Robbery with a 'Smoking Pen': The Story of Embezzler Orrin Shaid Jr.; Case Raises Questions of Regulators' Handling of Takeovers*, AM. BANKER, May 29, 1984, at 24.

[86] The FDIC closed the bank on November 19, 1982 because of exhaustion of its capital tied to loan losses and suspected bank fraud. *See* FDIC, ANNUAL REPORT 5 (1982).

[87] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1360, 100 Stat. 3207-29 to 3207-31 (1986) (codified at at 12 U.S.C. § 1817(j) (2012)) (enumerating the ADAA's amendments to the CIBCA). Prior to the enactment of the ADAA, the CIBCA did not require notice to, or solicitation of comments from, the public in connection with a notice filed under the CIBCA. *See id.* § 1360, 100 Stat. 3207-30 (1986) (codified at 12 U.S.C. § 1817(j) (2012)) (inserting these new requirements into the CIBCA).

[88] *Id.* § 1360(b), 100 Stat. at 3207-30 (codified at 12 U.S.C. § 1817(j)(2) (2012)).

[89] *Id.* § 1360(c), 100 Stat. at 3207-30 (codified at 12 U.S.C. § 1817(j)(2) (2012)).

agency's discretion and for up to ninety days if the agency needed gather additional information or complete an investigation.[90]

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[91] replaced the FSLIC with the Office of Thrift Supervision (OTS) as the supervisor of SLHCs and federal savings and loans associations,[92] repealed the CSLCA,[93] and designated the OTS as the appropriate federal banking agency for SLHCs and federal savings associations under the CIBCA.[94] The designation of the OTS meant that it would process change in control notices for SLHCs and federal savings associations.[95] FIRREA also made significant changes to the CIBCA: (i) clarifying that the resignation, termination of employment or participation, divestiture of control, or separation of or by an institution-affiliated party did not affect the jurisdiction and authority of the appropriate federal banking agency to take enforcement action against such a party under the CIBCA;[96] and (ii) expanding and increasing civil money penalties for violations of the CIBCA.[97] FIRREA also required the filing of a notice prior to a change in a director or senior executive officer when a depository institution had undergone a change in control in the preceding two years.[98] FIRREA authorized the appropriate federal banking agency to disapprove such a notice.[99] FIRREA also amended the definition of an

---

[90] *Id.* § 1360(a), 100 Stat. at 3207-29 to 3207-30 (codified at 12 U.S.C. § 1817(j)(1) (2012)).

[91] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of the U.S. Code).

[92] *Id.* § 403, 103 Stat. at 360.

[93] *Id.* § 401(a), 103 Stat. at 363. In 1987, the CSLCA was amended to require the FSLIC to consider the tax effects of an acquisition governed by the CSLCA. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 111, 101 Stat. 552, 580–81 (1987). This requirement was not a part of the CIBCA; therefore, it no longer applied to the acquisition of SLHCs and savings and loan associations after the repeal of the CSLCA. *Id.*

[94] Financial Institutions Reform, Recovery, and Enforcement Act of 1989 § 204(q)(4), 103 Stat. at 192 (codified at 12 U.S.C. § 1813 (2012)).

[95] *Id.*

[96] *Id.* § 905(b), 103 Stat. at 460 (codified at 12 U.S.C. § 1786(k) (2012)).

[97] *Id.* § 907, 103 Stat. at 468 (codified at 12 U.S.C. § 1818(i)(2) (2012)).

[98] *Id.* § 914(a)(1).

[99] *Id.* § 914, 103 Stat. at 484 (codified at 12 U.S.C. 1811 et. *seq*.)). The FIRREA notice added to the CIBCA requirement that the affected institution promptly file a report after a change or replacement of a chief executive officer or director occurring within 12 months after a change in control. Financial

institution-affiliated party in the FDIA to include persons who have filed or are required to file a change in control notice pursuant to the CIBCA.[100]

The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA)[101] amended CIBCA reporting requirements for financial institution loans secured by twenty-five percent or more of the voting shares of an insured depository institution to include foreign banks subject to the BHCA.[102] The expanded reporting requirement flowed from the Board's investigation of The Bank of Credit and Commerce International (BCCI), which uncovered secret and sham loans that allowed BCCI to gain control of First American Bancshares without regulatory approval. A Senate report summarized the facts and need for legislation:

> BCCI acknowledged in March 1991 that it had acquired a controlling interest in First American Bankshares Inc., the largest financial institution in the Washington, D.C. area, without applying for or receiving approval from the Federal Reserve. BCCI had lent money to the purported foreign owners of First American, a group of Middle Eastern investors acting through a Netherlands Antilles holding company. When the borrowers defaulted on their loans from BCCI, they forfeited their First American stock as collateral. Control of First American thereby

---

Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 602, 92 Stat. 3641, 3686 (adding § 7(j)(9) and (12) to the FDIA); *Id.* § 703, 92 Stat. 3641, 3689–90 (inserting a new section 407(q)(9) and (11) of the NHA). However, the requirement was later eliminated. *See* Economic Growth and Paperwork Reduction Act of 1996, Pub. L. No. 104-208, § 2209, 110 Stat. 3009, 3009–409 (codified at 12 U.S.C. § 1831i (2012)). *See infra* note 106 and accompanying text (discussing the removal of the prior notice requirement).

[100] Financial Institutions Reform, Recovery, and Enforcement Act, § 204(a), 103 Stat. at 193.

[101] Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991).

[102] *Id.* § 205, 105 Stat. at 2292–94 ("Any financial institution . . . shall file a consolidated report . . . if the extensions of credit by the financial institution and such institution's affiliates, in the aggregate, are secured, directly or indirectly, by 25 percent or more of any class of shares of the same insured depository institution.").

> passed to BCCI. . . . BCCIs acquisition of control over First American indicates the need to extend this reporting requirement to bank stock loans made by any foreign bank operating in this country as well as to bank stock loans made by an affiliate of such a bank. This situation also indicates the need to clarify that loans by one organization to a group of persons acting together to control a bank must be reported. This expansion of the reporting requirements will better serve the purpose of the statute to monitor the use of loans to control United States banking institutions.[103]

The Economic Growth and Paperwork Reduction Act of 1996[104] (Regulatory Relief Act) made two additional changes related to the CIBCA. First, it removed the CIBCA requirement that domestic institutions notify the appropriate federal banking agency of loans secured by twenty-five percent or more of the outstanding voting stock of an insured depository institution, but left the reporting requirement in place for foreign banks.[105] Second, it removed the FIRREA requirement that regulated institutions file a prior notice to change a senior executive officer or director if the institution underwent a change in control within the previous two years.[106]

The Financial Services Regulatory Relief Act of 2006[107] made two further changes to the CIBCA. It authorized a federal banking agency to disapprove a CIBCA notice based upon the impact of a

---

[103] S. RPT. NO. 102-167 at 120 (1991). *See also Hearings before Subcommittee on Terrorism, Narcotics, and International Operations of the Senate Committee of Foreign Relations*, 102nd Cong., at 83 and 89 (1991) (statement of Virgil Mattingly, Board General Counsel, Federal Reserve System).

[104] Economic Growth and Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[105] *Id.* § 2226, 110 Stat. at 3009–417 ("[B]y striking 'financial institution and any affiliate of any financial institution' and inserting 'foreign bank, or any affiliate thereof . . .'").

[106] *Id.* § 2209, 110 Stat. at 3009–409 ("ELIMINATION OF UNNECESSARY FILING FOR OFFICER AND DIRECTOR APPOINTMENTS").

[107] Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, 120 Stat. 1966 (2006).

proposed acquisition on future prospects of an institution.[108] It also permitted an agency to extend the time period for consideration of a CIBCA notice if it needed additional time to analyze the future prospects of an institution or the safety and soundness of an acquiring person's plans to sell the institution or make changes in its business operations, corporate structure, or management.[109]

D. Regulations Implementing the CIBCA and CSLCA

In 1979, the federal agencies with jurisdiction over financial institutions issued substantially similar regulations to implement the CIBCA and CSLCA.[110] All of the regulations established a rebuttable presumption that acquisition of ten percent or more of a class of voting securities constituted the acquisition of control, which implemented the first part of the statutory definition of control: "power to . . . direct the management or policies" of an institution.[111] The Board's rules became part of its Regulation Y.

In 1984, the Board reorganized, simplified, and clarified Regulation Y. One of the amendments clarified the lack of standing of third parties who submit information during the investigation of a CIBCA notice.[112] The revised regulation stated that the Board or a Reserve Bank may solicit views from any person when investigating a CIBCA notice, but the person does not become a party to the proceeding or acquire any standing or right to participate in the Board's consideration of the notice.[113]

---

[108] *Id.* § 705, 120 Stat. at 1987 ("[B]y striking 'the financial condition of any acquiring person' and inserting 'either the financial condition of any acquiring person or the future prospects of the institution.'").

[109] *Id*. ("By adding at the end the following: '(ii) to analyze the safety and soundness of any plans or proposals described in paragraph (6)(E) . . . .'").

[110] 44 Fed. Reg. 7120 (Feb. 6, 1979) (issuing Board's implementing regulations); 44 Fed. Reg. 7118 (Feb. 6, 1979) (issuing OCC's implementing regulations); 44 Fed. Reg. 7122 (Feb. 6, 1979) (issuing FDIC's implementing rules); 44 Fed. Reg. 10,500 (Feb. 21, 1979). The Board also issued a policy statement related to the CIBCA. 44 Fed. Reg. 7229 (Feb. 6, 1979).

[111] 12 U.S.C. § 1817(J)(8)(B) (2012).

[112] 49 Fed. Reg. 794, 831 (Jan. 5, 1984) (as codified at 12 C.F.R. § 225.43) ("No person (other than the acquiring person), whose views are solicited or who presents information, thereby becomes a party to the proceeding or acquires any standing or right to participate in the Board's consideration of the notice.").

[113] *Id.* at 831.

The revised regulation also defined an "acquisition" as including a "purchase, assignment, transfer, or pledge of voting securities, or an increase in percentage ownership of a bank or other company resulting from redemption of voting securities."[114] The definition tracked language in the CIBCA itself but added the phrase concerning an increase in percentage ownership resulting from redemption of voting securities. The definition clarified that control may arise not only from an increase in the number of voting shares owned, controlled, or held, but also from an increase in voting power.

The Board's initial regulation implementing the CIBCA applied to the acquisition of "voting securities" without defining the term. As revised in 1984, the regulation defined the term "voting securities" as follows:

> (1) "Voting securities" means shares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statue, charter, or in any manner, entitle the holder: (i) to vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or (ii) to vote on or to direct the conduct of the operations or other significant policies of the issuing company.
>
> (2) Preferred shares, limited partnership shares or interests, or similar interests are not "voting securities" if: (i) any voting rights associated with the shares or interest are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears; (ii) the shares or interest represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing company; and (iii) the shares or interest do not entitle the holder, by

[114] *Id.* at 830.

> statute, charter, or in any manner, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuing company.[115]

While the Board's preamble to the amended regulation explained its views in the context of the BHCA,[116] the amended regulation's definition of "voting securities" also applied to notices filed pursuant to the CIBCA.

In its preamble to the amended regulation, the Board also noted comments on its proposed rule suggesting that it define "acting in concert." The Board declined to adopt a definition at that time because it believed it lacked sufficient experience related to the issue. However, the Board provided some general guidance stating that it "regards two or more persons . . . as acting in concert when they have joined together formally or informally for the purpose of acquiring voting securities of a bank or bank holding company," such as "a group of persons who have identified themselves as a group for purpose of the Federal securities laws . . . ."[117]

In 1987, the Board amended Regulation Y to reflect the changes to the CIBCA made by the ADAA.[118] The amended regulation required publication of the name of each acquiring person and solicitation of comments from the public in connection with CIBCA notices, although publication was not required if it would threaten the safety and soundness of the institution. In addition, the amended regulation required the Board to investigate the competence, experience, integrity, and financial ability of each proposed acquirer, make an independent determination of the accuracy and completeness of the information submitted, and prepare a written report of investigation. Furthermore, the amended regulation also allowed the Board to extend the time period for disapproval of a CIBCA notice.

---

[115] 12 C.F.R. § 225.2(l) (1984). The preamble to the revised regulation provided helpful examples and clarification of this definition. 49 Fed. Reg. 794, 800 (Jan. 5, 1984).

[116] 49 Fed. Reg. 794, 800 (Jan. 5, 1984) (referring to the Board's 1982 Policy Statement on Nonvoting Equity Investments by Bank Holding Companies to explain its amendments in the context of the BHCA). *See* 12 C.F.R. § 225.143(d)(6)(iii) (2018); Letter from Theodore E. Allison, Assistant Sec'y, to [REDACTED BY BOARD], 1974 Fed. Res. Interp. Ltr. LEXIS 33 (Aug. 30, 1974).

[117] 49 Fed. Reg. 794, 817 (Jan. 5, 1984).

[118] 52 Fed. Reg. 23,021, 23,021 (June 17, 1987).

In 1990, the Board amended Regulation Y to reduce the regulatory burden associated with filing of notices pursuant to the CIBCA by removing the requirement that a person who has already received regulatory clearance to acquire ten percent or more of the voting shares of a SMB or BHC file additional notices for subsequent acquisitions resulting in ownership of between 10% and 24.9% of the shares of a SMB or BHC.[119] The Board stated that requiring a person that has already been subject to regulatory review to file a notice to acquire additional shares within those thresholds imposed a significant regulatory burden.[120] Before the amendment, a shareholder that had already been subject to the regulatory review process to acquire less than twenty-five percent of the shares of a SMB or BHC was required to seek further approval to acquire a small number of additional shares, even with a minimal expenditure of funds. Furthermore, a person that had already received regulatory clearance to own less than twenty-five percent of the shares of a SMB or BHC was required to file a notice in connection with a redemption of shares of another shareholder by the SMB or BHC, even though the percentage ownership of the individual increased only minimally, the individual expended no funds, and the individual acquired no additional shares. The amendment reduced regulatory burden in these circumstances.

The amendment applied retroactively; it applied to all persons who received approval under the CIBCA, section 3 of the BHCA, or section 18(c) of the FDIA, to hold between ten and twenty-five percent of the voting shares of a bank or bank holding company, regardless of when the approval was granted, unless the Board or appropriate Reserve Bank previously limited additional acquisitions by these persons.[121]

The amendment also provided relief to any person that was a member of a group acting in concert that had lawfully acquired and maintained control of a SMB or BHC after filing a notice under the CIBCA, or application under section 3 of the BHCA or section 18(c) of FDIA. A member of a group subject to such previous review could acquire additional voting shares of the SMB or BHC without filing a prior notice under CIBCA. However, if such an individual would cross the ten percent threshold without a previous approval to acquire ten percent or more of the voting shares in his or her individual capacity, the individual would be required to file a notice under the CIBCA to

---

[119] 55 Fed. Reg. 47,843, 47,843 (Nov. 16, 1990).
[120] *Id.*
[121] *Id.*

acquire additional shares, despite having participated (and receiving non-objection) in a previous filing as a member of a group.[122]

The amendment did not change other aspects of the Board's authority. When considering new proposals to acquire between ten and twenty-five percent of the voting shares of a SMB or BHC, the Board continued to review the financial, managerial, competitive, and other statutory factors under the CIBCA to determine whether any of these factors warranted a limitation on additional acquisitions.[123] The Board also retained supervisory authority to address situations where a change in circumstances would make additional acquisitions by a current owner unsafe or unsound for the SMB or BHC (e.g., examinations, inspections, and enforcement actions). Furthermore, the Board continued to require the filing of a CIBCA notice when a person (or persons acting in concert) intended to acquire twenty-five percent or more of the voting shares of a SMB or BHC even if they previously filed a notice to acquire between ten and twenty-five percent of the voting shares of the same SMB or BHC without objection by the Board.

In 1997, the Board amended the portion of Regulation Y that implements the CIBCA to incorporate past interpretations, provide guidance on current views, and reduce regulatory burden.[124] The Board added definitions of key terms to provide greater clarity to acquiring persons. In particular, the amended regulation defined the terms "*acting in concert*" and "*immediate family,*" and included presumptions that immediate family members act in concert and that the acquisition of a loan in default that is secured by voting securities of a SMB or BHC is presumed to be an acquisition of the underlying securities.[125]

The amended regulation also reduced regulatory burden in several ways. First, the revised rule eliminated the requirement that persons who have received authorization to control in excess of ten percent, but less than twenty-five percent, of the voting shares of a SMB or BHC file a second notice before acquiring control of twenty-five percent or more of the voting shares of the same institution.[126] The Board stated that it would apply this new rule to existing control relationships, unless the Board or Reserve Bank had specifically limited the amount of shares that the person may control without

---

[122] *Id.* at 47,845.
[123] *Id.*
[124] 62 Fed. Reg. 9290, 9290 (Feb. 28, 1997).
[125] *Id.*
[126] *Id.* at 9316.

additional review under the CIBCA.[127] The Board also stated that a limitation may be imposed on future transactions if a person appears to have sufficient financial resources to acquire more than 10%, but less than 100% of the shares of a SMB or BHC.[128] Second, the revised rule permitted a person whose ownership percentage increased as the result of an action outside the control of the person, such as a redemption of voting securities by the issuing BHC or a sale of shares by a third party, to file a notice within ninety calendar days *after* the transaction occurs, provided that the person does not reasonably have advance knowledge of the triggering transaction.[129] Third, the revised rule provided more flexibility for newspaper announcements of filings under the CIBCA by permitting notificants to publish the announcement up to fifteen calendar days before submitting the filing.[130] Fourth, the revised rule eliminated the requirement that the newspaper notice of a CIBCA filing include a statement of the specific percentage of shares proposed to be acquired.[131] Fifth, the revised rule no longer required prior notice from a regulated institution to change a senior executive officer or director if the institution underwent a change in control within the previous two years.[132] Finally, the revised rule eliminated the requirement that all financial institutions file reports of extensions of credit by the institution and its affiliates when the credit was secured by twenty-five percent or more of any class of voting securities of an insured depository institution.[133] The revised rule

---

[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id. See also* 12 C.F.R. § 225.43(a)(3)(ii)(A) (1996) ("The newspaper announcement shall state: (i) The name of each person identified in the notice as a proposed acquirer of the bank or bank holding company and *the percentage of shares proposed to be acquired* . . . ." (emphasis added)); 12 C.F.R. § 225.43(c)(2)(i) (1998) ("The newspaper announcement shall state: (i) The name of each person identified in the notice as a proposed acquiror of the bank or bank holding company . . . .").
[132] 62 Fed. Reg. 9290, 9341 (Feb. 28, 1997) (implementing the elimination of the requirement by the Regulatory Relief Act). *See supra* note 106 and accompanying text (summarizing elimination of the Regulatory Relief Act requirement that regulated institutions file a prior notice to change a senior executive officer or director if the institution underwent a change in control within the previous two years).
[133] 12 C.F.R. § 225.44(d) (1998) (eliminating the reporting requirement for certain institutions that meet the sufficient conditions); 62 Fed. Reg. at 9341

limited the reporting requirement to credit extended by foreign banks and their affiliates.

E. Jurisdiction over SLHCs Transferred to the Board

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred jurisdiction over SLHCs from the OTS to the Board as of July 21, 2011.[134] On September 13, 2011, the Board issued an interim final regulation to fulfill its new supervisory responsibility over SLHCs, which is designated Regulation LL.[135] For the most part, the Board adopted the same rules and processes for SLHC control determinations as it used for BHC and SMB control determinations.[136] However, the transition from OTS to Board rules and processes resulted in some changes. For example, while the OTS commonly accepted rebuttal of control agreements from persons, thereby avoiding filing notice, the Board does not allow investors to avoid filing a CIBCA notice through such agreements.[137]

F. State Change in Control Laws

Most states require notice or application in connection with a change in control of a state-chartered depository institution.[138] There-

---

(implementing the elimination of the report requirement for domestic institutions made by the Regulatory Relief Act); *see supra* note 105 and accompanying text.

[134] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 312, 124 Stat. 1521 (codified at 12 U.S.C. § 5412) (transferring jurisdiction from the Office of Thrift Supervision to the Board of Governors).

[135] Federal Reserve System Interim Final Rule, 76 Fed. Reg. 56,508, 56,508 (Sept. 13, 2011) (to be codified at 12 C.F.R. pt. 238).

[136] Savings and Loan Holding Companies (Regulation LL), 12 C.F.R. §§ 238.31–238.33 (2018) (describing change in control procedures under Regulation LL); Interim Final Rule, 76 Fed. Reg. at 56,509 (Sept. 13, 2011).

[137] Interim Final Rule, 76 Fed. Reg. at 56,509–10 (Sept. 13, 2011). The Board did not include OTS processes related to control determinations and rebuttals under HOLA in Regulation LL; such OTS processes included the OTS rebuttable control factors and process set forth in former (12 C.F.R. § 574.4(b) and (e)), the certification of ownership in former (12 C.F.R. § 574.5), and the rebuttal agreement in former (12 C.F.R. § 574.100).

[138] CONFERENCE OF STATE BANK SUPERVISORS, A PROFILE OF STATE CHARTERED BANKING 88 (16th ed., 1996); Michael P. Malloy, *State Change-*

fore, persons seeking to acquire direct or indirect control of a BHC, SLHC, SMB, or for that matter, any state-chartered depository institution should contact the appropriate state agency.

III. Definitions and Presumptions

A. Defined Terms

Many terms used in the CIBCA and Regulations Y and LL have specific meanings for analysis of control under the CIBCA. These definitions may vary from ordinary expectations about the meaning of terms.

1. Person

The CIBCA defines the term "person" as "an individual, corporation, partnership, trust, association, joint venture, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed."[139] Regulations Y and LL add "bank" to the definition of a "person."[140] Since every word in the definition is singular, a "person" is a single individual or entity. An "individual," while not separately defined, has in practice meant a natural person. The vast majority of CIBCA notices are filed by natural persons.[141] A partnership is a "person" subject to the CIBCA, even if the Board

---

Bank-Control Statutes: Does Mite Make Light of Recent Trends?, 5 ANN. REV. BANKING L. 29, 29 (1986).

[139] Change in Control of Insured Depository Institutions, 12 U.S.C. § 1817(j)(8)(A) (2012).

[140] Bank Holding Companies and Change in Bank Control (Regulation Y), 12 C.F.R. §§ 225.2(l) (2018) (listing the definition of "bank" under Regulation Y), 238.2(j). The FDIC explicitly includes LLCs. 12 C.F.R. § 303.81(g) (2018); FDIC Filing Requirements and Processing Procedures for Changes in Control, 80 Fed. Reg. 65,889, 65,891 (Oct. 28, 2015) (to be codified at 12 C.F.R pt. 303).

[141] BD. GOVERNORS FED. RES. SYS., SUPPORTING STATEMENT FOR THE NOTICE OF CHANGE IN BANK CONTROL, INTERAGENCY NOTICE OF CHANGE IN DIRECTOR OR SENIOR EXECUTIVE OFFICER, AND INTERAGENCY BIOGRAPHICAL AND FINANCIAL REPORT (2017), http://www.federalreserve.gov/boarddocs/reportforms/formsreview/fr2081.20030129_omb.pdf [perma.cc/LD88-39GQ].

determines that the partnership is a qualified family partnership excluded from the definition of a "company" under BHCA.[142]

A trust falls within the definition of "person" in Regulations Y and LL.[143] However, a trust may also be considered a "company" for purposes of the BHCA.[144] Presuming that a trust either does not qualify as a "company" for purposes of the BHCA, or that it has a relationship with SMB, BHC, or SLHC that would appear not to suggest that the trust controls such institution, a trust is a person for CIBCA purposes, and its direct or indirect acquisition of shares of an insured depository institution could be subject to CIBCA notice requirements.

2. Acquisition

The CIBCA does not define the term "acquisition;" however, Regulation Y and LL define "acquisition" to include "a purchase, assignment, transfer, or pledge of voting securities, or an increase in percentage ownership resulting from redemption of voting securities."[145] An acquisition of voting securities through "purchase" may

---

[142] 12 U.S.C. § 1841(o)(10) (2012) (defining the term "qualified family partnership" under the Board's determination).

[143] The three federal banking agencies—the Board, the OCC and the FDIC—define "person" in substantively similar ways, but with slight alterations varying the scope of definition. For the Board, *see* 12 C.F.R. § 225.2(l) (2018) (defining "person" as including "an individual, bank, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity"). For the OCC, *see* 12 C.F.R. § 5.50(d)(11) (2018) (pointing out that the OCC's definition of "person" is virtually identical to the Board's but includes "voting trusts and voting agreements and any group of persons acting in concert"). For the FDIC, *see* 12 C.F.R. § 303.81(g) (2018) (suggesting that the FDIC's definition of "person" appears functionally identical to the OCC's in that "person" means "an individual, corporation, limited liability company (LLC), partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, voting trust, or any other form of entity; and includes each party to a voting agreement and any group of persons acting in concert").

[144] 12 U.S.C. § 1841(b) (2012).

[145] 12 C.F.R. §§ 225.41(b)(1), 238.31(b)(1) (2018). Section 7(j)(1) of the FDIA states: "No person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured depository institution *through* a purchase, assignment, transfer, pledge, or other disposition of voting stock of such insured depository institution . . . ." (emphasis added). *See* 12 U.S.C. § 1817(j)(1) (2018). Therefore, merely becoming the largest shareholder without any change in the number of shares

occur in a variety of ways, including an initial public offering, secondary market purchase, privately negotiated transaction, and automatic investment through an issuer's dividend reinvestment plan.

An acquisition of voting securities through "transfer" may also occur in several ways, including judicial appointment of an executor of an estate pursuant to a will, acceptance of appointment by a trustee, distribution to the beneficiary of a will[146] or trust, and receipt of a gift by a donee. Certain transfers of voting securities to a revocable trust, also known as a "living trust," may not be considered to be acquisitions within the meaning of the CIBCA if such transfers:

(i) Have as beneficiaries the members of the grantor's immediate family;
(ii) Terminate upon the death of the grantor, or if they become testamentary trusts, terminate within twenty-one years and ten months from the date of death of individuals living on the effective date of the trust;
(iii) Contain banking assets only;
(iv) Contain assets from only one grantor;
(v) Do not have shares, certificates, or other evidence of ownership of the trust itself;
(vi) Have a sole trustee, who is usually the grantor, or in the event the grantor becomes incapacitated, a substitute designated by the grantor;
(vii) Are revocable; and
(viii) Are not Massachusetts business trusts.[147]

---

owned or change in percentage ownership does not require the filing of a CIBCA notice.

[146] However, by regulation, a testamentary transfer is exempt from prior notice requirement. *See* 12 C.F.R. § 225.42(b)(1)(i) (2018). *See also* H.R. REP. No. 95-1383, at 21 (1978) ("The phrase 'other disposition' is not meant to include a testamentary and intestate transfer of bank stock representing voting control. If an owner of a bank plans to transfer his ownership in a will to his family, that transfer is not considered a transfer subject to these titles.").

[147] Letter from J. Virgil Mattingly, Jr., Gen. Counsel, to Dennis Wallace, President, The Farmers State Bank of Burn, 1991 Fed. Res. Interp. Ltr. LEXIS 296 (Mar. 25, 1991). *See also* Letter from Scott G. Alvarez, Assoc. Gen. Counsel, to Douglas J. McClintock, Esq., Thacher Proffitt & Wood, 1996 Fed. Res. Interp. Ltr. LEXIS. 123 (June 7, 1996).

If there are multiple trustees at the time of a transfer of voting securities to such a revocable trust, it is possible that only the non-grantor voting trustee(s) would be viewed as engaging in the acquisition of voting securities, provided that the grantor's control over the shares transferred to the revocable trust has been previously reviewed by the Federal Reserve under the CIBCA. If a successor trustee accepts appointment after the transfer to the revocable trust because the grantor becomes incapacitated, it is possible that the acceptance of the appointment would be viewed as an acquisition of voting securities, which would trigger a CIBCA notice from the successor trustee (and possibly beneficiaries) if aggregate ownership or control of the successor trustee crossed applicable filing thresholds. A transfer may also occur upon the receipt of voting securities by the beneficiary of a trust after a grantor or other beneficiary dies.

An acquisition of voting securities through a "pledge" may occur when a person transfers the right to vote securities to a bank or other lenders as collateral for a loan. While a borrower may pledge voting securities of a SMB, BHC, or SLHC as collateral for a loan, the borrower may still retain the right to vote the pledged securities. If so, the pledge does not constitute an acquisition of voting securities by the lender.[148]

An acquisition through the "redemption" of voting securities that causes an increase in percentage ownership by a person, occurs on the date that the issuer redeems or repurchases the voting securities. Voting securities that are redeemed are usually retired by the issuer, meaning that they no longer represent a share of ownership in the issuer. However, an institution may repurchase voting securities, such as common stock, holding them as treasury shares. Treasury shares are issued but not outstanding. Although treasury shares continue to represent a share of ownership in the issuer, they are not included when calculating the percentage of shares owned, controlled, or held by a person. Therefore, interpretative letters issued by the Board staff view increases in percentage ownership of outstanding shares of any class of voting securities arising from a repurchase as an acquisition of voting securities.[149]

---

[148] According to the U.S. House Report issued in conjunction with enactment of the CIBCA, a "pledge . . . should only be considered a transfer of control if the pledgee acquires voting control of the bank whose stock is pledged." *See* H. R. REP. No. 95-1383, at 21.

[149] *See, e.g.*, Letter from William W. Wiles, Sec'y, to Paul J. Duggan, Jackson Boulevard Fund Ltd., 1997 Fed. Res. Interp. Ltr. LEXIS 153 (Oct. 6, 1997);

The death of a shareholder might not result in an acquisition via increase in percentage ownership of any other person or group with respect to ten percent or more of the voting securities of an institution with securities registered pursuant to section 12 of the Exchange Act, unless such other person is the recipient of a transfer of shares from the decedent's estate. Nor might an acquisition occur if a person becomes the largest individual shareholder of an institution without securities registered pursuant to section 12 of the Exchange Act. An increase in percentage ownership of voting securities caused by the death of another person is not a redemption of voting securities, and so percentages for the surviving shareholders would not change. However, it still may be prudent for such a person who becomes the largest shareholder by virtue of the death of another shareholder to file a CIBCA notice if it is likely they would engage in other transactions that would constitute an acquisition. For instance, a person's purchase of a single share of outstanding voting securities of a BHC after an increase in the person's percentage ownership of the BHC because of the death of another person might trigger the need for a prior CIBCA notice if the purchaser would hold ten percent or more of the voting securities of an institution with securities registered pursuant to section 12 of the Exchange Act.

3. Acting in Concert

The CIBCA prohibits the acquisition of control of an insured depository institution by an individual person, or group of persons acting in concert, unless the person(s) provide prior notice to the appropriate federal banking agency without agency disapproval of the proposed acquisition. "Acting in concert" is not defined in the statute, but is defined in Regulations Y and LL to include "knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a [BHC, SMB, or SLHC] whether or not pursuant to an express agreement."[150] Individuals need not enter into a formal

---

Letter from Barbara R. Lowery, Assoc. Sec'y, to [TEXT REDACTED BY THE AGENCY], 1985 Fed. Res. Interp. Ltr. LEXIS 58 (Aug. 7, 1985); Letter from James McAfee, Assoc. Sec'y to [TEXT REDACTED BY THE AGENCY], 1985 Fed. Res. Interp. Ltr. LEXIS 34 (June 4, 1985).

[150] 12 C.F.R. §§ 225.41(b)(2), 238.31(b)(2) (2018). One party coming together to act in concert with another party may be viewed as an "acquisition" of the shares of the second party by the first party.

agreement or even know each other to be considered persons acting in concert.[151]

4. Control

The CIBCA defines the term "control" as "the power, directly or indirectly, to direct the management or policies of an insured depository institution or to vote twenty-five per centum or more of any class of voting securities of an insured depository institution."[152] The general definition of "control" in subpart A of Regulation Y does not apply to the acquisition of control under the CIBCA.[153] Subpart E of Regulation Y and subpart D of Regulation LL state that the acquisition of voting securities of a SMB, BHC, or SLHC constitutes the "acquisition of control" under the CIBCA "if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote twenty-five percent or more of any class of voting securities of the institution."[154]

Regulations Y and LL provide that if transactions result in a person or group of persons acquiring less than twenty-five percent of any class of voting securities of an institution and if transactions do not trigger the ten percent rebuttable presumption set forth in the regulations, the transactions are not deemed by the Board to constitute the acquisition of control for purposes of the CIBCA.[155]

---

[151] Lindquist & Vennum v. FDIC, 103 F.3d 1409, 1413 (8th Cir. 1997 *reh'g, denied,* Donohoo v. FDIC, Nos. 95-3256, 95-3284, 1997 U.S. App. LEXIS 5506 (8th Cir. Mar. 21, 1997), *cert. denied,* 522 U.S. 821 (1997).

[152] 12 U.S.C. § 1817(j)(8)(B) (2012). *See also* Pauline B. Heller, FEDERAL BANK HOLDING COMPANY LAW § 6.06 (12th release, 1997). The preamble to the FDIC's 2015 revised regulation states: "The FDIC . . . seeks to clarify in the final rule that the definition of 'control' includes two standards: One based on the amount of voting securities controlled by a person and the other based on a facts-and-circumstances analysis of whether a person has the power to direct the management or policies of a covered institution." Filing Requirements and Processing Procedures for Changes in Control, 80 Fed. Reg. 65,889, 65,893 (Oct. 28, 2015).

[153] The general definition of "control" in Regulation Y specifically states that it does not apply to subpart E, which is the section of the regulation that is applicable to CIBCA notices. 12 C.F.R. § 225.2(e) (2018). Regulation LL does not include such a specific statement. 12 C.F.R. § 238.2(e) (2018).

[154] 12 C.F.R. §§ 225.41(c)(1), 238.31(c)(1) (2018).

[155] 12 C.F.R. §§ 225.41(f), 238.31(f) (2018).

5. Immediate Family

Regulations Y and LL define the term "immediate family" to include "a person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the person's spouse."[156] The Board added definitions of immediate family and acting in concert to Regulation Y in 1997 to clarify the scope of the regulation.[157]

An "immediate family" relationship can arise from a biological relationship (e.g., son or daughter born to a person) or legal relationship (e.g., becoming a spouse or stepmother or child through adoption).[158] A person who becomes a member of an immediate family by birth remains a member of that immediate family for the length of their life. A person that becomes a member of an immediate family through the creation of a legal relationship (e.g., marriage) could be considered to remain a member of that immediate family group even after the termination of the legal relationship (e.g., divorce or death of a spouse) because the person may have "knowing participation" in the acquisition of voting securities, thus qualifying as acting in concert under the broad definition of that term in the regulations.

The determination of membership in an immediate family group depends upon family relationships to a particular person.[159] However, it is not presumed that an immediate family member of an

---

[156] 12 C.F.R. §§ 225.41(b)(3), 238.31(b)(3) (2018). These revisions to Regulation Y codified the Board's view that immediate family members act in concert. 12 C.F.R. §§ 225.41(b)(3), (d)(2) (2018). The definition of "immediate family" in the FDIC's 2015 revised regulation is similar, although it includes a catch-all: "whether biological, adoptive, adjudicated, contractual, or *de facto*. . . . ." 12 C.F.R. § 303.81(f) (2018). The FDIC's preamble to its 2015 revision also states: "The FDIC would interpret the term "sibling" as one of two or more individuals having at least one common parent." Filing Requirement and Processing Procedures for Changes in Control, 80 Fed. Reg., at 65,891.

[157] Bank Holding Companies and Change in Bank Control (Regulation Y), 62 Fed. Reg. 9290, 9316 (Feb. 28, 1997).

[158] 12 C.F.R. §§ 225.41(b)(3), 238.31(b)(3) (2018) (including both biological and legal family relationships within the definition of "immediate family.").

[159] 12 C.F.R. §§ 225.41(b)(3), 238.31(b)(3) (2018).

immediate family member is a part of a group acting in concert.[160] For example, assume the following family relationships:

Name	Relationship to Jack Smith	Relationship to Bob Smith
Jack Smith	Self	Brother
Jill Smith	Spouse	Sister-in-law
Jeff Smith	Son	Nephew
Bob Smith	Brother	Self
Brenda Smith	Sister-in-law	Spouse
Bonnie Smith	Niece	Daughter

The definition of immediate family does not include a niece or nephew, nor an aunt, uncle, or cousin.[161] Therefore, all of the members of the Smith family are immediate family members of Jack Smith except Bonnie Smith. Similarly, all of the members of the Smith family are immediate family members of Bob Smith except Jeff Smith. Jeff Smith is not a member of the Bob Smith family group because, as the son of Jack Smith, he is Bob Smith's nephew, and thereby falls outside the scope of the presumption. However, depending on the facts surrounding the acquisition of securities by the Smith families, Jeff Smith may still be considered to be part of a group acting in concert with the members of the Bob Smith family group if the other facts suggest a joint understanding or parallel action toward acquiring control.[162]

6. Voting Securities

The CIBCA refers to "voting shares" without defining the term.[163] Regulations Y and LL define the term "voting securities" as:

> [S]hares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statute, charter, or in any manner, entitle the holder: (i) To vote for or to

[160] *See* 12 C.F.R. §§ 225.41(d), 238.31(d) (2018).
[161] *See* 12 C.F.R. §§ 225.41(b)(3), 238.31(b)(3) (2018) (excluding from the definition of "immediate family" nieces, nephews, aunts, and uncles).
[162] 12 C.F.R. §§ 225.41(b)(2), 238.31(b)(2) (2018) ("Acting in concert includes participating in a joint activity or parallel action towards a common goal of acquiring control of a savings and loan holding company . . . .").
[163] *See* 12 U.S.C. § 1817(j)(2)(a) (2012).

> select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or (ii) To vote on or to direct the conduct of the operations or other significant policies of the issuing company.[164]

This is a broad definition. It explicitly includes partnership shares or interests.[165] It also is applied to the managers of limited liability companies who function in ways similar to directors, trustees, or partners.[166] However, the definition is narrower than the definition the Board initially proposed when it proposed amending Regulation Y.[167] The initial proposal would have treated preferred stock and limited partnership interests that entitled the holders to vote for or select directors, trustees, or partners (or persons exercising similar functions), or to vote on other significant matters as voting securities.[168] The final regulation narrowed the scope of preferred stock and limited partnership interests that would qualify as voting securities by excluding securities with voting rights "customarily provided by statute solely with regard to matters that adversely and significantly affect the rights or preference of the stock or other interest . . . ."[169] After the OTS's jurisdiction over SLHCs was transferred to the Board in 2011, the Board's Regulation LL incorporated the same definition of voting securities as Regulation Y.[170]

The final regulations provide examples of customary statutory rights: (i) issuance of additional amounts or classes of senior securities; (ii) modification of the terms of the security or interest; (iii) dissolution of the issuing company; or (iv) payment of dividends by the issuing company when preferred dividends are in arrears.[171] Shares or interests

---

[164] 12 C.F.R. §§ 225.2(q), 238.31(r) (2018). For rationale behind the Board's definition of "voting securities," *see* Revision of Regulation Y, 49 Fed. Reg. 794, 800 (Jan. 5, 1984). *See also* Robert M. Taylor, III, *Equity Investment Opportunities Available to Banks and Bank Holding Companies*, 104 BANKING L.J. 127, 131–33 (1987).

[165] 12 C.F.R. §§ 225.2(q), 238.31(r) (2018).

[166] *Id.*

[167] Proposed Revision of Regulation Y, 48 Fed. Reg. 23,520, 23,522 (May 25, 1983).

[168] *Id*. at 23522, 23538 (May 25, 1983).

[169] 49 Fed. Reg. 791, 799–800 (Jan. 5, 1984).

[170] *Compare* 12 C.F.R. § 238.2(r) (2018), *with* 76 Fed. Reg. 56,508, 56,534 (Sept. 13, 2011).

[171] 12 C.F.R. §§ 225.2(q)(2), 238.2(r)(2) (2018).

with these customary statutory rights are nonvoting securities.[172] Only the Board can determine the status of additional rights as customary statutory rights under its regulations.[173] Organizing documents that give a security holder the right to vote on the issuance of *pari passu* or junior securities might be viewed by the Board as a voting security because *pari passu* or junior securities are, by definition, not senior securities and thus may not qualify as "customary."

Generally, shares or interests with any right to select, add, remove, confirm or replace a director, general partner, or other management official of an issuing company are voting securities.[174] However, securities may be considered nonvoting if a power to remove a director, general partner, or other management official is limited to extreme cases (e.g., felony conviction and gross negligence).

Furthermore, the Board affirmed with its 1984 revision to Regulation Y its long held view that nonvoting preferred shares that gain the right to elect or appoint a director as the result of the nonpayment of dividends would not be considered voting securities under the BHCA until such time as the right to vote or appoint is effective.[175] The Board's General Counsel, through a no action letter, applied this precedent to preferred stock issued to the U.S. Treasury as part of the Capital Purchase Program (CPP).[176] Under the terms of the preferred stock, the U.S. Treasury had the right to elect or appoint two directors of an issuer if the issuer failed to pay preferred dividends on the stock for six quarters or more.[177] The Board's General Counsel stated that staff would not recommend to the Board that it view CPP preferred stock

---

[172] 12 C.F.R. § 225.2(q)(2); 12 C.F.R. § 238.2(r)(2) (2018).

[173] *See e.g.*, Revision of Regulation Y, 49 Fed. Reg. at 794 (reviewing the Board's adoption of changes to Regulation Y).

[174] 12 C.F.R. §§ 225.2(q)(1), 238.2(r)(1) (2018). For a summary of comments urging the Board to adopt a less expansive definition of "voting securities," *see* Memorandum from Legal Division to Board of Governors, 1997 Fed. Res. Interp. Ltr. LEXIS 221 (Feb. 10, 1997).

[175] Bank Holding Companies and Change in Bank Control; Revision of Regulation Y, 49 Fed. Reg. 794, 818 (Jan. 5, 1984) (codified at 12 C.F.R. Part 225) ("With respect to nonvoting preferred stock that has the right to elect directors upon failure to pay preferred dividends, the Federal Register notice accompanying the proposed revision stated that such nonvoting stock would be considered a voting security only at the time the right to vote arises.").

[176] Letter from Scott G. Alvarez, Gen. Counsel, to Joseph J. Samarias, Esq., Chief Counsel, Office of Fin. Stability, 2012 Fed. Res. Interp. Ltr. LEXIS 22 (Dec. 7, 2012).

[177] *Id.*

with such rights as voting securities under the BHCA, HOLA, or CIBCA until such time as the right to vote or appoint became effective.[178] Furthermore, the Board's General Counsel stated that staff would not recommend to the Board that it view CPP preferred stock as voting securities in the hands of a purchaser of such stock from the U.S. Treasury if the purchaser commits to the Board not to exercise any right to select a person to the board of directors of the issuing firm.[179]

Shares of stock issued by a single issuer are deemed to be the same class of voting shares, regardless of differences in dividend rights or liquidation preference, if the shares are voted together as a single class on all matters for which the shares have voting rights other than matters described as customary statutory rights that affect solely the rights or preferences of the shares.[180] However, rights unique to a class of voting securities could create a separate class of voting securities. For example, a class of voting securities that has the right to appoint a director separate and apart from the right of holders of another class of voting securities to vote for directors could be considered a separate class of voting securities.

B. Presumptions Regarding Control

The CIBCA and Regulations Y and LL establish several presumptions for determining control under the CIBCA.[181] The presumptions may result in the requirement to file a CICBA notice with the Board related to the acquisition of voting securities of SMB, BHC, or SLHC. However, the Board will not require the filing of a CIBCA notice for any acquisition of voting securities under a presumption of control if the Board finds that the acquisition will not result in

---

[178] *Id*. ("Given the similarity of the terms of the CPP shares to those previously considered by the Board, staff would recommend that the Board not consider the CPP shares to be 'voting securities' for purposes of the BHC Act, HOLA, or the CIBC Act in the hands of a successful bidder so long as the bidder commits to the Board in writing not to exercise any right provided in a CPP share certificate of designation to select a person to the board of directors of a CPP firm."). *See also* Letter from Robert deV. Frierson, Sec'y, to Steven R. Stenhaug, Senior Inv. Officer, Mayo Clinic, 2016 Fed. Res. Interp. Ltr. LEXIS 25 (Aug. 31, 2016); Letter from Margaret McCloskey Shanks, Deputy Sec'y, to Emanuel J. Friedman, Chief Exec. Officer, EJF Capital LLC, 2016 Fed. Res. Interp. Ltr. LEXIS 21 (July 27, 2016).

[179] Letter from Scott G. Alvarez to Joseph J. Samarias, *supra* note 176.

[180] 12 C.F.R. §§ 225.2(q)(3), 238.2(r)(3) (2018).

[181] 12 C.F.R. §§ 225.41(c)(2), 238.31(c)(2) (2018).

control.[182] The Board will afford a person seeking to rebut a presumption the opportunity to present his or her views.[183] Rebuttal of presumptions requires action by the Board itself.[184] Rebuttal determinations are not delegated to individual Board staff members or the Reserve Banks.[185]

1. Rebuttable Presumption of Control

Regulations Y and LL each establish a rebuttable presumption that the acquisition of voting securities of a SMB, BHC, or SLHC constitutes the "acquisition of control" under the CIBCA:

> If immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote ten percent or more of any class of voting securities of the institution, and if:
> (i) The institution has registered securities under section 12 of the Exchange Act; 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.[186]

The ten percent presumption is based on the first prong of the CIBCA's definition of "control;" "the power to . . . direct the management or policies of an insured bank."[187] The word "person" in

---

[182] 12 C.F.R. §§ 225.41(g), 238.31(g) (2018).
[183] 12 C.F.R. §§ 225.41(g), 238.31(g) (2018).
[184] *Id.*
[185] *Id.*
[186] 12 C.F.R. §§ 225.41(c)(2), 238.31(c)(2) (2018). A footnote also states: "If two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of voting securities of the state member bank or bank holding company, each person must file prior notice to the Board." *Id*.
[187] 12 U.S.C. § 1817(j)(8)(B) (2012). The OCC and FDIC regulations implementing the CIBCA explicitly state that the power to vote ten percent or more of a class of voting securities of an institution national bank will be presumed (subject to rebuttal) to be an acquisition by a person of the power to direct that institution's management or policies. 12 C.F.R. §§ 5.50(f)(2)(iii) (2018) (pertaining to the OCC), 303.82(b)(1) (2018) (pertaining to the FDIC). *See also*

subsection (ii) is singular rather than plural.[188] Furthermore, subsection (2)(ii) omits the parenthetical "or persons acting in concert" that is included in the introduction to subsection (2), which is based upon the second prong of the statutory definition of control (i.e., the acquisition of twenty-five percent or more of any class of voting securities).[189] Based upon the plain language of the regulation, the Board has limited its interpretation of "person" in subsection (ii) to a single person and not a group of persons.[190] Therefore, a person acquiring ten percent or more of any class of an institution's outstanding voting securities would not be relieved of the need to file a CIBCA notice if a group of persons owned, controlled, or held with the power to vote a greater percentage of the voting securities of the institution.

Robert Bloom, *Changes in Bank Control,* 2 ANN. REV. BANKING L. 21, 27–28 (1983):

> Only a careful reading of the CIBCA provides a basis for the ten percent test. . . . [T]he agencies focus on the first part of the definition which includes "power, directly or indirectly, to direct the management or policies of an insured bank." Using this language, the agencies concluded they could require CIBCA notices before the transfer of as little as ten percent of the outstanding shares of a widely-held institution.

[188] 12 C.F.R. § 225.31(c)(2)(ii) (2018).

[189] 12 U.S.C. § 1817(j)(8)(B) (2012).

[190] Letter from Robert deV. Frierson, Assoc. Sec'y, to Carl V. Thomas, 1999 Fed. Res. Interp. Ltr. LEXIS 17 (Feb. 10, 1999):

> The Board's regulations require a filing under the CIBC Act whenever an individual or a group acting in concert acquires more than 10 percent of the shares of a state member bank and no other single shareholder owns a larger percentage of shares. Because you and Notificants acquired over 10 percent of Bank shares and no other shareholder owned as many shares, the Reserve Bank informed you and Notificants that a notice under the CIBC Act was required (citation omitted).

Cf. Board Correspondence from Ms. Nardolilli and Mr. Wright to Mr. Mattingly, 1994 Fed. Res. Interp. Ltr. LEXIS 48 (Apr. 15, 1994); Letter from J. Virgil Mattingly, Jr., Gen. Counsel, to Robert E. Mannion, Esq., Arnold & Porter, 1991 Fed. Res. Interp. Ltr. LEXIS 261 (Dec. 30, 1991).

2. Rebuttable Presumptions of Concerted Action

Regulations Y and LL establish rebuttable presumptions that the following persons act in concert: (i) a company and any controlling shareholder, partner, trustee, or management official; (ii) companies under common control; (iii) an individual and his or her immediate family; (iv) parties to an agreement to acquire, vote or transfer control of voting securities; (v) joint filers under securities laws; and (vi) a trustee and trust.[191] The voting securities owned, controlled, or held with the power to vote by any of these persons could be combined for analysis of control under the CIBCA. For example, the voting common stock of a BHC or SLHC owned by a person, immediate family members of that person, a trust for which that person serves as trustee, and a company controlled by that person might be aggregated to analyze control of a group acting in concert under the CIBCA.

a) Company and Controlling Shareholder, Partner, Trustee, or Management Official

Regulations Y and LL each establish a rebuttable presumption that a company and any controlling shareholder, partner, trustee, or management official[192] are acting in concert if both the company and the person own voting securities of the same institution.[193] For example, if a company and its controlling shareholder both own voting securities of a BHC, they would be presumed to be acting in concert for purposes of the CIBCA. In this situation, the Board also would consider application of the BHCA. If the company owns a very small percentage of the BHC and the controlling shareholder is an individual that owns a very large percentage of the BHC, the Board may conclude that attribution of the voting securities to the company is not appropriate under the BHCA because control more clearly is directed by the individual and not by the company. If so, any filing related to the acquisition of control would be filed by the individual under the

[191] 12 C.F.R. §§ 225.41(d), 238.31(d) (2018).
[192] 12 C.F.R. §§ 225.2(i), 238.2(g) (2018) (defining management official). *See also* 12 C.F.R. § 5.50(d)(9) (2018) (OCC) (defining management official); and 12 C.F.R. § 303.81(h) (2018) (FDIC) (defining management official). The OCC and FDIC explicitly include the manager of an LLC within the definition of management official.
[193] 12 C.F.R. §§ 225.41(d)(1) (2018), 238.31(d)(1) (2018) (establishing a presumption of concerted action).

CIBCA rather than by the company under the BHCA.[194] In any event, management officials of a company are not presumed to be acting in concert with each other if the company does not own any voting securities of a SMB, BHC, or SLHC.[195]

b) Companies Under Common Control

Regulations Y and LL each establish a rebuttable presumption that companies under common control are acting in concert.[196] For example, if the combined ownership of three persons constituted thirty-three percent of the voting securities of one company and twenty-five percent of the voting securities of another company, the two companies would be presumed to be acting in concert for purposes of the CIBCA. If the proposed acquisition of the voting securities of a SMB, BHC, or SLHC by those two companies would cross applicable filing thresholds, the companies would be required to file a CIBCA notice.[197] No other connection between the companies or their owners is required for this presumption to apply. Common control alone triggers this presumption.

c) Individual and Immediate Family

Regulations Y and LL each establish a rebuttable presumption that an individual and an individual's immediate family are acting in

[194] Vickars-Henry Corp. v. Bd. of Governors of the Fed. Res. Sys., 629 F.2d 629, 634 (9th Cir. 1980) (upholding the board's decision to treat Vickars-Henry Corp. as an individual for purposes of control under BHCA). *See also* Announcement by Bd. of Governors of the Fed. Reserve Sys., Actions of the Board; Applications and Reports Received During the week Ending Nov. 19, 1977 (Nov. 19, 1977), H.2, 1977 No. 47 (announcing application decisions); Letter from Jennifer J. Johnson, Deputy Sec'y, to A. Patrick Doyle, Esq., Arnold & Porter, 1995 Fed. Res. Interp. Ltr. LEXIS 19 (Sept. 29, 1995) (allowing filing as an individual under CIBCA rather than the BHCA); Letter from John D. Hawke, Jr., Gen. Counsel, to Carl N. Byers, Esq., Heltzel, Byers & Upjohn, 1977 Fed. Res. Interp. Ltr. LEXIS 37 (June 16, 1977) (denying a request to be considered a BHC rather than individuals for purposes of control under BHCA).

[195] 12 C.F.R. §§ 225.41(d), 238.31(d) (2018).

[196] 12 C.F.R. §§ 225.41(d)(3), 238.31(d)(3) (2018).

[197] *Id*.

concert.[198] Adult members of immediate family groups could try to rebut the presumption, arguing that they make independent decisions regarding the acquisition, voting, and transfer of control of voting securities. They also could argue that estrangement or animosity between members of an immediate family group justify rebuttal of the presumption. For example, one might use evidence of estrangement or animosity between persons whose legal relationship has ended in an effort to rebut the presumption of concerted action by immediate family members (e.g., widow and children of deceased husband not related by blood or through legal adoption by the widow).

Although certain persons with family relationships are not included in the definition of immediate family, there could be other commonalities of enterprise or bases for a presumption of concerted action that require aggregation of voting securities of immediate and extended family members.[199]

For example, there may be an agreement or understanding among immediate and extended family members regarding the acquisition, voting, or transfer of voting securities, such as a person and their cousins. The Board generally looks at the totality of the circumstances to determine whether other connections or behavior constitutes "parallel action toward a common goal of acquiring control" to determine whether extended family members are acting in concert.[200]

d) Trusts, Trustees, Beneficiaries, and Nominees

Regulations Y and LL each establish a rebuttable presumption that a person and any trust for which the person serves as trustee are presumed to be acting in concert.[201] At a minimum, this presumption (if not successfully rebutted) results in the creation of a group of two persons acting in concert—the trustee and the trust. Any voting securi-

---

[198] 12 C.F.R. §§ 225.31(d)(2), 225.41(d)(2) (2018) (stating that an individual and individual's immediate family are presumed to be acting in concert). *See also* 80 Fed. Reg. 65,889, 65,891 (Oct. 28, 2015) (discussing that "immediate family" members have a natural tendency to engage in joint or parallel action to preserve the value of the family investment(s), including voting securities.").

[199] 12 C.F.R. §§ 225.41(b)(2), 225.41(b)(3), 238.31(b)(2) (2018).

[200] 12 C.F.R. §§ 225.41(b)(2), 238.31 (b)(2) (2018).

[201] 12 C.F.R. §§ 225.41(d)(6), 238.31(d)(6) (2018) (stating that persons and any trust for which they serve as trustee are presumed to be acting in concert). The OCC and FDIC regulations differ slightly from the Board's on this presumption. *See, e.g.*, 12 C.F.R. §§ 303.82(b)(2)(v), 5.50(f)(2)(ii)(E) (2018).

ties held by a trust are attributed to *each* of its trustees when calculating the percentage of voting securities owned, controlled, or held by a person; however, if the trust allocates voting or dispositional control to one or more specific trustees and withholds such powers from one or more other trustees, the shares held by a trust might not be attributed to the powerless trustee. Furthermore, the trustee must aggregate voting securities owned or controlled individually or jointly with another person with voting securities held by a trust for which the person serves as trustee.[202] Other presumptions of concerted action, such as the presumption that immediate family members act in concert, may also apply to the calculation of the percentage of voting securities held by a trustee.[203]

For example, assume the following ownership of Fictional Bancshares, a bank holding company, with one million shares of outstanding voting common stock, which are registered pursuant to section 12 of the Exchange Act:

Person	Relationship of Jack Smith to Person	Voting Securities owned by Person
Jack Smith	Self	50,000
Jill Smith	Spouse	20,000
John Miller Trust	Trustee	20,000
Smith Auto, Inc.	Controlling shareholder	20,000
Group Total		110,000

Each of these persons would be required to join a single CIBCA notice filed with the appropriate Reserve Bank because each person is presumed to be acting in concert with the others due to the web of relationships between them, and the group (although none of the persons individually) owns, controls, or holds with the power to vote ten percent of the voting securities of Fictional Bancshares.

Voting securities controlled or held by co-trustees are attributed to each co-trustee to calculate the percentage of voting securities owned, controlled, or held by each co-trustee.[204] However, persons

---

[202] *See, e.g.*, Letter from Margaret McCloskey Shanks, Deputy Sec'y, to David W. Barton, Esq., Bodman PLC, 2014 Fed. Res. Interp. Ltr. LEXIS 19 (Nov. 13, 2014) (describing filing of CIBCA notice by individuals and trusts for which they served as trustee).

[203] 12 C.F.R. §§ 225.41(d)(2), 238.31(d)(2) (2018).

[204] 12 C.F.R. §§ 225.41(d)(2), n.1, 238.31(d)(2) (2018), n.2.

who serve as co-trustees are *not* presumed to be acting in concert with each other based merely on their co-fiduciary roles.

Voting securities may be attributed to a beneficiary of a trust in certain circumstances. The beneficiary of a trust has an equitable interest in the trust and, thereby, indirect ownership of any property held by the trust.[205] The beneficiary may also derive a present or future economic benefit from the trust.[206] The beneficiary of a trust usually does not have the power either to vote or to control the disposition of securities held by the trust, which power usually resides with the trustee who holds legal title to assets held by a trust.[207] However, Regulations Y and LL require the filing of a CIBCA notice based on the fact that an acquiring person will "own" twenty-five percent or ten percent of the voting securities of a SMB, BHC, or SLHC immediately after a proposed transaction.[208] The Board has not taken a position on the attribution of securities to a person if the person only has a beneficial ownership interest in voting securities of a SMB, BHC, or SLHC.[209]

If a person is not a trustee, but rather is a member of a trust advisory committee, which may have the power under the trust to (i) direct the voting of shares of a SMB, BHC, or SLHC; (ii) appoint or remove a trustee; or (iii) dissolve the trust, the person may be viewed as having the power to vote SMB, BHC, or SLHC voting securities held by the trust and to "control" such securities. The advisory committee member may be a beneficiary of the trust, an immediate family member of a beneficiary of a trust, or an independent person (such as a bank or trust company). It is also possible that the trust instrument grants a beneficiary the power to do the things listed above for a member of any advisory committee. In any event, voting securities might be attributed to an advisory committee member or beneficiary having those powers for purposes of calculating the percentage of

---

[205] *See* UNIF. TRUST CODE § 103 (UNIF. LAW COMM'N, amended 2010).
[206] *Id.*
[207] *See id.* § 816(1)(A).
[208] 12 C.F.R. §§ 225.41(c)(1)–(2), 238.31(c)(1)–(2) (2018).
[209] However, the FDIC's presumption of concerted action includes "any trust for which the person is a beneficiary." 12 C.F.R. § 303.82(b)(2)(v) (2018). The OCC's regulations similarly presume that a trust and a beneficiary act in concert but the OCC's presumption includes a carve out for trustees of tax-qualified employee stock benefit plans, solely for purpose of aggregating the trust's shares with any owned by the trustee. 12 C.F.R. § 5.50(f)(2)(ii)(E) (2018).

voting securities owned, controlled, or held with the power to vote by the person under the CIBCA.

In a situation in which the trust instrument directs the trustee to consult a beneficiary or other person regarding the voting of securities of a SMB, BHC, or SLHC, the Board could review the history of such consultation to determine whether the trustee defers to the person consulted such that the person has *de facto* control over voting securities of the SMB, BHC, or SLHC.

Many persons own voting securities through a bank trust department, brokerage account, or individual retirement account. These voting securities are usually registered on the books of an issuer in their "street name" or the name of a nominee, such as Depository Trust Company (DTC).[210] The owner retains the power to direct the voting of securities held in nominee name.[211] Therefore, these securities may need to be included in calculations of the percentage of voting securities owned, controlled, or held with the power to vote by a person under the CIBCA.

e) Parties to an Agreement to Acquire, Vote, or Transfer Control of Voting Securities

Regulations Y and LL each establish a rebuttable presumption that parties to an agreement to acquire, vote, or transfer control of voting securities are acting in concert.[212] A shareholder agreement regarding the purchase, sale, or transfer of voting securities may

---

[210] *See* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 381–82 (Del. 2010) (citing John C. Wilcox et al., *"Street Name" Registration & The Proxy Solicitation Process*, *in* A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES 10-3 (Amy Goodman et al. eds., 4th ed. 2007 & 2008 Supp.)).

[211] *See Kurz,* 992 A.2d at 394 (citing Am. Hardware Corp. v. Savage Arms. Corp., 136 A.2d 690, 692 (Del. Ch. 1957) ("[N]o one but a registered stockholder is, as a matter of right, entitled to vote . . . .") ("DTC is generally regarded as the entity having the power under Delaware law to vote the shares that it holds on deposit for the banks and brokers who are members of DTC. Through the DTC omnibus proxy, DTC transfers its voting authority to those member banks and brokers. The banks and brokers then transfer the voting authority to Broadridge [Financial Services, Inc.], which votes the shares held at DTC by each bank and broker in proportion to the aggregate *voting instructions received from the ultimate beneficial owners*." (emphasis added)). *Id*. at 382.

[212] 12 C.F.R. §§ 225.41(d)(4), 238.31(d)(4) (2018).

trigger this rebuttable presumption.[213] For instance, shareholders may enter into an agreement to establish and maintain an institution's status as a Subchapter S corporation under the Internal Revenue Code,[214] which may grant the issuing institution and other shareholders rights of first refusal to help preserve the status of an institution as a Subchapter S corporation and/or prohibit the sale of securities to persons that would result in disqualification of an institution as a Subchapter S corporation. The Board does not require a formal application when a financial institution elects to become a Subchapter S corporation.[215] However, certain steps taken by an institution or its shareholders to meet the criteria to qualify for Subchapter S status, particularly limitations on the number and types of shareholders, may require applications or notices with the Board under the CIBCA, BHCA, HOLA, or BMA. Therefore, shareholders should consult the appropriate Reserve Bank before entering into an agreement related to election of Subchapter S status to investigate whether its provisions would trigger a rebuttable presumption of concerted action under the CIBCA.[216]

---

[213] *Id.* (providing example for when the rebuttable presumption will come into effect under the statute).

[214] 26 U.S.C. § 1362(a) (2012). Subchapter S corporations can receive pass-through tax treatment for federal income tax purposes, avoiding taxation of dividends at the corporate level. However, dividend restrictions may prevent shareholders from receiving dividends from the institution sufficient to satisfy their proportionate share of personal federal income tax liability.

[215] BD. GOVERNORS FED. RESERVE SYS., DIV. OF BANKING SUPERVISION & REGULATION, SR 96-28, SUBCHAPTER S ELECTION FOR FEDERAL INCOME TAXES (Nov. 7, 1996) (explaining that a formal application is not required to the Board merely upon a financial institution electing to become an S Corporation).

[216] A right of first refusal is carved out from the presumption that parties to agreement restricting the rights of the holder of voting securities under BHCA and HOLA are acting in concert. 12 C.F.R. §§ 225.31(d)(1)(ii)(A), 238.21(d)(1)(ii)(A) (2018). Generally, the Board applies presumptions applied to control analysis under the BHCA and HOLA to control analysis under the CIBCA. Letter from Michael Bradfield, Gen. Counsel, to Neal L. Petersen, Esq., Manatt, Phelps, Rothenberg & Tunney, 1984 Fed. Res. Interp. Ltr. LEXIS 67 (May 14, 1984). The Board has not determined whether an agreement among shareholders, granting each other a right of first refusal to acquire each other's shares, would serve to trigger the presumption in 12 C.F.R. § 225.41(d)(4) that the parties to the agreement are acting in concert pursuant to the CIBCA. ("We take no position at this time as to whether the controlling influence presumptions apply to proceedings under the Control Act."). *Id*.

Even if a shareholder agreement itself does not trigger the rebuttable presumption, steps taken by an institution or its shareholders to meet the criteria to qualify for Subchapter S status may require a CIBCA notice, particularly reductions or limitations related to the number of shareholders.[217] For example, the repurchase of securities by an institution or shareholder purchases of small blocks of voting securities from other shareholders may cause a shareholder or group of shareholders to cross thresholds that trigger the need for a CIBCA notice.

Other shareholder agreements that create rights regarding voting securities of an institution may trigger the rebuttable presumption that shareholders are acting in concert. For instance, shareholders may enter into so called "co-sale" agreements, which grant shareholders the right to sell voting securities if other shareholders sell their securities, or shareholders may obtain so called "tag-a-long" rights, which grant shareholders the right to participate in the registration of voting securities if the issuer registers any voting securities.[218] It would be prudent for shareholders contemplating the execution of such agreements to consult the appropriate Reserve Bank to determine the consequences of such provisions under the CIBCA.

Shareholders of SMBs, BHCs, and SLHCs sometimes create voting trusts to maintain concentration of ownership in the hands of a group of persons. A voting trust involving the voting securities of a BHC or SLHC may be considered a "company" under the BHCA or HOLA.[219] If an acquisition of voting securities involves those of a SMB or BHC, then the voting trust must be reviewed to determine whether it constitutes a "company."[220] If the acquisition of voting

---

[217] BD. GOVERNORS FED. RESERVE SYS., *supra* note 215 (highlighting that changing corporate status to an S Corporation for tax purposes may require CIBCA filings).

[218] *See generally* Sean O'Connor, *Using Stock and Stock Options to Minimize Patent Royalty Payment Risks After Medimmune v. Genentech*, 3 N.Y.U. J.L. & BUS. 381, 458 (2007).

[219] 12 U.S.C §§ 1467a(a)(1)(C), 1841(b)(2). *See also* 12 C.F.R. §§ 225.2(d)(1) and 238.2(d) (2018).

[220] 12 C.F.R. § 225.2(d)(1) (2018). Under most circumstances, a voting trust agreement should *not* be considered a "company" if the trust: (1) relates to shares of a single bank, (2) terminates within 25 years, (3) engages in no other activity except to hold and vote the shares of a single bank, and (4) involves parties who are not participants in any similar voting trust or related agreement with respect to any other banking or nonbanking business. Voting trusts which do not satisfy all of the above-specified conditions should not be automatically

securities involves those of an SLHC, then a voting trust is always a company under HOLA.[221] A company may be required to file an application pursuant to section 3 of the BHCA or section 10(l) of HOLA rather than the CIBCA if the company's ownership crosses applicable percentage thresholds.[222]

If a voting trust is not a "company" under the BHCA or HOLA, the trustee, trust, and its beneficiaries may still be required to file a CIBCA notice.[223] The trustee of a voting trust usually holds the power to vote all of the shares subject to the trust.[224] Often, this places the trustee in a control position even though the trustee may only own a nominal percentage of the voting securities individually. Furthermore, a subsequent addition or replacement of the trustee is an event that may require prior notice under CIBCA, if the percentage of voting securities held by the trust and successor trustee would put them in a control position.[225]

All of the securities subject to a voting trust may be attributed to each of the beneficiaries of the trust even if they individually own,

---

required to register as BHCs but should continue to be reviewed in detail for elements of "company" status. Opinion by Tynan Smith, Sec'y, 1972 Fed. Res. Interp. Ltr. LEXIS 37 (May 4, 1972). *See also* Letter from Jennifer J. Johnson, Assoc. Sec'y, to William C. Norman, Jr., President, Ashley Bancstock Co., 1992 Fed. Res. Interp. Ltr. LEXIS 204 (Aug. 13, 1992).

[221] 12 U.S.C. § 1467a(a)(1)(C) (2012) (stating that trusts fall within the definition of a company). Furthermore, a voting trust may be a SLHC, because it does not fit the exclusion from the definition of a SLHC as a testamentary trust. 12 U.S.C. § 1467(a)(a)(B) (2012); 12 C.F.R. § 238.2(m) (2018).

[222] 12 U.S.C. §§ 1467a(a)(1)(E), 1842(a) (2012)**.** If an application is required pursuant to the BHCA or HOLA, the CIBCA, and its implementing regulations, would not govern the processing of such an application.

[223] Letter from Jennifer J. Johnson to William C. Norman, *supra* note 220. *See also* Letter from William W. Wiles, Sec'y, to Harvey N. Bock, Senior Vice President and Deputy Gen. Counsel, Dean Witter, Discover & Co. 1997 Fed. Res. Interp. Ltr. LEXIS 254 (May 28, 1997).

[224] *See* John J. Woloszyn, *A Practical Guide to Voting Trusts*, 4 U. BALT. L. REV. 245, 250 (1975) ("Common provisions [of voting trust certificates] usually include . . . that the voting trustee shall . . . possess all stockholder rights of every kind . . . ."); *The Use of Chapter X Reorganizations to Increase Informed Shareholder Participation in Reorganized Corporations*, 107 U. PA. L. REV. 238, 249 (1958) ("Under a voting trust agreement, a group of trustees, often a part of management, is formed and vested with complete power to vote all stock placed in trust with it.").

[225] 12 C.F.R. §§ 225.41(c), 238.31(c) (2018).

control, or hold only a small percentage of the institution's voting securities. If the aggregate voting securities subject to the trust would cross applicable thresholds, all of the beneficiaries of the trust might be required to join in filing a prior notice pursuant to the CIBCA. However, if the beneficiaries of the voting trust do not possess the power to dissolve the trust or remove the trustee (except for cause), it is possible that only the trust and trustee would be required to file a CIBCA notice.

Buy-sell agreements between shareholders also may constitute a "company" under the BHCA. The criteria for determining whether a buy-sell agreement is a "company" under the BHCA are very similar to the criteria for voting trusts.[226] If a buy-sell agreement is not a "company" under the BHCA, the attribution and filing consequences under the CIBCA for the parties to the agreement and a representative designated by the agreement are very similar to those for the beneficiaries and trustee of a voting trust.

f) Joint Filers Under Federal Securities Laws

Regulations Y and LL each establish a rebuttable presumption that persons who made, or propose to make, a joint filing under sections 13 or 14 of the Exchange Act and their implementing rules are acting in concert.[227] For example, section 13(d) of the Exchange Act generally requires a person, or group of persons, that acquire beneficial ownership of more than five percent of the voting class of a company's equity securities registered under section 12 of the Exchange Act to file a Schedule 13D with the U.S. Securities and Exchange Commission (Commission) within ten days after the acquisition.[228] A group of persons may consist of a partnership, limited partnership, syndicate, or group of persons entering into an agreement regarding the acquisition of a company's equity securities.[229] If a joint filing is made with the Commission pursuant to sections 13 or 14 of the Exchange Act, the filers are presumed to be acting in concert for purposes of the CIBCA,

---

[226] Under most circumstances, a buy-sell agreement should not be considered a "company" if the agreement satisfies conditions (1), (3), and (4) listed in footnote 220 *supra*. *See* Opinion by Tynan Smith, *supra* note 220.

[227] 12 C.F.R. §§ 225.41(d)(5), 238.31(d)(5) (2018).

[228] 15 U.S.C. § 78m(d) (2012). *See also* 17 C.F.R. § 240.13d-1 (2018).

[229] *Cf.* 12 C.F.R. §§ 225.41(d)(1)–(4), 238.31(d)(1)–(4) (2018) (describing when multiple people will be considered to be acting in concert with regard to ownership of a company's securities).

and an acquisition by any one of them could trigger a filing by the entire group.[230] Under section 13(d) of the Exchange Act, a "person" includes a group of persons.[231] This is not true under the ten percent presumption of Regulations Y and LL—a single person with a greater percentage is necessary to relieve another person of a filing obligation.

C. Acquisition of a Loan in Default

Regulations Y and LL each establish a presumption that an acquisition of a loan in default secured by voting securities of an SMB, BHC, or SLHC is an acquisition of the underlying voting securities.[232] This presumption may result in the need for a person to file a CIBCA notice. However, a BHC or SLHC acquiring voting securities through the acquisition of a loan in default may be required to file an application under the BHCA or HOLA instead of a CIBCA notice.[233]

IV. Acquisition of Control Under CIBCA

A. Control Under CIBCA and its Implementing Regulation

As noted above, there are two prongs to the CIBCA definition of control: (i) the power to direct the management or policies of an insured depository institution; and (ii) the power to vote twenty-five percent or more of any class of voting securities of an insured depository institution.[234] The federal banking agencies implemented the first prong through promulgation of the ten percent rebuttable presumption of control.[235] The second prong is implemented through a straightforward measurement of the amount of voting shares owned, controlled, or held with the power to vote.[236]

---

[230] 12 C.F.R. §§ 225.41(d)(5), 238.31(d)(5) (2018).
[231] 17 C.F.R. § 240.13d-1(b)(1)(ii)(K) (2018).
[232] 12 C.F.R. §§ 225.41(e), 238.31(e) (2018).
[233] If an existing BHC acquires five percent or more of the voting securities of a SMB, BHC, or SLHC through the acquisition of a loan in default, the acquiring BHC would be required to file an application under the BHCA rather than the CIBCA unless the acquisition fits the good faith exception under the BHCA and Regulation Y. 12 U.S.C. § 1842(a)(3) (2012); 12 C.F.R. § 225.12(b) (2018).
[234] 12 U.S.C. § 1817(j)(8)(B) (2018).
[235] 12 C.F.R. §§ 225.41(c)(2), 238.31(c) (2018).
[236] 12 C.F.R. §§ 225.41(c)(1), 238.31c(1) (2018).

B. Control Analysis Differs Under CIBCA, BHCA, and HOLA

The Board's analysis of control under the BHCA and HOLA differs from its control analysis under the CIBCA because of variations in the definitions of control in these statutes. While the control test in the CIBCA looks very similar to the control tests of the other statutes, similar is not identical. Under the BHCA, a company has control over a bank or other company if it:

> (i) Directly or indirectly or acting through one or more other persons owns, controls, or has the power to vote twenty-five percent or more of any class of voting securities of a bank or other company;
> (ii) Controls in any manner the election of a majority of the directors or trustees of the bank or company; or
> (iii) Directly or indirectly exercises a controlling influence over management or policies of the bank or company.[237]

The definition of "control" under HOLA is substantially similar, but adds holding twenty-five percent or more of the proxies of a savings association or contribution of twenty-five percent or more of the capital of a savings association as determinates of control.[238] Regulations Y and LL further define "control" under the BHCA and HOLA.[239]

Additional guidance regarding the Board's view on the definition of "control" under the BHCA and HOLA is provided in the Board's orders,[240] the 1982 Policy Statement on Nonvoting Equity Investments by Bank Holding Companies (1982 Policy Statement),[241]

---

[237] 12 U.S.C. § 1841(a)(2) (2012); 12 C.F.R. § 225.2(e) (2018). For control to arise from a "controlling influence," the Board must make a determination after reasonable notice and opportunity for hearing.
[238] 12 U.S.C. § 1467a(a)(2) (2012); 12 C.F.R. § 238.2(e) (2018).
[239] 12 C.F.R. §§ 225.2(c) and 238.2(e) (2018).
[240] *See* Patagonia Corporation, 63 FED. RES. BULL. 288, 291, 297 (1977) (stating "whether or not the power to exercise a controlling influence existed on a particular date requires a careful appraisal of the whole effect of the various relationships and other circumstances" and listing some of these relationships and circumstances). *See also* 49 Fed. Reg. 794, 799 (Jan. 5, 1994) (confirmation of opinion expressed in Patagonia).
[241] 68 FED. RES. BULL. 413, 415 (1982) (codified at 12 C.F.R. § 225.143).

and the 2008 Policy Statement on Equity Investments in Banks and Bank Holding Companies (2008 Policy Statement),[242] as well as interpretations issued by the Board's General Counsel.[243]

An in-depth exploration of the parameters of control under the BHCA and HOLA is beyond the scope of this article. However, a person considering the acquisition of voting securities of a BHC, SLHC, or any insured depository institution should consider the possible application of the BHCA or HOLA, particularly if the person is a company or the person is affiliated with a company that owns, controls, or holds with the power to vote the securities of any holding company or insured depository institution.[244] The consequences of a control determination under the BHCA or HOLA are significantly more burdensome than the consequences of a control determination under the CIBCA. A "company" or "association" subject to the BHCA or HOLA has obligations related to capital, examination, reporting, permissible activities, and other matters, which do not apply to an acquiring person under the CIBCA.[245] Reaching some comfort about the inapplicability of the BHCA or HOLA to a particular acquisition of voting securities may merit consultation with Board staff or the appropriate Reserve Bank. The Board may require passivity,[246] juris-

---

[242] Policy Statement on Equity Investments in Banks and Bank Holding Companies, 12 C.F.R. § 225.144 (2018), https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20080922b1.pdf [https://perma.cc/R39N-LB7M] ("Accordingly, since the 1982 Policy Statement, the Board has determined whether an equity investor in a banking organization has a controlling influence over the management or policies of the banking organization by considering carefully all the facts and circumstances surrounding the investor's investment in, and relationship with, the banking organization.").

[243] *See, e.g.*, Letter from Scott G. Alvarez, Gen. Counsel, to B. Robbins Kiessling, Esq., Cravath, Swaine & Moore LLP, 2007 Fed. Res. Interp. Ltr. LEXIS 5 (July 18, 2007).

[244] *See* 12 U.S.C. §1467a(a)(2)(A)–(B) (2012) (outlining control definitions under HOLA); 12 U.S.C. § 1841(a)(2)(A) (2012) (outlining control definitions under BHCA).

[245] *See* discussion *supra* text accompanying note 57 (observing that, unlike BHCA and HOLA, CIBCA does not contain any ongoing supervisory requirements regarding capital, examination, or reporting).

[246] *See, e.g.*, Letter from Scott G. Alvarez, Gen. Counsel, to B. Robbins Kiessling, Esq., Cravath, Swaine & Moore LLP, 2009 Fed. Res. Interp. Ltr. LEXIS 20 (Mar. 24, 2009) (listing eleven "passivity commitments" required of GM under the BHCA); Letter from Scott G. Alvarez to to B. Robbins Kiessling, *supra* note 243 (discussing various passivity requirements, including a commitment "not to acquire or retain shares . . . that would cause

diction,[247] and anti-association[248] commitments from investors in order to reach the decision not to initiate control proceedings under the BHCA or HOLA. The Board does not generally accept any form of commitment to offset CIBCA control.[249] However, the Board applies BHCA presumptions set forth in subpart D of Regulation Y and Subpart C of Regulation LL to the analysis of control of voting securities in CIBCA.[250]

---

the Investor, together with its officers, directors, and affiliates, to own 10 percent or more of a class of voting securities . . . ."); Letter from James McAfee, Assoc. Sec'y, to Thomas M. Shoaff, Esq., Baker & Daniels & Shoaff, 1986 Fed. Res. Interp. Ltr. LEXIS 42 (May 1, 1986) (regarding Lincoln National Corporation); Letter from James McAfee, Assoc. Sec'y, to Mark L. Starcher, Esq., Sutherland, Asbill & Brennan 1985 Fed. Res. Interp. Ltr. LEXIS 1 (May 28, 1985) (regarding Crownx Inc.).

[247] *See, e.g.*, Letter from Sidney M. Sussan, Assistant Dir., to Neal L. Petersen, Esq., Hogan & Hartson, 1992 Fed. Res. Interp. Ltr. LEXIS 124 (June 5, 1992) (requiring additional information from the notificant regarding commitments on jurisdiction matters vis-à-vis the United States and Cayman Islands); Letter from Jennifer J. Johnson, Assoc. Sec'y, to Robert Tortoriello, Esq., Cleary, Gottlieb, Steen & Hamilton, 1991 Fed. Res. Interp. Ltr. LEXIS 253 (Dec. 20, 1991) (mandating that the acquirer consent "to the jurisdiction of the United States for purposes of all U. S. banking laws . . . .").

[248] *See, e.g.*, Letter from Scott G. Alvarez, Gen. Counsel, to Judith Muncy, Esq., Barack Ferranzano Kirschbaum & Nagelberg LLP, 2010 Fed. Res. Interp. Ltr. LEXIS 11 (Mar. 2, 2010) (requiring that the acquirer not be "an affiliate of any other investor in the proposed transaction").

[249] The investment advisor "fund complex" commitments are one exception to this general rule. *See infra* note 592 and accompanying text (providing examples of how an acquisition may not result in control under the BHCA, HOLA, or CIBCA even though a fund sponsor, manager or advisor works in conjunction with affiliated investment funds to make the acquisitions).

[250] 12 C.F.R. §§ 225.31(d), 238.21(d) (2018) (outlining rebuttable presumptions of control under BHCA and HOLA, respectively). *See also* Letter from Michael Bradfield to Neal L. Petersen, *supra* note 216 ("With respect to voting securities however, it is clear that the Board has the authority to determine what constitutes voting securities for the purposes of the Control Act and the presumption in section 225.31(d)(1)(i) was validly promulgated under the provisions of the Administrative Procedure Act. Thus we do not believe that any acquiror can reasonably assert that he was unaware that the Board considers immediately convertible securities to be voting securities.").

C. Obligation of Acquiring Person

The obligation to file a CIBCA notice falls upon the person (or persons acting in concert) prior to the acquisition of control.[251] Accordingly, the person (or persons acting in concert) must self-identify. While a BHC, SLHC, or SMB,[252] or a Reserve Bank reviewing a transaction[253] may determine that a person will acquire control or that control group exists among affiliated acquirers, it is the responsibility of the shareholders of the affected institution to identify themselves based on acquisition thresholds and presumptions of acting in concert.

Voting securities acquired by affiliated persons (those subject to any of the rebuttable presumptions of concerted action, or any person who, even if not subject to a presumption of concerted action, is in fact acting in concert with another acquirer), will be aggregated and thus may trigger a filing obligation by a person who, in isolation, would not be acquiring a significant amount of shares, let alone sufficient shares to trigger a notice.

The converse of the aggregation principle is that an individual person may have to file a notice to acquire shares of a BHC, SLHC, or SMB in an individual capacity in addition to filing as part of a group acting in concert even though the group would own, control, or hold with power to vote more than the amount that the person owns

---

[251] 12 U.S.C. § 1817(j)(1) (2012).

[252] BD. GOVERNORS FED. RESERVE SYS., DIV. OF BANKING SUPERVISION & REGULATION, SR 03-19, GUIDANCE ON CHANGE IN BANK CONTROL PROCEDURES (Nov. 19, 2003) ("While the burden to file a timely change in bank control notice is placed on the person(s) acquiring control, the subject banking organization may have better information than the individual(s) regarding current ownership positions, including shareholder lists. In view of this, it is important that state member banks and bank holding companies be familiar with the regulations and policies governing changes in bank control, and when possible to share such information with shareholders with significant ownership positions.").

[253] *Id*. ("In some instances, a person acquires control of a banking organization without submitting the prior or after-the-fact notice required by Regulation Y. These unauthorized or undisclosed changes in bank control may not be known to the person, the state member bank, or the bank holding company, but rather are discovered by Reserve Bank examiners during an inspection or examination of the affected institution. In most cases, such a violation of the Change in Bank Control Act is addressed by the person immediately filing a notice to the Federal Reserve requesting authority to retain the acquired shares.").

individually. For example, if an individual person proposes to acquire ten percent of the voting securities of a BHC that does not have securities registered pursuant to section 12 of the Exchange Act, and two members of the individual's immediate family each plan to acquire five percent of the BHC's voting securities, a group filing would be required in connection with the acquisition of twenty percent of the BHC's voting securities, and an individual filing would be required because an individual would own ten percent if another individual single person does not own a larger block of stock. Furthermore, a new CIBCA notice could be required from an individual even if an individual was reviewed previously as a member of a group of three persons each acquiring five percent of the voting securities of a BHC, if one of those persons subsequently proposed to acquire an additional five percent of the voting securities of the BHC.[254] BHCs, SLHCs, and SMBs should facilitate compliance with the CIBCA by understanding the CIBCA and its implementing regulations and sharing ownership information with significant shareholders, or shareholders known to management to be part of a potential control group, prior to, or as part of, acquisition proposals.[255]

D. Acquisition-specific Nature of Notices

Determinations not to disapprove a CIBCA notice are issued by the Board or Reserve Banks with respect to specific proposals for the acquisition of voting securities, not for acquisitions of specific percentages of voting securities. If Federal Reserve action was tied to a specific percentage, a person could conceivably "churn" securities ownership by initially acquiring both voting and nonvoting convertible securities, selling all of the voting securities, then converting the nonvoting securities into voting securities to return to the same percentage

---

[254] This is the Board's view. 55 Fed. Reg. 47,843, 47,844 (Nov. 16, 1990). *See, e.g.*, 75 Fed. Reg. 9602 (Mar. 3, 2010) (notice by Jeffrey J. Woda and David Cooper, Jr. acting in concert); 80 Fed. Reg. 49,236 (Aug. 17, 2015) (notice by Jeffrey J. Woda and David Cooper, Jr. individually and as a group acting in concert). *Cf.* 80 Fed. Reg. 65,899, 65,890 (Oct. 28, 2015).

[255] BD. GOVERNORS FED. RESERVE SYS., *supra* note 252 ("[T]he subject banking organization may have better information than the individual(s) regarding current ownership positions, including shareholder lists. In view of this, it is important that state member banks and bank holding companies be familiar with the regulations and policies governing changes in bank control, and when possible to share such information with shareholders with significant ownership positions.").

of voting securities initially held. The acquisition of additional shares always requires a notice unless the acquisition itself is subject to one of the exemptions discussed in section V below, such as the increase of previously authorized acquisitions.

E. Equal Acquisition by Different Persons

Regulations Y and Regulation LL each include a footnote stating that if two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of ten percent or more of a class of voting securities of an institution, each person must file prior notice with the Board.[256] This position is a logical outgrowth of the need to have a single larger shareholder in the event the issuer does not have registered securities—if two or more acquirers are equal in ownership, then both (or all) must file.[257]

F. Follow the Control Chain

In general, when dealing with companies, trusts, or other forms of business organizations, the requester should follow the "chain of control" until it reaches the natural person or persons acting as final decision makers for such organizations.[258] Accordingly, the person requesting guidance from the Board should be prepared to provide a list of all investors who own more than ten percent of an entity's voting securities, as the Board may consider such investors as acquiring persons who must join a CIBCA notice. The Board may require persons who serve as directors, trustees, or equivalent positions of authority for each entity within the chain of control to provide information to support the filing if such persons have decision making authority for the entities making the filing. Furthermore, control also

---

[256] 12 C.F.R. §§ 225.41(c)(2)(ii) n.1, 238.31(c)(2)(ii) n.2 (2018).

[257] 12 C.F.R. § 225.41(c)(2)(ii) (2018). *See also supra* note 194 and accompanying text (concluding that individual filing under CIBCA rather than company filing under BHCA is appropriate if control would be more clearly directed by the individual).

[258] THOMAS VARTANIAN, AMERICAN BAR ASSOCIATION, THE NEW RULES OF PRIVATE EQUITY INVESTMENTS & ACQUISITIONS IN U.S. FINANCIAL INSTITUTIONS 2 (2007), http://apps.americanbar.org/buslaw/newsletter/0062/materials/pp2.pdf [https://perma.cc/YW88-2JM5] ("That means that, as a general matter, no one can acquire 10% or more of a class of the voting stock of these *parent entities*, and in some cases 5% or more, without getting prior federal and/or state regulatory approval." (emphasis added)).

should be tested at each level of the chain.[259] If a natural person owns twenty-five percent of an entity, and the entity owns twenty-five percent of a BHC, the natural person may be considered to control the BHC because calculation of the natural person's interest is unlikely to be diluted to 6.25% (.25 times .25). Control may be found at each level, which may impact filing and informational obligations.[260]

G. Attribution of Voting Securities

The question of who owns, controls, or holds with power to vote the voting securities of an institution is primarily determined by the manner in which the ownership of securities is listed in the official shareholder records of the issuing institution (e.g., individually, jointly, or as fiduciary). Under the definition of control in the CIBCA and its implementing regulations, voting securities can be attributed to (and can trigger filing requirements for) more than one person.[261]

For instance, if the names of spouses are listed as owners of the same voting securities in the shareholder registry, then each spouse could be viewed as owning and controlling all of those securities. If the shareholder records list only one spouse, the unlisted spouse would not be considered to be a control party unless a contract, agreement, understanding, relationship, or other arrangement (such as a trustee or custodial relationship) provides the unlisted spouse with control over the securities. A non-objection to the acquisition of control by one spouse should not be considered to extend to the other spouse. In community property states, all property accumulated by each spouse during the marriage usually becomes joint property even if it was originally acquired in the name of only one spouse.[262] For purposes of

---

[259] *See id.* (discussing various options for structuring acquisition relationships to avoid "chain of control" issues between acquiring parties).

[260] *See* discussion *supra* Section III.B.2. (outlining how aggregation of voting control among multiple parties can result in filing obligations).

[261] *See* 12 U.S.C. § 1817(j)(8)(B) (2018) (defining "control" for the purposes of CIBCA); 12 C.F.R. § 225.41(c)(2) (2018) (triggering Board notification if a person or "persons acting in concert" will own, control, or hold with power to vote ten percent or more of the voting securities of an institution).

[262] There are currently nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Alaska is an opt-in community property state that gives both parties the option to make their property community property. *See* Internal Revenue Manual § 25.18.1.2.2 (2018) (outlining states that have adopted community property systems and discussing the theory underlying community property).

CIBCA control analysis, voting securities owned by one spouse may be attributed to the other spouse when they reside in community property states.[263] However, the review and approval of a CIBCA notice, being person- and acquisition-specific, would not extend to the other spouse, even in a community property state.[264]

H. Changes in Members of a Family Control Group

Changes in ownership or control of voting securities by immediate family members may require a CIBCA notice even though some members of the family previously filed a CIBCA notice that was not disapproved.[265] For example, the acquisition or planned acquisition of voting securities could arise as children become adults, family members marry, family members engage in estate and tax planning, and family members die. These developments often result in changes in the membership of a family control group and the voting securities owned, controlled, or held with the power to vote by group members, which may require a new CIBCA notice.[266] A classic example is a gift

---

[263] *See id.* (discussing how property is shared among spouses in community property states).

[264] *See* 12 U.S.C. § 1817(j)(1) (2012) (mandating that all persons, acting directly or indirectly with other persons, must receive approve from federal banking regulators prior to acquiring control over voting securities).

[265] *See* 12 U.S.C. § 1817(j)(1) (2012); 12 C.F.R. §§ 225.41(c) and (d)(2), 238.31(c) and (d)(2). *See also* 80 Fed. Reg. 65,889, 65,890 (Oct. 28, 2015) ("The FDIC also notes that if a person who is a member of a group acting in concert proposes to acquire voting securities that result in that person holding twenty-five percent or more of the voting securities in his/her/its own right, then the person must file a Notice with the FDIC because that person individually will have acquired control as defined by the Change in Bank Control Act. Such a person must file a Notice even if that person had already filed and been approved as a member of the group acting in concert.").

[266] 12 U.S.C. § 1817(j)(1) (2012); 12 C.F.R. §§ 225.41(c), 238.31(c). *See also* the Preamble to FDIC's 2015 revised regulation states:

> The FDIC notes that a group of persons acting in concert becomes a different group of persons acting in concert when a member of the group leaves or a new member joins. For example, if certain members of a family have previously filed a Notice with, and received a non-objection from, the FDIC as a group acting in concert, each member of the group must file a new Notice and obtain the FDIC's non-objection when a member of the group ceases

by adults to children. The transfer of ownership of even a single share could conceivably create a filing obligation for the recipient of the single share, because that person would own voting securities that, when aggregated with persons in their immediate family (and thus subject to the presumption of concerted action) amount to a sufficient percentage ownership to trigger a filing obligation as part of a group.[267] Although practical control has not changed, the constituent nature of the group has changed.[268]

I. Any Class of Voting Securities

The thresholds that require a person to file a CIBCA notice are based on percentages of ownership or control of any class of voting securities.[269] This statutory requirement begs more than a few questions, one of which is how to appropriately calculate the percentage of voting securities attributable to any given person. The answer to this question depends upon the number of shares treated as part of a single class of voting securities.

Multiple classes of voting securities of the same issuer are treated as a single class, regardless of differences in dividend or liquidation rights, if the securities vote together on all matters for which securities have voting rights (such as the selection of directors or the approval of significant corporate events such as acquisitions or mergers).[270] Whether securities constitute a single class of shares or

---

> participation in the group, and the group continues to hold sufficient shares to constitute "control."

80 Fed. Reg. 65,889, 65,890 (Oct. 28, 2015). The Board has generally taken to the same approach to new group members but has not taken the same approach to remaining group members when a group member ceases participation in the group.

[267] *See* 12 C.F.R. § 225.41(c)–(d) (2018) (outlining notice requirements for control and the presumption that share ownership of immediate family members will be aggregated when determining control).

[268] *See* 80 Fed. Reg. 65,889, 65,890 (Oct. 28, 2015) (FDIC approach: "[A] group of persons acting in concert becomes a different group of persons acting in concert when a member of the group leaves or a new member joins."). The Board has generally taken the same approach to new group members but not leaving group members.

[269] 12 C.F.R. §§ 225.41(c), 238.31(c) (2018).

[270] 12 C.F.R. §§ 225.2(q)(3), 238.31(r)(3) (2018) (defining voting securities); Letter from J. Virgil Mattingly, Jr., Gen. Counsel, to Douglas J. McClintock, Esq., Thacher, Profitt & Wood, 1990 Fed. Res. Interp. Ltr. LEXIS 59 (Mar. 8,

multiple classes can significantly impact percentage calculations and result in filing obligations.[271] For example, assume a BHC has 100 outstanding shares of Class A common stock and ten outstanding shares of Class B common stock. If holders of Class A and Class B common stock of a BHC vote together on all matters for which securities have voting rights, including the election of directors, they will be treated as a single class of voting securities. Therefore, a person who plans to purchase ten shares of the Class B common stock would not be required to file a CIBCA notice because the person would only own nine percent of the combined classes of voting securities upon consummation of the proposed acquisition. However, if holders Class B common stock of a BHC vote separately for one director position, Class A and Class B common stock will be treated as separate classes of voting securities. In that circumstance, a person who plans to purchase ten shares of the Class B common stock would be required to file a prior notice pursuant to the CIBCA because the person would own 100% of a class of voting securities upon consummation of the proposed acquisition.

J. Convertible Securities and Other Instruments

Generally, instruments immediately convertible into voting securities in the hands of the holder are treated as if they have been converted. Options on voting securities, warrants for voting securities, and rights to convert a debt security or promissory note into voting

---

1990) (describing how preferred stock immediately convertible into common stock at the option of the holder and with the right to vote together as a separate class in the event of default in the payment of dividends only with the approval of the Board is viewed as single class of voting securities). *See also* Letter from J. Virgil Mattingly, Jr., Gen. Counsel, to F. Dean Copeland, Esq., Alston & Bird, 1989 Fed. Res. Interp. Ltr. LEXIS 169 (July 17, 1989) (discussing the treatment common stock and preferred stock as a single class of voting securities); Letter from Michael Bradfield, Gen. Counsel, to Cathy A. Lewis, Esq., Vinson & Elkins, 1988 Fed. Res. Interp. Ltr. LEXIS 33 (Mar. 2, 1988) (discussing whether the ordinary common stock and Class A common stock "may be considered a single class of voting securities for purposes of the filing requirements under the Change in Bank Control Act.").

[271] *See* Letter from Scott G. Alvarez, Assoc. Gen. Counsel, to Victoria M. Trumbower, 1995 Fed. Res. Interp. Ltr. LEXIS 20 (Sept. 29, 1995) (stating that since the common stock would not be considered a different class of voting shares, the investor in question only held 5% of the company's voting shares, meaning he did not have to file under BHCA or CIBCA).

securities should be taken into consideration *as if exercised or converted* when calculating the voting securities owned, controlled, or held with the power to vote by a person or group of persons.[272]

There are no published opinions or interpretations of the Board indicating that a waiting period prior to a mandatory conversion, or remote contingency that must occur before the shares are considered to be voting, has been considered sufficient to avoid the application of the presumption that a person controls the underlying voting securities. Options that are unexercised or "out of the money" may not be

---

[272] While § 225.31(d)(i) of Regulation Y and § 238.21(d)(1)(i) of Regulation LL apply on their face to options immediately exercisable by a "company," the Board applies the same principle to CIBCA analysis, so that immediately exercisable employee stock options are included in the voting securities held by a person when calculating the percentage of voting securities controlled under the CIBCA. Letter from Michael Bradfield to Neal L. Petersen, *supra* note 216:

> In addition, you argue that the stock acquired by [TEXT REDACTED BY THE AGENCY] is not "immediately" convertible because the Resolution creating the Stock requires [TEXT REDACTED BY THE AGENCY] (and presumably any purchaser of the Stock from [TEXT REDACTED BY THE AGENCY] to comply with all applicable law, including but not limited to the Control Act, before the Stock can be converted. We infer from your letter that you believe that the term "immediately" implies a conversion that occurs automatically once the holder of the stock decides to convert the shares and that [TEXT REDACTED BY THE AGENCY] stock will not convert automatically because of the condition contained in the Resolution. However, the condition that you cite in support of this position is one that states that the holder of the voting stock must comply with all applicable laws. We view this condition to be merely the inclusion in the Resolution of a legal requirement that would apply notwithstanding its inclusion in the Resolution, and we do not consider this condition sufficient to defeat the immediately convertible feature of the stock. We note that when the Board considered the "immediately convertible" presumption in Regulation Y, a question was presented as to whether a requirement to comply with applicable law would defeat the immediately convertible aspects of the stock. The Board declined to interpret "immediately convertible" to exclude stock issues that require compliance with applicable law.

considered sufficient to avoid attribution of control of the underlying voting securities to a person.[273] Similarly, it may not be relevant that conversion is mandatory or optional. An instrument that converts into voting securities on a fixed date five years from issuance would be considered by the Board to be *presently* voting, for purposes of triggering a CIBCA filing, as well as for BHCA or HOLA control purposes.[274]

K. Calculation of Control

For calculating control, the current and *pro forma* voting securities a person owns, controls, or holds the power to vote, as well as the voting securities associated with options, warrants,[275] and rights are added to the numerator and denominator in a percentage control calculation for a given person or group of persons: In the numerator, all of the person's voting securities and options, warrants, or other immediately exercisable rights to voting securities are added together, and, in the denominator, the total outstanding voting securities of the issuer plus the person's voting securities and options, warrants, or other immediately exercisable rights to voting securities are added

---

[273] An option is "in the money" if the exercise of the option is economically beneficial—the option price is lower than the market price.

[274] Policy Statement, *supra* note 242, at 10.

[275] Warrants are included based on the 1982 Policy Statement (grouping warrants with convertible stock and options for determination of control). 68 FED. RES. BULL. 413, 415 (1982) (codified at 12 C.F.R. § 225.143). *See also* Letter from Michael Bradfield to Neal L. Petersen, *supra* note 216, which reads in part:

> You cite a letter dated May 28, 1980, from the Deputy General Counsel of the Board to the General Counsel of the FDIC (FDIC letter) concerning the acquisition by the FDIC of warrants to purchase shares of First Pennsylvania Bank. . . . [O]n July 8, 1982, subsequent to the FDIC letter, the Board issued a Policy Statement on Nonvoting Equity Investments that dealt *inter alia* with the status of convertible stock, warrants and options (collectively "rights"). . . . The Board's Policy Statement contradicts the staff's 1980 interpretation of the status of warrants as voting securities.

But see Letter from William W. Wiles, Sec'y, to Peter B. Bartholow, Exec. Vice President—Fin. Mercantile Texas Corp., 1983 Fed. Res. Interp. Ltr. LEXIS 46 (July 8, 1983) ("We do not regard the obtaining of a right to purchase voting stock in the future as being the acquisition of voting stock and, therefore, the Change in Bank Control Act would not apply.").

together without including any options, warrants, or other immediately exercisable rights to voting securities held by persons other than the person for whom the calculation is being conducted. In other words, the calculation of the percentage of ownership, dispositional control, or voting power of any given person is not conducted on a fully diluted basis, but on an individual full-exercise basis. Expressed as an equation, the calculation would be as follows:

Person's Voting Securities + Person's Options, Warrants, & Rights ÷
Total Outstanding Voting Securities +
Person's Voting Securities, Options, Warrants, & Rights =
percentage control

Classes of voting securities that vote on the same matters (and thus which would be considered to be a single class for calculation purposes) but which have different voting powers (i.e. each share of the first class has ten votes, while each share of the second class has one vote) pose a special challenge. Two calculations may be required to determine the ownership and voting power held by each person. The first calculation is based purely on the number of shares held, and the second calculation is based on the voting power held by all the shares owned or controlled by the person. If either calculation crosses an applicable filing threshold, a CIBCA notice may be required.

While the Board generally includes warrants in the calculation of voting securities owned or controlled by a person, the Board has excluded warrants in certain circumstances in the past when the exercise or transfer of the securities was limited in specific ways.[276]

[276] The Board has excluded warrants from the calculation of the percentage of control when the warrant could not be exercised if such exercise would result in the holder either becoming the largest shareholder of the subject institution or holding more than 14.9% of the shares of the subject institution and the warrants could not be transferred by the holder other than (1) in a public offering, (2) in a sale to independent and unrelated parties with no investor acquiring rights to more than two percent of the shares of the subject institution, or (3) in a method approved by the Federal Reserve System. Letter from J. Virgil Mattingly, Jr., Gen. Counsel, to Robert E. Mannion, Esq., Arnold & Porter, 1991 Fed. Res. Interp. Ltr. LEXIS 26 (May 20, 1991) ("The warrants may not be transferred by [TEXT REDACTED BY THE AGENCY] other than (1) in a public offering, (2) in a sale to independent and unrelated parties with no investor acquiring rights to more than two percent of the shares of [TEXT REDACTED BY THE AGENCY] or (3) in a method approved by the Federal Reserve System."). *See also* Letter from James

Whether the Board would take the same approach in current times remains an open question. Nonvoting securities that are not convertible into voting securities are not included in the calculation for CIBCA control analysis purposes, since the statute and the regulation are geared solely to the ownership and control of voting securities.[277] Per the Board's 2008 Policy Statement, nonvoting convertible securities would not be considered voting securities if they are subject to the restrictions on transferability described in that policy statement; accordingly, such shares may not be treated as voting securities for CIBCA purposes.[278]

McAfee, Assoc. Sec'y, to Thomas M. Shoaff, Esq., Baker & Daniels & Shoaff, 1986 Fed. Res. Interp. Ltr. LEXIS 42 (Apr. 30, 1986) (investment by Lincoln National Corporation in Lincoln Financial Corporation).

[277] Generally, while the acquisition of nonvoting securities of a BHC, SLHC, or SMB by a company may not require the filing of a CIBCA notice, it may nevertheless require an application pursuant to the BHCA or HOLA. This can arise from presumptions of controlling influence found in subpart D of Regulation Y. For example, if a company that has greater than five percent ownership of an institution and a director interlock, but no other shareholders own more than five percent of the institution, the company is presumed to have control over the institution. *See* 12 C.F.R. § 225.31(d)(2)(iii) (2018) ("A company that has one or more management officials in common with a bank or other company controls the bank or other company, if the first company owns, controls or holds with power to vote more than five percent of the outstanding shares of any class of voting securities of the bank or other company, and no other person controls as much as five percent of the outstanding shares of any class of voting securities of the bank or other company.").

[278] The 2008 Policy Statement specifically demurs on applicability to the CIBCA context; however, in light of prior Board staff interpretation, it is possible that nonvoting convertible securities subject to the restrictions on transferability described in that policy statement may not be voting securities under the CIBCA. *See* Letter from Michael Bradfield to Neal L. Petersen, *supra* note 216 (stating "the Board indicated its concern about whether nonvoting investments by a bank holding company in an out-of-state bank holding company or bank should be considered to be control of voting securities").

V. Exemptions

A. No Notice

The Board has exempted several types of transactions from the notice requirements of the CIBCA through its promulgation of Regulations Y and LL.

1. Existing Control Relationships

The Board grandfathered control relationships that existed prior to March 9, 1979, by regulation. More specifically, a person is not required to file a CIBCA notice to acquire additional voting securities of a BHC, SLHC, or SMB: (i) if the person held the power to vote twenty-five percent or more of any class of voting securities of the institution continuously since March 9, 1979; (ii) if if the person is presumed to have controlled the institution continuously since March 9, 1979 and the aggregate amount of voting securities does not exceed twenty-five percent or more of any class of voting securities of a BHC, SLHC, or SMB; or (iii) in other cases, where the Board determines that the person has controlled the institution continuously since March 9, 1979.[279]

2. Increase in Previously Authorized Acquisition

Regulations Y and LL exempt from the CIBCA notice requirement increases in previously authorized acquisitions.[280] Once a person has been reviewed without disapproval to acquire more than 10% of the voting securities of a particular BHC, SLHC, or SMB, they may acquire up to 100% of the voting securities of the BHC, SLHC, or SMB if they maintain continuous control of the institution, unless the Board or a Reserve Bank otherwise provides in writing.[281] This

---

[279] 12 C.F.R. §§ 225.42(a)(1), 238.32(a)(1) (2018). *See also* Notice Requirement, F.R.R.S. 4-396 (Feb. 19, 1981), 2011 WL 1895701 (clarifying that a family may acquire additional shares without filing a CIBCA notice because it held twenty-five percent or more of the institution's outstanding voting shares since March 9, 1979); Letter from Robert E. Mannion, Deputy General Counsel, to Amy Bizar, Attorney, Fed. Reserve Bank of Boston, 1981 Fed. Res. Interp. Ltr. LEXIS 40 (Feb. 18, 1981).

[280] 12 C.F.R. §§ 225.42(a)(2), 238.32(a)(2) (2018).

[281] 12 C.F.R. §§ 225.42(a)(2), 238.32(a)(2) (2018).

exemption was not always available. Initially, the Board utilized a two-step process through which a person could obtain a non-disapproval for investments between ten and twenty-five percent, and then file again, for a second non-disapproval after crossing the twenty-five percent threshold.[282] The Board's 1997 revisions to Regulation Y created, for most notificants, a one-time only filing process.[283]

3. Acquisition Subject to Other Approval

Regulations Y and LL exempt from the CIBCA notice requirement any type of acquisition that is or was subject to certain other approvals,[284] which includes acquisitions made and reviewed in the process of approvals under section 3 of the BHCA,[285] section 18(c) of the FDIA (also known as the BMA),[286] and section 10(e) of HOLA.[287]

4. Exempt Transactions

Regulations Y and LL exempt from the CIBCA notice requirement transactions that are exempt under various provisions of the BHCA and HOLA.[288] Acquisitions of control of voting shares in a fiduciary or an underwriting capacity, in a proxy solicitation, or in satisfaction of debt previously contracted in good faith, and acquisitions of additional shares by a person who already owns a majority of shares, are all exempted in sections 2(a)(5)[289] and 3(a)(A) and (B)[290] of the BHCA and are excluded by Regulation Y from filing notices pursuant to the CIBCA.[291] Regulation LL, however, is not perfectly

---

[282] 12 C.F.R. §§ 225.42(a)(1)–(2) (1996).
[283] 12 C.F.R. § 225.42(a)(2) (1997); Regulation Y, 62 Fed. Reg. 9316 (Feb. 28, 1997).
[284] 12 C.F.R. §§ 225.42(a)(3), 238.32(a)(3) (2018). *See also* 12 U.S.C. § 1817(j)(17) (2012) ("This subsection does not apply with respect to a transaction which is subject to . . . (A) section 1842 of this title; (B) section 1828(c) of this title; or (C) section 1467a of this title.").
[285] 12 U.S.C. § 1842 (2012).
[286] 12 U.S.C. § 1828(c) (2012).
[287] 12 U.S.C. § 1467a(e) (2012).
[288] *See* 12 U.S.C. §§ 1841(a)(5), 1842(a)(A)–(B) (2012); 12 C.F.R. §§ 225.42(a)(4), 238.31(a)(4) (2018).
[289] 12 U.S.C. § 1841(a)(5) (2012).
[290] 12 U.S.C. § 1842(a)(A)–(B) (2012).
[291] *See* 12 C.F.R. § 225.42(a)(4) (2018).

parallel; it exempts from filing persons who obtain control through transactions listed in section 10(a)(3)(A) (underwriting) and section 10(e)(1)(B)(ii) (reorganizations of ownership under a de novo holding company) of the HOLA.[292]

5. Proxy Solicitation

Regulations Y and LL exempt acquisitions of voting power in the context of proxy solicitations from filing change in control notices for BHCs, SLHCs, and SMBs.[293] To qualify for the exemption, the proxy must be revocable by the shareholder granting the proxy, must be for purposes of conducting business at a regular or special meeting of shareholders, and must terminate within a reasonable period of time after such shareholder meeting.[294] However, an exemption from a CIBCA filing may not be the end of the analysis. Any company contemplating the solicitation of proxies should consider the possible application of BHCA and HOLA.[295]

---

[292] 12 C.F.R. § 238.32(a)(4) (2018).

[293] 12 C.F.R. §§ 225.41(a)(5), 238.32(a)(5) (2018).

[294] Letter from Jennifer J. Johnson, Deputy Sec'y, to Murray A. Indick, Esq., Wilmer, Cutler & Pickering, 1995 Fed. Res. Interp. Ltr. LEXIS 160 (Mar. 6, 1995) (citing Citizens First Bancorp, Inc. v. Harreld, 559 F.Supp. 867 (W.D. Ky. 1982) (requiring a CIBCA notice in a proxy solicitation "could disenfranchise shareholders by requiring prior agency approval before shareholders may vote existing shares"); Letter from William W. Wiles, Sec'y, to H. Rodgin Cohen, Esq., Sullivan & Cromwell, 1991 Fed. Res. Interp. Ltr. LEXIS 40 (May 21, 1991). *See Harreld*, 559 F.Supp at 873–74 ("Defendants did not violate CIBCA [notice requirement], since whatever control defendants have, they had prior to events now in question, and control has not been acquired through purchase, assignment, transfer, pledge or other disposition, as required by statute."). *See also* Oberstar v. Fed. Deposit Ins. Corp., 987 F.2d 494, 500 (8th Cir. 1992) (finding that because the proxies at issue were limited, they did not create a change in control or a disposition of stock in violation of CIBCA).

[295] The Regulation Y exemption for proxy solicitation of voting securities of BHCs is narrower than the CIBCA exemption because the BHCA exemption applies only to voting power held by the shares and may not apply to the selection of a majority of directors or the exercise of a controlling influence. 12 C.F.R. § 225.42(a)(5) (2018) ("The acquisition of the power to vote securities of a state member bank or bank holding company through receipt of a revocable proxy in connection with a proxy solicitation for the purposes of conducting business at a regular or special meeting of the institution, if the proxy terminates within a reasonable period after the meeting."). *See also*

6. Stock Dividends and Splits

Regulations Y and LL exempt transactions involving the receipt of voting securities of a SMB, BHC, or SLHC through a stock dividend or stock split from the requirement to file a CIBCA notice, so long as the proportionate interest of the recipient in the institution remains substantially the same.[296]

7. Acquisitions by Qualifying Foreign Banking Organization

Finally, transactions involving the acquisition of shares of a qualifying foreign bank that has a federally licensed branch in the United States do not trigger a CIBCA filing requirement pursuant to exemptions under Regulations Y and LL.[297]

B. No Prior Notice

As discussed in this section, although the Board has not completely exempted a transaction from the need to file a notice, it has

---

North Fork–Dime, 86 FED. RES. BULL. 767, n.2 (2000) (citing 12 C.F.R. § 225.2(c)(1)(iii) (2018) ("Based on a review of the facts . . . , including the fact that the proxies solicited by North Fork were of limited duration and scope and that North Fork owned a small percentage of Dime's shares at the time, . . . North Fork's participation in the proxy solicitation was not prohibited . . . .")); Letter from Jennifer Johnson, Deputy Sec'y, to Derwood Knight, Esq., 1995 Fed. Res. Interp. Ltr. LEXIS 146 (Dec. 21, 1995) (finding that despite irrevocability of a voting proxy, the Board would not disapprove acquisition notice because acquisition does not reflect so adversely upon notificant's competence, experience, and integrity, or any other factor, as to indicate that the proposed acquisition would not be in best interest of depositors or interest of the public).With respect to SLHCs, HOLA does not provide an exemption for proxy solicitation. HOLA includes proxies in its calculation of voting percentage ownership in calculating control. 12 U.S.C. § 1467a(2)(A) (2012) ("[A] person shall be deemed to have control of . . . a savings association if the person . . . holds proxies representing, more than 25 percent of the voting shares of such savings association . . . ."). However, an existing SLHC's acquisition of five percent or more of the voting shares of a savings association or SLHC does not require prior approval if "no control is held other than control of voting rights acquired in the normal course of a proxy solicitation." 12 U.S.C. § 1467a(e)(1)(A)(iii)(IV) (2012).

[296] *See* 12 C.F.R. §§ 225.42(a)(6), 238.32(a)(6) (2018).

[297] *See* 12 C.F.R. §§ 225.42(a)(7), 238.32(a)(7) (2018).

eliminated the requirement that such notice be filed, and non-disapproval received, prior to consummation of the transaction.[298] Depending on the type of transaction, it may or may not require publication.[299]

1. No Publication

For some transactions exempt from prior notice, all that the Board requires is notice within ninety calendar days after the acquisition and provision of any relevant information requested by the Reserve Bank, without newspaper publication.[300]

a) Inheritance

Regulations Y and LL exempt from prior notice and publication the acquisition of voting securities of a BHC, SLHC, or SMB by inheritance if the acquiring person notifies the appropriate Reserve Bank within ninety days after the acquisition.[301] This exemption implies that the acquirer does not have any knowledge of the impending transaction before acquiring the shares through testate or intestate succession, and thus does not have the opportunity to file prior to acquiring the shares of the institution.[302]

---

[298] *See* 12 C.F.R. §§ 225.42(b), 238.32(b) (2018).
[299] *See* 12 C.F.R. §§ 225.43(c), 238.33(c) (2018).
[300] *See* 12 C.F.R. §§ 225.42(b), 238.32(b) (2018).
[301] 12 C.F.R. §§ 225.42(b)(1)(i), 238.32(b)(1)(i) (2018) (stating notice exemption for acquisition through inheritance).
[302] Policy Statement on Act of 1978, F.R.R.S. 4-801 (Jan. 24, 1979), 2011 WL 1895977 ("The Board's regulations exempt the following transactions from the prior-notice requirement: . . . [t]estate or intestate succession."); Bruce P. Golden, *Corporate Law for Financial Institutions: New Requirements for Financial Institutions*, 96 BANKING L.J. 531, 532 (1979). *See also* 124 CONG. REC. H11720 (daily ed. Oct. 5, 1978):

> Mr. Vento. . . . I am concerned about situations in which bank stock is inherited or acquired by gifts within a family. I trust that the chairman of the subcommittee does not intend that the supervisory authorities be empowered to prevent such transfers?
>
> Mr. St. Germain. In actual practice, I doubt that this title will have much impact on such family bank situations. It will be necessary where changes of control result that the appropriate supervisory authorities be furnished with the

The inheritance exemption may not apply to distributions of voting securities from testamentary trusts, given that foreknowledge of a distribution under such circumstances is likely. Similarly, the inheritance exemption may not apply to a fiduciary or executor of a testamentary trust. The inheritance exemption from prior notice may only apply to the beneficial owners of voting securities. Therefore, before a bank trust department accepts appointment as executor for an estate controlling twenty-five percent or more of the voting securities of a BHC, the bank may be required to file a CIBCA notice with the appropriate Reserve Bank.[303] If a bank trust department controls the voting securities for two years or more, a BHCA application would be required from the bank pursuant to section 225.11(a) of Regulation Y, unless the bank disposed of its sole discretionary authority to vote the securities, which is most often accomplished by appointing a co-trustee.[304]

> data that bears on the qualifications and competence of the new owners. Basically, we would want the supervisory agencies to assure themselves that the community would continue to have adequate and competent banking services under the new ownership. The committee report states on page 21: "If an owner of a bank plans to transfer his ownership in a will to his family, that transfer is not considered a transfer subject to the provisions of these titles." Such transfers of ownership as well as gifts of stock within a family would not require the supervisory agencies to apply the various criteria that relates to the means of financing and the methods by which the bank was acquired. We would, of course, leave the regulators with the power to check into the qualifications and to make certain that the new owners were able to operate the bank in a proper and legitimate manner. This would give the regulators the power to prevent those rare instances where such a family transfer could result in a banking institution falling into improper or unqualified hands.

[303] 12 C.F.R. § 225.41(c)(1) (2018). The Board might forbear from requiring a CIBCA notice if the executor will dispose of the BHC shares within ninety days after appointment as executor.

[304] *See, e.g.*, Letter from Jennifer J. Johnson, Assoc. Sec'y, to Cynthia W. Young, Esq., Wyatt, Tarrant & Combs), 1990 Fed. Res. Interp. Ltr. LEXIS 218 (June 15, 1990) (commitment 6). However, sole discretionary authority to vote the shares during that two-year period would be permissible for the bank without a BHCA application. 12 C.F.R. § 225.12(a)(1) (2018). If a BHCA

b) Bona Fide Gift

Regulation Y and Regulation LL also exempt from prior notice and publication requirements the acquisition of voting securities through *bona fide* gift.[305] Similar to the inheritance exemption, the Board may interpret "*bona fide*" to include a requirement that the transferee have no prior knowledge of the pending gift. This could cause concern with respect to estate planning transactions that are considered "gifts" for purposes of income taxation, but which would be ineligible for the exemption from prior notice due to the knowledge (and possibly control over the timing of the transfer) that the recipients could possess.

c) Debt Previously Contracted

The final type of transaction exempted from prior notice and newspaper publication by Regulations Y and LL is the acquisition of voting securities in satisfaction of a debt previously contracted in good faith.[306] Like the prior two prior notice exemptions, the knowledge of the acquirer may play a key role in this exemption, as the acquirer should not have extended credit in anticipation of a pending default.[307]

---

application is approved, no corresponding CIBCA notice would be required, due to the exemption discussed above applicable to BHCA applications.

[305] 12 C.F.R. §§ 225.42(b)(1)(ii), 238.32(b)(1)(ii) (2018).

[306] 12 C.F.R. §§ 225.42(b)(1)(iii), 238.32(b)(1)(iii) (2018).

[307] *See* Bd. of Gov. of Fed. Reserve Sys. v. DLG Fin. Corp., 29 F.3d 993, 1004 (5th Cir. 1994):

> Both the FDIC and the OCC have expressly stated that this exemption to the notice requirement is not applicable where a loan collateralized by a controlling interest of the stock of an insured bank is purchased and the loan already is in default.[49] In such an instance, the FDIC recognized that "the acquisition of the loan and the acquisition of the shares is virtually inseparable due to the default status of the loan at the time of its purchase." [50] Thus, "[i]n order for the 'good faith' element of the [debt previously contracted in good faith] exemption to be satisfied, a lender must either make or acquire a loan secured by bank stock in advance of any known default." [51] As we find neither arbitrary nor capricious this consistent interpretation, and we see no meaningful distinction between the good faith exemptions of the C[I]BCA and the BHCA, we conclude that the good faith exemption was inapplicable here,

Any such acquisition, as specifically noted by the regulation elsewhere, is considered an acquisition of the underlying securities and would require prior notice and non-objection prior to the extension of credit.[308]

2. Publication Required

Two additional types of transactions are exempt from prior notice: (i) acquisition arising from redemptions; and (ii) acquisitions of voting securities as a result of action, including the sale of securities, by any third party that are not within the control of the acquirer.[309] In contrast to the exemptions from prior notice discussed above, the Board's Regulations Y and LL require persons involved in these two types of transactions to provide, on a post-transaction basis, the written notice otherwise required for a prior notice and publish in the newspaper.[310] The key is that acquiring persons do not reasonably have advance knowledge of the transactions.[311]

> making prior Board approval a requirement. And, as DLG and De La Garza failed to obtain the requisite approval, the Board did establish a prima facie case that the parties were liable for civil money penalties under the BHCA.[52]

The footnotes accompanying the above quotation cite to the following FDIC and OCC interpretations: FDIC Interp. Ltr. Rul. 84-13 (Aug. 3, 1984) (finding that the exemption is not available where a loan collateralized by more than twenty-five percent of the stock of an insured bank is purchased and that loan is in default); OCC Interp. Ltr. No. 451, FED. BANKING L. REP. (CCH) ¶ 85,675 (Aug. 8, 1988) (opining that for the good faith element to be satisfied, "a lender must either make or acquire the loan secured by bank stock in advance of any known default.").

[308] *See* 12 C.F.R. §§ 225.41(e), 238.31(e) (2018). *See also* 62 Fed. Reg. 9316 (Feb. 28, 1997) ("[T]he final rule incorporates current Board practice that the acquisition of a loan in default that is secured by voting securities of a state member bank or bank holding company is presumed to be an acquisition of the underlying securities."). Therefore, a person proposing to acquire such a loan should file a CIBCA notice. *See also* Letter from J. Virgil Mattingly, Jr., Gen. Counsel, to [REDACTED BY BOARD], 1992 Fed. Res. Interp. Ltr. LEXIS 233 (Sept. 25, 1992).

[309] 12 C.F.R. §§ 225.42(b)(2), 238.32(b)(2) (2018).

[310] *Id.* and 12 C.F.R. §§ 225.43(c), 238.33(c) (2018).

[311] 12 C.F.R. §§ 225.42(b)(2) (2018), 238.32(b)(2) (2018) (identifying the lack of reasonable advance knowledge as a condition of application of redemption and third party action prior notice exemptions). The lack of reasonable advance knowledge is applied in practice to the prior notice

a) Redemption

Regulations Y and LL exempt from the prior notice requirement of the CIBCA the acquisition of voting securities resulting from the redemption of voting securities by the issuing BHC, SLHC, or SMB.[312] For example, with respect to acquisitions arising from redemptions, assume that a privately-held BHC has 100 shares outstanding. One shareholder owns twenty-five shares, one director owns eight shares, and one investment fund also owns eight shares, while all other shareholders, none of which are acting in concert, own only a single share each. The principal shareholder dies, and the BHC's board approves a plan to repurchase the voting securities from the estate and retire the shares, reducing the total number of shares outstanding to seventy-five. Neither the director or investment fund filed a prior CIBCA notice. The consummation of the redemption plan pushes both the director and the investment fund above ten percent of the amount of shares outstanding. If no other shareholder would hold a greater percentage, CIBCA notices would be required from each. The director participated in the board's decision to approve the repurchase program, while the investment fund has no knowledge that the redemption will occur until it receives an updated report from the BHC. Under these circumstances, while the investment fund would be able to use the exemption to file a delayed CIBCA notice, because it would not have known it crossed the filing threshold until well after the fact, the director would likely be considered to be in violation of the CIBCA because the director would have had advance knowledge that the transaction was going to occur and could have filed prior to the transaction taking place.

b) Actions by Third Parties

Regulations Y and LL exempt from the prior notice requirement of the CIBCA the acquisition of voting securities of a BHC, SLHC, or SMB resulting from action by a third party that is not within the control of the acquirer.[313] For example, assume that the largest

---

exemptions discussed above for inheritance, *bona fide* gift, and debt previously contracted.

[312] 12 C.F.R. §§ 225.42(b)(2)(i), 238.32(b)(2)(i) (2018). For definition of "redemption" as including a repurchase of voting securities, *see also* McAfee, *supra* note 149 and accompanying text.

[313] 12 C.F.R. §§ 225.42(b)(2)(ii) (2018), 238.32(b)(2)(ii) (2018).

shareholder of a privately-held SLHC, who owns thirty percent of the outstanding shares, is incapacitated and her estate, including the voting shares of the SLHC, is placed in a conservatorship by the court. An attorney, one of several on a list maintained by the court, is appointed as conservator. The attorney's control over thirty percent of the shares would arise outside of any action over which he had control, and he would be able to file a notice within ninety days of appointment.[314] On the other hand, an attorney who sought appointment as conservator for the shareholder may be required to file a prior notice pursuant to the CIBCA before his or her appointment as conservator.

An intriguing question is whether a shareholder that owns between ten and twenty-five percent of a privately-held BHC, SLHC, or SMB and who becomes the largest shareholder without acquiring any additional shares or increasing percentage ownership must file a CIBCA notice to reflect the change in circumstances. In the example immediately above, if the largest shareholder is not incapacitated, but instead sells twenty percent of her thirty percent to other shareholders (none of which are acting in concert), and a different shareholder, who owns fifteen percent, becomes the largest shareholder as a result of the sale of securities, it is possible that the fifteen percent owner would not have a CIBCA filing obligation, because no *acquisition* took place. CIBCA filing obligations are triggered by the acquisition of control, including an increase in the number of shares owned or increase in percentage ownership, not by the status as an organization's largest shareholder alone.[315] Indirect support for this concept can be found in the *Citizens First* case, in which a federal district court found that the key concept in the statute was acquisition "through" a disposition of voting securities.[316]

VI. Filing, Publication, Processing, and Disposition

A. Filing

A notice for the acquisition of control of a SMB, BHC, or SLHC should be filed with the Reserve Bank of the Federal Reserve

---

[314] 12 C.F.R. §§ 225.42(b)(2), 238.32(b)(2) (2018).

[315] 12 C.F.R. §§ 225.42(c), 238.31(c) (2018) (specifying acquisitions that trigger obligation to file CIBCA notice).

[316] *See* Citizens First Bancorp, Inc. v. Harreld, 559 F. Supp. 867, 873 (W.D. Ky. 1982) ("[C]ontrol must be acquired 'through a purchase, assignment, transfer, pledge, or other disposition.").

District in which the SMB, BHC, or SLHC principally conducts its banking operations, as measured by total domestic deposits on the date the notice is filed.[317] Unless otherwise provided by regulation, the CIBCA requires the notice to include the following: (i) identity, personal history, and business background of acquiring person; (ii) five-year financial history of acquiring person; (iii) terms and conditions of the proposed acquisition; (iv) source of funds or other consideration used for the proposed acquisition; (v) future plans for the institution; (vi) identity of any person making solicitations or recommendations to stockholders; (vii) invitations, tenders, or advertisements making a tender offer to stockholders; and (viii) additional relevant information.[318] Regulations Y and LL require the submission of the information required by the CIBCA or in a form designated by the Board.[319] The Board has designated the Interagency Notice of Change in Bank Control (Notice)[320] and the Interagency Biographical and Financial Report (IBFR) as the forms for submission of information.[321] These forms may be filed in paper or electronic form with the appropriate Reserve Bank.[322]

The Board may waive any information requirements if it determines that doing so would be in the public interest.[323] If a BHC or

---

[317] 12 C.F.R. §§ 225.3(b)(3), 238.3(b)(2) (2018) (stating that notice should be submitted to "[t]he Federal Reserve Bank of the Federal Reserve District in which the banking operations . . . are principally conducted, as measured by total domestic deposits on the date the notice is filed.").

[318] 12 U.S.C. § 1817(j)(6) (2012).

[319] 12 C.F.R. §238.33 (2018).

[320] *Interagency Notice of Change in Control—FR 2081a*, http://www.federalreserve.gov/reportforms/forms/FR_2081a20150331_f.pdf [https://perma.cc/JEB4-NKTM] [hereinafter *Notice*] (last visited May 10, 2017).

[321] *Interagency Biographical and Financial Report—FR 2081c*, http://www.federalreserve.gov/reportforms/forms/FR_2081c20150331_f.pdf [https://perma.cc/8SQ6-W7X9] [hereinafter *IBFR*] (last visited May 10, 2017).

[322] *Electronic Applications and Applications Filing Information,* BD. GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/bankinforeg/afi/regionalinfo.htm [http://perma.cc/UY7P-ZZK4] (describing how electronic filings are made through the Board's E-Apps platform. Any person who obtains a digital certificate may file a CIBCA notice via E-Apps (e.g., notificant, legal counsel, or consultant)).

[323] 12 C.F.R. §§ 225.43(a)(2), 238.33(a)(2) (2018) ("The Board may waive any of the informational requirements of notice if the Board determines that it is in the public interest."). With respect to provision of financial statements in accordance with GAAP, the House Report allowed for flexibility. H.R. REP. NO. 95-1383, at 242 (1978) ("The original requirement that acquiring parties

SLHC is required to file an application pursuant to the BHCA in connection with a proposed acquisition, and if a person or group of persons proposes to acquire control of the acquiring BHC, the person or group of persons may fulfill CIBCA notice requirements by providing the information required by the CIBCA as part of the BHCA application.[324]

1. Forms

The Notice requests detailed information about the proposed acquisition of voting securities of the affected SMB, BHC, or SLHC, including the following:

a. Identity of the proposed acquirers, voting securities to be acquired, manner in which securities will be registered, and purchase price;[325]
b. Copies of pertinent documents, such as purchase and sale agreements, shareholder agreements, non-compete agreements, employment contracts, and trust agreements;[326]
c. Source of funds for the proposed acquisition, such as copies of account statements if cash will be used and the terms of borrowing arrangements if debt will be used;[327]

---

provide audited financial data for 5 years has been made more flexible. . . . The information required will be tailored to the situation at hand so that the agency can meet its responsibilities without erecting needless barriers to the consummation of legitimate transactions."). S*ee also* 124 CONG . REC. H11,33824–25 (daily ed. Oct. 5, 1978) (statement of Mr. Rousselot) ("It would seem to me that agencies should be given sufficient flexibility to require whatever information is needed to determine whether or not to disapprove a proposed change of control, no more or no less.").

[324] 12 C.F.R. § 225.14 (2018) ("If, in connection with a transaction under this subpart, any person or group of persons proposes to acquire control of the acquiring bank holding company for purposes of the Bank Control Act or § 225.41, the person or group of persons may fulfill the notice requirements of the Bank Control Act and § 225.43 . . . .").

[325] *Notice*, *supra* note 320, at 2–3 (items 1–7).

[326] *Id.* at 3 (item 8.b.).

[327] *Id*. at 4 (item 9.c.). The form requests information about the source of funds to determine the financial ability of the person and verify that the person filing the notice is not acting on behalf of a third party (who should file a

d. Identity of persons making solicitations or recommendations[328] and copies of invitations, tenders, or advertisements making a tender offer;[329]
e. Description of any plan or proposal the notificant may have to change the business strategy or corporate structure of the affected institution, such as a plan to increase asset growth, expand into new geographic markets, change funding sources, introduce new services or products, or expand or reduce existing service or product offerings;[330]
f. Description of any proposed changes in directors and senior executive officers;[331]
g. Disclosure of positions held by any proposed acquirer with any other depository institution or depository institution holding company (e.g., director, officer, or employee);[332]

---

notice). *See also* Letter from Scott G. Alvarez, Assoc. Gen. Counsel, to Dennis J. Lehr, Esq., Hogan & Hartson (July 22, 1992).

[328] *Notice, supra* note 320, at 5 (item 11) (requiring the identity of persons making solicitations or recommendations to stockholders, thereby assisting in the acquisition).

[329] *Id.* (item 8.b.).

[330] *Id.* (item 12). If the acquirer proposes significant changes, a business plan should be submitted, which provides detailed description of the proposed changes and systems, the risks posed by the changes, and processes that will be used to measure, monitor, and control risk.

[331] *Id.* (item 13). *See also* 12 U.S.C. § 1831i (2012); 12 C.F.R. §§ 225.71–225.73, 238.71–238.77 (2018). If changes are contemplated, the regulatory agency with which the notice has been filed should be contacted to determine filing requirements, if any, associated with changes to directors and senior executive officers pursuant to section 32 of the FDIA.

[332] *Notice, supra* note 320, at 4 (item 14) (stating that other positions currently held in other depository institutions be disclosed). *See also IBFR*, *supra* note 321, at 6. If any office of any depository institution or depository institution holding company with which the acquiring person is associated is located in the same geographic market as the subject institution, the *Notice* also asks for the name and location of such other organization. *Id.* at 5. If the acquirer identifies any such positions, and if the acquirer proposes to become a management official of the institution that is the subject of the CIBCA notice, it must be determined whether the interlock is prohibited by the Depository Institution Management Interlocks Act, as implemented by Regulation L. 12 U.S.C. §§ 3201–3208 (2012); 12 C.F.R. pt. 212 (2018).

h. Disclosure of direct or indirect ownership, control, or power to vote ten percent or more of the voting securities or other voting equity interests of any other depository institution or depository institution holding company;[333] and

i. If acquiring person is not an individual, a description of insurance activity in which the company is engaged.[334]

The IBFR requests detailed information about the acquiring person related to the identity, employment, education, professional licensing, business and banking affiliations, involvement in legal and regulatory proceedings, and other matters.[335] The form also requests financial statements from individuals with "as of" dates not more than ninety days prior to the date of submission.[336] The federal banking agency may request up to five years of financial data.[337]

2. Investigation

The CIBCA requires the Board to conduct an investigation of the competence, experience, integrity, and financial ability of each person proposing to acquire a controlling interest in a BHC, SLHC, or SMB, to make an independent determination of the accuracy and completeness of information submitted in a notice.[338] The Board often conducts background checks on proposed acquirers through contacts with other regulatory or law enforcement agencies.[339] For instance, the

---

[333] *Notice, supra* note 320, at 5 (item 14); *IBFR*, *supra* note 321, at 6 (item 4(d)).
[334] *Notice, supra* note 320, at 6 (item 16).
[335] *IBFR, supra* note 321.
[336] *Id*. at 1.
[337] *Id*. ("[E]ach regulatory agency specifically reserves the right to require up to five years of financial data from any acquiring person as well as the filing of additional information and/or statements, such as a federal income tax return or a current appraisal to support an asset's value.") With respect to provision of financial statements, the House Report for the initial enactment of the CIBCA allowed for flexibility. *See* H.R. REP. NO. 95-1383, at 242 (1978) ("The original requirement that acquiring parties provide audited financial data for 5 years has been made more flexible.").
[338] 12 U.S.C. § 1817(j)(2)(B) (2012).
[339] BD. GOVERNORS FED. RESERVE SYS., DIV. OF BANKING SUPERVISION & REGULATION, SR 03-10, ENHANCEMENT TO THE NAME CHECK PROCESS

Board obtains fingerprints from some acquirers, which are used to run a background check through the Federal Bureau of Investigation.[340] Fingerprints are submitted through a fingerprint card or electronic scan of fingerprints using a "Live-Scan" terminal.[341] The Board or Reserve Bank prepares a written report of investigation as required by the CIBCA and the Board's implementing regulations.[342]

3. Joint Ownership, Control, or Power to Vote

If a person is required to file a notice, other persons with whom such person jointly owns, controls, or holds voting power over voting securities of the affected institution may be required to join the notice.[343] Notices filed by acquiring persons sometimes fail to include a spouse when voting securities of the affected institution are held in the joint name of spouses. Spouses may incorrectly attribute voting securities to only one spouse despite contrary registration of the securities in the records of an institution. If shares are jointly registered, each spouse may be required to be a notificant if one spouse is a notificant.

An entity and its controlling persons may be required to file a Notice if the entity owns, controls, or holds voting securities of the affected institution. For example, as noted, voting securities held by a trust are attributed to the trust and each of its trustees, and voting securities held by a partnership are attributed to the partnership and each of its general partners.[344]

RELATED TO APPLICATIONS REVIEWED BY THE FEDERAL RESERVE (May 28, 2003) ("In connection with its review of various applications and notices, the Federal Reserve has had a longstanding policy of conducting name checks with law enforcement and other government authorities on certain individuals associated with a proposed transaction.").

[340] *Id.* ("The Federal Reserve has worked with the Federal Bureau of Investigation on an enhancement to the System's current name check process that will enable the Federal Reserve to obtain from the FBI more accurate and current information relating to arrests and convictions.").

[341] BD. GOVERNORS FED. RESERVE SYS., *supra* note 339 ("There are currently two methods by which fingerprints can be provided to the Federal Reserve—a "Live-Scan" terminal or a fingerprint card.").

[342] 12 U.S.C. § 1817(j)(2)(C) (2012); 12 C.F.R. §§ 225.43(f), 238.33(f) (2018).

[343] *See* 12 U.S.C. § 1817(j)(8)(B) (2012); 12 C.F.R. § 225.41(c)(2) (2018).

[344] *See supra* notes 201–04 and accompanying text ("Any voting securities held by a trust are attributed to each of its trustees when calculating the percentage of voting securities owned, controlled, or held by a person.").

4. New Members of an Existing Family Control Group

Board review of a family control group without disapproval only authorizes the members of that control group to own, control, or hold voting securities of a BHC, SLHC, or SMB.[345] The proposed acquisition of voting securities of the same institution by immediate family members who were not parties to a previous CIBCA notice expands the family control group, which would likely require CIBCA filings.[346] Depending upon the circumstances, a prior or post notice may be required.[347] Generally, information regarding *all* members of the group may be required in a notice.[348] For a prior notice, the Board may require each new member of the group to execute signature pages for the notice.[349] In addition, the Board may require each new group member to provide a complete and executed IBFR based upon their

---

[345] Filing Requirements and Processing Procedures for Changes in Control with Respect to State Nonmember Banks and State Savings Associations, 80 Fed. Reg. 65,890, 65,890 (Oct. 28, 2015) ("The FDIC notes that a group of persons acting in concert becomes a different group of persons acting in concert when a member of the group leaves or a new member joins.").

[346] Based upon the preamble to FDIC's 2015 revised regulation, it appears that the FDIC would require a new notice when a person ceases participation in a group. Filing Requirements and Processing Procedures for Changes in Control with Respect to State Nonmember Banks and State Savings Associations, 80 Fed. Reg. 65,890, 65,890 (Oct. 28, 2015) ("For example, if certain members of a family have previously filed a Notice with . . . each member of the group must file a new Notice . . . when a member of the group ceases participation in the group, and the group continues to hold sufficient shares to constitute 'control.'"). The Board has generally not taken the same approach to group members leaving a group.

[347] *See e.g.,* 12 C.F.R. §§ 225.41(a), 225.42(b)(2), 238.31(a), 238.32(b)(2) (2018) ("Two additional types of transactions are exempt from prior notice: (i) acquisition arising from redemptions, and (ii) acquisitions of voting securities as a result of action, including the sale of securities, by any third party that are not within the control of the acquirer.").

[348] 12 C.F.R. §§ 225.41(a), 238.12(a) (2018) ("Any person acting directly or indirectly, or through or in concert . . . shall give the Board 60 days' written notice . . . .").

[349] Filing Requirements and Processing Procedures for Changes in Control with Respect to State Nonmember Banks and State Savings Associations, 80 Fed. Reg. 65,890, 65,890 (Oct. 28, 2015) (stating that whenever a new member is added to the group, each member of the group must file a new Notice and obtain the FDIC's non-objection). The Board has generally taken the same approach to new group members.

position with the institution or level of ownership. Persons who were parties to a previous CIBCA notice may not have to provide a new IBFR. In any event, Board or Reserve Bank staff may require an IBFR and request a name check on any group member based on facts and circumstances of the filing.

5. Notices Exempt from Prior Notice Requirement

For an acquisition exempt from the prior notice requirement, such as an acquisition through inheritance under a will or *bona fide* gift, the acquiring person may provide a notice to the Board within ninety days after an acquisition.[350] The acquiring person should contact the appropriate Reserve Bank for guidance on the information to be submitted. Reserve Banks may request the following information for an acquisition pursuant to inheritance or *bona fide* gift:

(i) Name of the affected institution;
(ii) Number of shares of voting securities of the institution outstanding on the transaction date;
(iii) Name of the acquirer of the voting securities of the institution (e.g., name of the individual, trust, corporation, and/or partnership);
(iv) Number and percentage of the shares of voting securities of the institution held in any manner before and after the acquisition;
(v) Identity of any immediate family members holding voting securities of the institution;
(vi) Number and percentage of the shares of voting securities of the institution held by an immediate family group before and after the acquisition; and
(vii) Date of the acquisition.

The Reserve Bank may ask for additional information, including information about the prior knowledge of any acquiring person concerning the acquisition and information about the competence, experience, integrity, and financial condition of any acquiring person.[351]

---

[350] 12 C.F.R. §§ 225.41(b)(1), 238.32(b)(1) (2018).

[351] 12 U.S.C. § 1817(j) (2012).] ("[T]he appropriate Federal banking agency shall . . .conduct an investigation of the competence, experience, integrity, and financial ability of each person named in a notice of a proposed acquisition as a person by whom or for whom such acquisition is to be made.").

6. Remedial Filings

If a person fails to provide a required notice for the acquisition of voting securities of a BHC, SLHC, or SMB, the Board may require the person to file a remedial notice to retain the voting securities.[352] The Board may require a remedial notice to include all of the information required by the Notice and IBFR forms for the acquiring person, even if the Board would have accepted less information if the notice had been filed in a timely manner.[353] For instance, a person who acquires voting securities through inheritance pursuant to a will may be permitted to file an abbreviated notice within ninety days of the acquisition without publication.[354] When such a notice is not filed within the specified time period, the Board may require all of the information required for a prior notice, as well as publication.[355] However, the Board may waive some information requirements for a remedial notice from a person owning, controlling, or holding a small number of shares.[356] In any event, the remedial notice should include an explanation of the circumstances that resulted in the violation and a description of the actions that have been taken by the person to ensure against any further violations of the CIBCA.[357]

---

[352] BD. GOVERNORS FED. RESERVE SYS., *supra* note 252.

[353] *Id.* ("The filing should include an explanation of the circumstances that resulted in the violation, and a description of the actions that have been (or will be) taken by the filer(s) to ensure no further violations of the statute.").

[354] *Id.* ("The transactions that require after-the-fact notice include, among others, the acquisition of voting securities through inheritance . . . the appropriate Reserve Bank must be notified within 90 days after the acquisition, and the acquirer must provide any relevant information requested by the Reserve Bank.").

[355] *Id.* (stating that violations of the requirement to file a change in bank control notice may result in the Board taking enforcement action against the relevant person(s)).

[356] 12 C.F.R. § 238.33(a) (2018) ("The Board may waive any of the informational requirements of the notice if the Board determines that it is in the public interest.").

[357] BD. GOVERNORS FED. RESERVE SYS., *supra* note 252, at 2 ("The filing should include an explanation of the circumstances that resulted in the violation, and a description of the actions that have been (or will be) taken by the filer(s) to ensure no further violations of the statute."). *See also*, *e.g.,* Letter from Jennifer J. Johnson, Deputy Sec'y, to Rod Jones, Esq., Shutts & Bowen, 1997 Fed. Res. Interp. Ltr. LEXIS 131 (Sept. 17, 1997) ("Based on all the facts of record, the Board has determined not to disapprove the retroactive notice. . . . The record also indicates that Notificants have taken

7. Other Banking Agency Filings

Depending upon the circumstances, the acquiring person or affected institution may be required to make filings with federal or state banking agencies in addition to a notice. If a proposed acquisition of a BHC, SLHC, or SMB involves a proposal to add or change a director or senior executive officer, and the institution is in troubled condition, that institution is required to file a "914 Notice" with the appropriate Reserve Bank without disapproval before the addition or change would be authorized.[358] The Board may disapprove a 914 Notice if it finds that the competence, experience, character, or integrity of the individual with respect to which the notice is submitted indicates that it would not be in the best interests of the depositors of the institution or the public to permit the individual to be employed by the institution.[359]

If a proposed acquisition involves a person convicted of certain criminal offenses, the person is prohibited from acquiring ownership or control of the affected institution, or otherwise participating in the affairs of the affected institution, unless the person obtains the consent of the FDIC pursuant to section 19 of the FDIA.[360]

If a proposed acquisition involves a reduction or retirement of capital stock or the declaration or payment of dividends to shareholders when the institution is subject to prompt corrective action restrictions, formal enforcement action, or dividends restrictions under federal or state law, the institution may be required to seek prior approval from the appropriate federal and state supervisors.[361]

---

steps to ensure that they will comply with federal banking laws in the future.").

[358] The term "914 Notice" refers to the section of FIRREA that established the notice requirement for changes in directors and officers of an institution in troubled condition. *See* FIRREA, Pub. L. No. 101-73, § 914(a)(3), 103 Stat. 183, 484 (codified at 12 U.S.C. § 1831i).

[359] 12 C.F.R. § 225.73(c) (2018).

[360] 12 U.S.C. § 1829(a)(1)(A) (2012); *IBFR*, *supra* note 321, at 1 ("If you have been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or have agreed to enter into a pretrial diversion or similar program in connection with a prosecution of such offense, you must obtain approval from the FDIC before you can own, control, participate in the affairs of, or become an institution-affiliated party of a depository institution." (citation omitted)).

[361] *See, e.g.*, 12 U.S.C. § 1831o(f)(2)(H) (2012) (explaining that the appropriate federal banking agency may place discretionary limitation on capital

B. Publication Requirements

An acquiring person must publish an announcement of the proposed acquisition one time in a newspaper of general circulation in the community in which the head office of the SMB, BHC, or SLHC is located.[362] In the case of a BHC or SLHC, an announcement also must be published once in the community where the head office of any depository institution subsidiary of the holding company is located.[363] The appropriate Reserve Bank should be contacted for the specific requirements for the notice in the newspaper.[364] A person who publishes a notice that does not satisfy Board requirements may be required to re-publish. The newspaper publication may occur up to fifteen days before the filing or ten days after the filing.[365] A copy of the affidavit(s) of publication must be submitted to the appropriate Reserve Bank.[366]

The newspaper publication should include several items. First, it should include the name, city, and state of residence of each acquiring person.[367] If an acquiring person is a trust, the name, city, and state of residence of the trust and each trustee should be included. If an acquiring person is a partnership, the name, city, and state of residence of the partnership and each of general partner should be included.[368] Second, the newspaper publication should include the name of the SMB, BHC, or SLHC and city and state of the institu-

---

distributions based on prompt corrective action for failure to submit and implement capital restoration plans); 12 C.F.R. § 208.5(d)(1) (2018) (explaining that a member bank must obtain approval from "the Board and of at least two-thirds of the shareholders of each class of stock outstanding" to exceed statutory dividend limitations).

[362] 12 C.F.R. §§ 225.43(c)(1), 238.33(c)(1) (2018).

[363] *Id*.

[364] FED. RESERVE BD., FR Y-3, Instructions for Preparation of Application to Become a Bank Holding Company and/or Acquire an Additional Bank or Bank Holding Company (July 2018), https://www.federalreserve.govreportforms/forms/FR_Y-320180731_i.pdf [https://perma.cc/43RM-CV9V] ("Applicant should consult with the appropriate Reserve Bank or the Board's public website for the specific publication format used at that Reserve Bank.").

[365] 12 C.F.R. § 225.43(c)(1) (2018) (outlining the timing of the newspaper publication requirements).

[366] *Id.* ("[A]nd the publisher's affidavit of a publication shall be provided to the appropriate Reserve Bank.").

[367] 12 C.F.R. §§ 225.43(c)(2), 238.33(c)(2) (2018).

[368] *Id.*

tion's head office.[369] If publication is required for a subsidiary depository institution, it should include the name of the subsidiary, the city, and the state where its head office is located.[370] Third, the newspaper publication should include a general statement of the percentage of outstanding voting securities of the SMB, BHC, or SLHC that the person proposes to acquire (e.g., ten percent or more or twenty-five percent or more of the voting shares). A specific percentage is not required to be included in the newspaper notice (e.g., up to 15.2%). Finally, the newspaper publication should include a statement that comments may be submitted to the Board or appropriate Reserve Bank for twenty days after the date of publication, with the name of the person to whom comments should be submitted.[371]

The Board also arranges for publication of the proposed acquisition in the Federal Register, which provides for a fifteen-day comment period.[372] Acquirers may submit a request, including the specific information enumerated above, to the Reserve Bank to arrange for this publication no earlier than fifteen calendar days prior to the date the change in control notification is filed.[373] Otherwise, the Reserve Bank will arrange for the publication upon receipt of the filing.[374]

In certain circumstances, the Board may delay publication or shorten or waive the publication requirement or public comment period. The Board may delay the newspaper and Federal Register

---

[369] 12 C.F.R. § 225.43(c)(1) (2018) (requiring newspaper publication to identify the proposed acquirer of the bank or bank holding company, as well as the institution being acquired).

[370] *See Electronic Applications and Applications Filing Information*, *supra* note 322 (providing a newspaper publication template, which requires inclusion of "([b]anking holding company) controls (name and head office locations of subsidiary banks).")

[371] Reserve Bank websites specify a person to whom comments should be submitted. Bd. of Governors of the *Electronic Applications and Applications Filing Information*, *supra* note 322. *See also* 12 C.F.R. §§ 225.43(c)(2), 238.33(c)(2) (2018) ("The newspaper announcement shall state . . . that interested persons may submit comments on the notice to the Board or the appropriate Reserve Bank for a period of 20 days, or such shorter period as may be provided.").

[372] 12 C.F.R. §§ 225.43(c)(3), 238.33(c)(3) (2018).

[373] 12 C.F.R. §§ 225.43(c)(1), 238.33(c)(1) (2018).

[374] *Id.*

publication, for good cause shown, if it is in the public interest.[375] The Board may shorten or waive newspaper publication requirements or the public comment period if the Board determines in writing that an emergency exists or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety or soundness of the SMB, BHC, or SLHC to be acquired.[376]

Even if an acquisition is exempt from the prior notice requirement, publication is still required for an acquisition resulting from a stock redemption or action by a third party not within the control of the acquirer, such as the sale of securities by a third party.[377] Publication is not required for the acquisition of voting securities through inheritance under a will, *bona fide* gift, or acquisition pursuant to a debt previously contracted.[378]

When an acquisition of voting securities of a BHC, SLHC, or SMB involves the addition of a new member to a control group previously reviewed by the Board or Reserve Bank without disapproval, the name of the new group member and a general description of the existing control group should be included in the newspaper and Federal Register publications.[379] For example, the publications could include the following: "John Smith, Hometown, Iowa proposes to acquire voting shares of ABC Bancorp, Big City, Iowa, and thereby indirectly acquire ABC Bank, Big City, Iowa, and become a member of the Smith Family Control Group that was approved on January 1, 2015."

---

[375] 12 C.F.R. §§ 225.43(c)(4) (2018) ("The Board may permit delay in the publication . . . if the Board determines, for good cause shown, that it is in the public interest to grant such delay."), 238.33(c)(4) (2018).

[376] 12 C.F.R. §§ 225.43(c)(5) (2018) ("The Board may shorten or waive the public comment or newspaper publication requirements of this paragraph, or act on a notice before the expiration of a public comment period, if it determines in writing that an emergency exists, or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety or soundness of the bank or bank holding company to be acquired."), 238.33(c)(5) (2018).

[377] 12 C.F.R. §§ 225.42(b)(2) (2018) (requiring the person to provide the written notice required by section 225.43, which includes publication).

[378] 12 C.F.R. § 225.42(b)(1) (2018) (requiring the person to provide any relevant information requested by the Reserve Bank).

[379] 12 C.F.R. §§ 225.42(c)(2)(i) (2018), 238.33(c)(2)(i) (2018).

C. Processing Notices

The Board's regulations and guidance set forth procedures for processing notices, which include the processing of pre-filing submissions, treatment of requests for confidential treatment, acceptance of notices, advice to other regulatory agencies of receipt of notices, consideration of public comments, investigation of notificants, preparation of a report of investigation, review of the proposed acquisition in light of statutory factors, rules for delegation of action to Reserve Banks, processing timeframes, action on notices, and provision for hearing or appeal in the event of disapproval by the Board.

1. Pre-filing Submissions

Board and Reserve Bank staff will review information prior to the submission of a formal filing to provide guidance related to potential filings with the Board under the CIBCA, BHCA or HOLA.[380] Those submitting pre-filings may ask whether a filing is required or the type of filing that the Board would require in connection with a proposal, such as the persons who should join in a filing, or whether an entity is a "company" or has "control" under the BHCA or HOLA.[381] Pre-filings may also address supervisory issues arising from a proposed acquisition, looking at the impact of a business plan or *pro forma* financial information on an institution.[382] Furthermore, Reserve Banks have delegated authority to determine a person is or will be subject to a rebuttable presumption of concerted action under the

---

[380] *See, e.g.*, Letter from Michael Bradfield, Gen. Counsel, to [REDACTED BY BOARD], 1989 Fed. Res. Interp. Ltr. LEXIS 45 (Feb. 9, 1989) (clarifying that no CIBCA notice required because no regulatory purpose would be served).

[381] *Id.* ("This is in response to your letters . . . requesting an opinion regarding whether an application under the Bank Holding Company Act (the BHC Act) or a notice under the Change in Bank Control Act (the CIBC Act) would be required in connection with a proposed plan of reorganization involving [TEXT REDACTED BY THE AGENCY] and the [TEXT REDACTED BY THE AGENCY] wholly-owned subsidiary, [TEXT REDACTED BY THE AGENCY] are both registered bank holding companies under the BHC Act.").

[382] BD. GOVERNORS FED. RESERVE SYS., DIV. OF BANKING SUPERVISION & REGULATION, SR 12-12, IMPLEMENTATION OF A NEW PROCESS FOR REQUESTING GUIDANCE FROM THE FEDERAL RESERVE REGARDING BANK AND NONBANK ACQUISITIONS AND OTHER PROPOSALS (July 11, 2012).

Board's regulations implementing the CIBCA.[383] Action pursuant to that authority could determine whether the filing of a notice is required.[384]

2. Confidentiality

Notificants may request confidential treatment for portions of documents submitted as a pre-filing or formal notice.[385] Generally, the Board treats pre-filings and notices as public documents, unless confidential treatment is requested and justified.[386] Pre-filing inquiries become public records of the Board and may be requested by any member of the public in accordance with the Board's Rules Regarding Availability of Information.[387] However, pre-filings are not published in the Board's H.2 report of applications received and actions taken by the Board and Reserve Banks.[388] Formal notices also become public records of the Board. Federal Register publications of the filing of a notice include the following language: "The notices are available for immediate inspection at the Federal Reserve Bank indicated. The

---

[383] 12 C.F.R. §§ 225.41–225.44 (2018) (detailing regulation of BHCs and SMBs); 12 C.F.R. §§ 238.31–238.33 (2018) (detailing regulation of SLHCs). *See also* 12 C.F.R. §§ 5.50 (detailing regulation of national bank and federal savings associations), 303.80–303.99, and 391.40-48 (detailing regulation of state nonmember banks and state savings associations); Policy Statement on Act of 1978, F.R.R.S. § 4-801 (Jan. 24, 1979), 2011 WL 1895977; Board, *Regulation Y: Policy Statement and Revision*, 65 Fed. Res. Bull. 139 (1979). The OCC published guidance for its processing of CIBCA notices. U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, *Comptroller's Licensing Manual, Change in Bank Control* (Sept. 2017), https://www.occ.gov/publications/publications-by-type/licensing-manuals/cbca.pdf [https://perma.cc/JD4W-6MWX] (providing comprehensive instructions and guidelines for changes in bank control).

[384] 12 C.F.R. § 265.11(c)(5)(iii) (2018).

[385] *Notice*, *supra* note 320, at 1.

[386] BD. GOVERNORS FED. RESERVE SYS., SUPPORTING STATEMENT FOR THE NOTICE OF CHANGE IN BANK CONTROL, INTERAGENCY NOTICE OF CHANGE IN DIRECTOR OR SENIOR EXECUTIVE OFFICER, AND INTERAGENCY BIOGRAPHICAL AND FINANCIAL REPORT, OMB No. 7100-0134 (2017), 3-4, https://www.federalreserve.gov/boarddocs/reportforms/formsreview/fr2081.20030129_omb.pdf [https://perma.cc/346J-XTPL].

[387] 12 C.F.R. §§ 261.1–261.23 (2018).

[388] *See Actions of the Board, Its Staff, and the Federal Reserve Banks, Release Dates - H.2,* https://www.federalreserve.gov/releases/h2 [https://perma.cc/J6E7-4NRE].

notices also will be available for inspection at the offices of the Board of Governors."[389] To justify confidential treatment, an acquirer must specifically demonstrate the harm that would result from disclosure of the information for which it seeks confidential treatment (e.g., competitive harm or invasion of privacy).[390] Information for which confidential treatment is requested should be specifically identified, separately bound, and labelled confidential.[391] The FOIA exempts certain information from disclosure, including trade secrets, inter-agency memoranda, personnel files, and examination reports.[392] Generally, the following information often submitted with a CIBCA notice is given confidential treatment: (i) completed IBFRs; (ii) social security numbers; (iii) details regarding personal financial transactions, accounts, and statements of individuals; (iv) personal contact information for individuals; and (v) trust instruments.[393] Furthermore, confidential

---

[389] *See, e.g.*, 82 Fed. Reg. 30,862 (July 3, 2017) ("The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors."). Early in the history of the Board's implementation of the CIBCA, the Board withheld most information about notices, disclosing only the name of the bank and acquiring person. REPORT, *supra* note 67, at 5–6. *See also* Michael S. Helfer & Russell J. Bruemmer, *Federal Banking Law Considerations in Unfriendly Takeovers of Depository Institutions*, 33 AM. U. L. REV. 309, 323, n.81 (1984).

[390] FEDERAL RESERVE SYSTEM, *supra* note 141, at 3 ("The Federal Reserve treats notices as public documents. Respondents may request that parts of their notices be kept confidential, but in such cases the burden is on the respondent to justify the exemption by demonstrating that disclosure would cause 'substantial competitive harm' or result in 'an unwarranted invasion of personal privacy' or would otherwise qualify for an exemption under the Freedom of Information Act . . . .").

[391] *Notice*, *supra* note 320, at 1 ("Information for which confidential treatment is requested should be (1) specifically identified in the public portion of the notice (by reference to the confidential section); (2) separately bound; and (3) labeled 'Confidential.'").

[392] 5 U.S.C. § 552(b) (2012) ("This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . ."); 12 C.F.R. § 261.14 (2018).

[393] *See, e.g.*, Letter from William W. Wiles, Sec'y, to William J. Sweet, Jr., Esq., Skadden, Arps, Slate, Meagher & Flom, 1996 Fed. Res. Interp. Ltr.

supervisory information about the affected institution, such as examination ratings, is not available to an acquiring person without approval of the Board's General Counsel.[394] Similarly, information of a notificant accorded confidential treatment would not be available to the affected SMB, BHC, or SLHC.

3. Acknowledgement and Acceptance

When a notice is filed, the appropriate Reserve Bank acknowledges receipt of the filing in writing. When a notice is accepted for processing, the appropriate Reserve Bank notifies the acquiring person in writing of the date of acceptance of the notice. Acceptance indicates that the notice contains sufficient information to commence processing. However, the Reserve Bank may request additional information thereafter. The sixty-day period for review of a notice commences on the date of acceptance.[395] Occasionally, a notice is returned without acceptance because it is informationally insufficient or lacks sufficient viability as to justify processing the notice.[396] The sixty-day period for review of a notice commences on the date of acceptance.[397] Occasionally, a notice is returned without acceptance because it is informationally insufficient or lacks sufficient viability as to justify processing the notice.[398]

LEXIS 175 (July 31, 1996) (portions of documents containing publicly available factual information released); Letter from Susan M. Phillips, Governor, to George Yarnevich, Esq., Kennedy, Berkley, Yarnevich & Williamson, 1996 Fed. Res. Interp. Ltr. LEXIS 161 (May 9, 1996) (denying appeal of determination to withhold release of personal financial statements submitted with CIBCA notice).

[394] 12 C.F.R. § 261.22 (2018).

[395] 12 C.F.R. §§ 225.43(b), 238.33(b) (2018).

[396] *See, e.g.*, Letter from William W. Wiles, Sec'y, to L. Napoleon Cooper, [REDACTED BY BOARD], 1986 Fed. Res. Interp. Ltr. LEXIS 36 (Dec. 24, 1986); Letter from William W. Wiles, Sec'y, to [REDACTED BY BOARD], 1985 Fed. Res. Interp. Ltr. LEXIS 40 (June 27, 1985) ("Based on the determination that the Notice is informationally incomplete, the Acting General Counsel has also determined that effective Notice under the Act and the Board's regulations thereunder has not been given and that the period during which the Board may issue its disapproval has not begun.")

[397] 12 C.F.R. §§ 225.43(b), 238.33(b) (2018).

[398] *See, e.g.*, Letter from William W. Wiles to L. Napoleon Cooper, *supra* note 396. *See also* Letter from William W. Wiles, Sec'y, to Kevin J. Handly, to [REDACTED BY BOARD], 1985 Fed. Res. Interp. Ltr. LEXIS 40 (June

4. Advice to Bank Regulatory Agencies

The CIBCA requires the appropriate federal banking agency to furnish the other federal banking agencies with a copy of any notice received.[399] The Board's Regulations Y and LL require the appropriate Reserve Bank to furnish "any notice" to the OCC, FDIC, and OTS.[400] Furthermore, the CIBCA requires the appropriate federal banking agency to forward a copy of a notice received to the appropriate state supervisor when the voting shares sought to be acquired are those of a state depository institution.[401] For a SMB, the Board's Regulation Y requires a Reserve Bank that has accepted a notice to send a copy to the appropriate state bank supervisor, which has thirty days to submit its views and recommendations.[402] While not required by the statute or regulation, the appropriate Reserve Bank may solicit comment from the appropriate state banking supervisors regarding notices to acquire control of a BHC or SLHC.[403]

27, 1985), at 2 ("Based on the determination that the Notice is informationally incomplete, the Acting General Counsel has also determined that effective Notice under the Act and the Board's regulations thereunder has not been given and that the period during which the Board may issue its disapproval has not begun.").

[399] 12 U.S.C. § 1817(j)(11) (2012) (requiring the federal banking agency receiving a notice to "immediately furnish" a copy of such notice to the other federal banking agencies).

[400] 12 C.F.R. §§ 225.43(e)(1) (2018) (mandating the Reserve Bank send a copy of the notice to the OCC, the FDIC, and the OTS), 238.33(e) (2018) (specifying the Reserve Bank must send a copy of "any notice" to the OCC and the FDIC).

[401] 12 U.S.C. § 1817(j)(2) (2012) ("Upon receiving any notice under this subsection, the appropriate Federal banking agency shall forward a copy thereof to the appropriate State depository institution supervisory agency if the depository institution the voting shares of which are sought to be acquired is a State depository institution . . . .").

[402] 12 C.F.R. §§ 225.43(e), 238.33(e) (2018) ("Upon accepting a notice relating to acquisition of securities of a state member bank, the Reserve Bank shall send a copy of the notice to the appropriate state bank supervisor, which shall have 30 calendar days from the date the notice is sent in which to submit its views and recommendations to the Board.").

[403] 12 C.F.R. § 225.43(f)(1) (2018) (allowing the Board or Reserve Bank "to solicit information or views from any person, including any bank or bank holding company involved in the notice, and any appropriate state, federal, or foreign governmental authority.").

5. Delegated Action

The Board delegates authority to the Reserve Banks to: (i) determine whether a person who is or will be subject to a presumption described in Regulations Y or LL should file a notice regarding a proposed transaction; (ii) determine the informational sufficiency of notices and reports filed under the CIBCA; (iii) extend periods for consideration of notices; (iv) waive, dispense with, modify, or excuse failure to comply with publication and comment period requirements; and (v) issue a notice of intention not to disapprove a proposed change in control.[404]

When a CIBCA notice raises an issue that exceeds a Reserve Bank's delegated authority, the matter is transferred to the Board. Notices that raise significant issues under the statutory factors may be transferred to the Board, as are notices that prompt public comments opposing the proposal.[405] Notices transferred to the Board for processing, other than those involving an adverse public comment, may be transferred back to appropriate Reserve Bank after issues have been resolved.[406] However, the Board has not delegated authority to the Reserve Banks to issue determinations of intent to disapprove a notice. If a notice must be disapproved, the Board must take this action.[407]

6. Public Comments

The Board considers all substantive public comments received within the period specified in the newspaper or Federal Register

---

[404] 12 C.F.R. § 265.11(c)(5) (2018); Press Release, August 12, 2011, attaching Board order, Appendix A, at 7 (SLHC), http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20110812a1.pdf [https://perma.cc/HT7K-VZVF] (last visited May 10, 2017) ("The Board will apply these delegations [including notices under the Change in Bank Control Act] to actions with respect to savings and loan holding companies in the same manner that they are applied to bank holding companies.").

[405] 12 C.F.R. § 265.11(c)(5) (2018); Press Release, *supra* note 404. *See also* BD. GOVERNORS FED. RESERVE SYS., DIV. OF BANKING SUPERVISION & REGULATION, SR 97-10, GUIDANCE ON PROTESTED PROPOSALS (Apr. 24, 1997).

[406] 12 C.F.R. § 265.11(c)(5) (2018).

[407] 12 C.F.R. §§ 225.43(h), 238.33(h) (2018).

announcement.[408] The Board may, but need not, consider public comments received after this period.[409] Comments may support or oppose the proposed acquisition.[410] Generally, a comment is substantive if it relates to the statutory factors for Board review specified in the CIBCA.[411] More specifically, a non-supportive comment is substantive unless it clearly meets criteria for delegation to a Reserve Bank. A non-supportive comment is not substantive if it is based on a (i) minority shareholder dispute; (ii) individual customer complaint; (iii) previously decided issue; (iv) frivolous or unsubstantiated claim; or (v) dispute arising under a statute administered by another federal or state agency that is not related to the statutory factors specified in the CIBCA.[412] Federal Reserve staff follow *ex parte* rules after receipt of a timely substantive comment. These rules avoid one-sided communications to maintain a fair process.

While any person may submit comments, persons other than a notificant have no standing to request Board reconsideration, hearing, or appeal.[413] Even the affected institution and its management lack

---

[408] 12 C.F.R. §§ 225.43(c)(6), 238.43(h) (2018). *See also* 62 Fed. Reg. 9290, 9295 (Feb. 27, 1997).

[409] 12 C.F.R. §§ 225.43(c)(6), 238.42(h) (2018). *See* 62 Fed. Reg. 9290, 9295 (Feb. 27, 1997) ("The Board continues to reserve the right to consider late comments at its discretion, but expects to exercise that discretion only in extraordinary circumstances."); Letter from William W. Wiles, Sec'y, to Conrad P. Wekenthin, Esq., Clark, Thomas & Winters, 1997 Fed. Res. Interp. Ltr. LEXIS 180 (Nov. 17, 1997); Letter from William W. Wiles, Sec'y, to Conrad P. Wekenthin, Esq., Clark, Thomas & Winters, 1997 Fed. Res. Interp. Ltr. LEXIS 174 (Nov. 4, 1997).

[410] 12 C.F.R. §§ 225.43(c)(6), 238.33(c)(6) (2018) ("In acting upon a notice filed under this subpart, the Board shall consider all public comments received in writing within the period specified in the newspaper or Federal Register announcement, whichever is later.").

[411] BD. GOVERNORS FED. RESERVE SYS., *supra* note 405 ("Generally, a comment is substantive if it relates to the statutory factors for Board review specified in the CIBCA.").

[412] *Cf.* BD. GOVERNORS FED. RESERVE SYS., *supra* note 405.

[413] 12 C.F.R. §§ 225.43(c)(7), 238.33(c)(7) (2018). *See also* 62 Fed. Reg. 9316-17 (Feb. 28, 1997). For Board interpretative letters reaching the same conclusion, *see* Letter from William W. Wiles, Sec'y, to Barnabas D. Horton, President, Rawlins Bancshares, Inc., Fed. Res. Interp. Ltr. LEXIS 23 (May 30, 1996), at n. 2; Letter from Jennifer J. Johnson, Assoc. Sec'y, to John F. Stuart, Esq., Manatt, Phelps, Rothenberg & Phillips, 1996 Fed. Res. Interp. Ltr. LEXIS 23 (Mar. 19, 1996), at n. 1 (regarding CIBCA notice filed by Industrial Equity (Pacific Limited); Letter from William W. Wiles, Sec'y, to

standing to challenge Board actions under the CIBCA.[414] However, the affected institution or other commenter may request Board review of delegated action by a Reserve Bank.[415] The Board will only conduct a review of such action if a Board member requests a review.[416]

7. Statutory Criteria

During review of a proposed acquisition of control of a BHC, SLHC, or SMB, the Board or Reserve Bank consider the effect of the proposed change in control on competition in any relevant market; the financial position, competence, experience, and integrity of the acquiring person; the effect of the proposed change in control on the financial condition of the institution to be acquired; the future prospects of the institution to be acquired; the completeness of the information submitted by the acquiring person; and whether the proposed change would have an adverse effect on the FDIC deposit insurance fund.[417]

John L. Douglas, Esq., Alston, Miller & Gaines, 1982 Fed. Res. Interp. Ltr. LEXIS 8 (Apr. 5, 1982), fn. 4 (Board may meet with an individual to collect information without conferring standing on the individual to participate in the notice) (regarding CIBCA notice filed by C.A. Cavendes). *See also* Pauline B. Heller, FEDERAL BANK HOLDING COMPANY LAW (Law Journal Seminars Press, 1997), § 3.02 n. 6 and *id*. at § 7.10 n. 10.

[414] 12 C.F.R. §§ 225.43(c)(7), 238.33(c)(7) (2018) ("No person (other than the acquiring person) who submits comments or information on a notice filed under this subpart shall thereby become a party to the proceeding or acquire any standing or right to participate in the Board's consideration of the notice or to appeal or otherwise contest the notice or the Board's action regarding the notice.").

[415] *Id.*

[416] 12 C.F.R. § 265.3(a) (2018). *Cf.* Letter from William W. Wiles, Sec'y, to Kevin J. Handy, Esq., Goodwin, Proctor & Hoar, 1990 Fed. Res. Interp. Ltr. LEXIS 168 (May 11, 1990) (petition for review of Reserve Bank action by affected institution presented to the Board without a Board member request for a review pursuant to 12 C.F.R § 265.3). *See* Letter from James McAfee, Assoc. Sec'y, to A.A. Sommer, Jr., Esq., Morgan, Lewis & Bockius, 1987 Fed. Res. Interp. Ltr. LEXIS 18 (Sept. 24, 1987), (determining that review of the Reserve Bank's action was not warranted under 12 C.F.R § 265.3); Memorandum from Legal Division to Board, 1985 Fed. Res. Interp. Ltr. LEXIS 29 (May 15, 1985) (stating that the Reserve Bank's action will be reviewed by the Board only if a member of the Board so requests pursuant to 12 C.F.R § 265.3).

[417] 12 U.S.C. § 1817(j)(7) (2012) (providing a list of factors upon which a proposed acquisition may be disapproved).

a) Competition

The Board may disapprove a proposed acquisition of control of a BHC, SLHC, or SMB if:

(i) the proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize to or attempt to monopolize the business of banking in any part of the United States; or

(ii) the effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or to tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[418]

For a proposed acquisition of control of a BHC, SLHC, or SMB, the Board considers competitive factors similar to those under section 3 of the BHCA.[419] If a person controls a different depository institution or depository institution holding company, the full combination of the institution affected by the CIBCA notice and other banking organizations is assumed for purposes of the competitive analysis.[420]

---

[418] 12 U.S.C. § 1817(j)(7)(A)–(B) (2012).

[419] BD. GOVERNORS FED. RESERVE SYS, *FAQs: How Do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, Analyze the Competitive Effects of Mergers and Acquisitions Under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act?*, https://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm [https://perma.cc/87VQ-Y9D9] (last visited May 10, 2017) ("The competitive analysis of banking acquisitions begins with an initial screen based on market shares and market concentration for the local banking markets in which the parties to a transaction have overlapping operations.").

[420] *See, e.g.*, Letter from Robert deV. Frierson, Assoc. Sec'y, to R. Dean Phillips, Pres., T&C Bancorp, Inc., 1999 Fed. Res. Interp. Ltr. LEXIS 106 (Sept. 22, 1999) (reviewed the competitive effects of the proposal as if the transaction would result in the affiliation of affected institution and banks controlled by the notificant) and Letter from William W. Wiles to Kevin J.

b) Financial Condition of Acquiring Person

The Board may disapprove a proposed acquisition of control of a BHC, SLHC, or SMB if "the financial condition of any acquiring person . . . might jeopardize the financial stability of the [depository institution] or prejudice the interests of depositors of the [depository institution]."[421] The Board or Reserve Bank reviews the financial information provided in the Notice, IBFR, and responses to additional information requests. This includes review of the personal financial statements of any acquiring person[422] and information about the identity, source, and sufficiency of funds to be used to make the proposed acquisition.[423] Additional financial information may be gathered from the investigation of the financial ability of an acquiring person.[424] Adverse information may include lack of financial assets to acquire voting shares, inability to service a loan required to acquire voting shares, and prior bankruptcy proceedings.

Handly, *supra* note 416 (no adverse competitive effect even if notificant found to control affected institution).

[421] 12 U.S.C. § 1817(j)(7)(C) (2012) ("[E]ither the financial condition of any acquiring person or the future prospects of the institution is such as might jeopardize the financial stability of the bank or prejudice the interests of the depositors of the bank . . . .").

[422] 12 U.S.C. § 1817(j)(6)(B) (2012) ("A statement of the assets and liabilities of each person by whom or on whose behalf the acquisition is to be made. . . . The terms and conditions of the proposed acquisition and the manner in which the acquisition is to be made.") The legislative history of the CIBCA indicates that if certified financial data is not needed to make the statutory determination (of whether to disapprove the notice), it will not be required. H.R. RPT. No. 95-1383, at 242 ("The information required will be tailored to the situation at hand so that the agency can meet its responsibilities without erecting needless barriers to the consummation of legitimate transactions.").

[423] 12 U.S.C. § 1817(j)(6)(D) (2012).

[424] 12 U.S.C. § 1817(6)(j)(2)(B) (2012) ("[T]he appropriate Federal banking agency shall . . . conduct an investigation of the integrity and financial ability of each person by whom or for whom such acquisition is to be made.").

c) Competence, Experience, or Integrity of Acquiring Person or Any Proposed Management Personnel

The Board may disapprove a proposed acquisition of control of a BHC, SLHC, or SMB if "the competence, experience, or integrity of any acquiring person or any of the proposed management personnel indicates that it would not be in the interest of the depositors of the [depository institution] or in the interest of the public to permit such person to control the [depository institution]."[425] Adverse information regarding an acquirer or management personnel may include: (i) lack of banking experience; (ii) lack of experience with the particular problems confronting an institution; (iii) lack of experience with activities proposed in a business plan or strategy for the institution; (iv) mismanagement of a financial institution as a director, officer, or employee; (v) default on a loan made by an FDIC-insured depository institution; (vi) disregard for banking laws and regulations; or (vii) conviction on felony and misdemeanor criminal charges.

d) Future Prospects of the Institution

The Board may disapprove a proposed acquisition of control of a BHC, SLHC, or SMB if "the future prospects of the institution . . . might jeopardize the financial stability of the [depository institution] or prejudice the interests of depositors of the [depository institution]."[426] The future prospects of an institution may be threatened by inability of an acquiring person to inject capital into an institution needed to restore capital to an appropriate level.[427] The future prospects of an institution also may be threatened by changes to management or business strategy.[428] These changes may include an acquirer's intention to (i) change directors or officers of the institution, (ii) significantly increase the rate of an institution's asset growth, (iii) change the institution's geographic market from a local to nationwide market, (iv) change the institution's funding sources from core deposits to brokered deposits, and (v) change the institution's lines of business, such as significantly increasing commercial real estate lending.[429] The

[425] *Id*. 12 U.S.C. § 1817(j)(7)(D) (2012).
[426] 12 U.S.C. § 1817(j)(7)(C) (2012).
[427] *Cf. OCC Licensing Manual*, *supra* note 9, at 11.
[428] *Id.*
[429] *Id.*

Board may disapprove an acquisition if the acquirer fails to demonstrate the availability of adequate capital and managerial resources, systems, and processes to address the risks raised by the current condition of the institution or proposed changes to its operations.

e) Failure to Furnish Information

The Board may disapprove a proposed acquisition of control of a BHC, SLHC, or SMB if "any acquiring person neglects, fails, or refuses to furnish" all the information required by the Board.[430] This might include: (i) submission of insufficient, inaccurate, or misleading biographical, financial, or other information; (ii) failure to supply information related to the source of funding for an acquisition; and (iii) failure to furnish tax returns. The Board may disapprove a notice when it has incomplete information from an acquiring person.

f) Adverse Effect on Deposit Insurance Fund

The Board may disapprove a proposed acquisition of control of a BHC, SLHC, or SMB if it "determines that the proposed transaction would result in an adverse effect on the Deposit Insurance Fund."[431]

8. Opportunity to Respond to Adverse Information

If the Board receives adverse information related to an acquiring person or proposed transaction, the acquiring person may be given the opportunity to supplement, correct, or challenge the adverse information. The response may mitigate concerns raised by the adverse information. The information or discussion may lead to the notificant's withdrawal of the proposal. In the absence of adequate mitigation or withdrawal, the adverse information may lead to the Board's disapproval of the notice.

---

[430] 12 U.S.C. § 1817(j)(7)(E) (2012).
[431] 12 U.S.C. § 1817(j)(7)(F) (2012).

D. Disposition

1. Time Period

The ordinary time period for action on a notice is sixty days from the date the notice is accepted by the appropriate Reserve Bank. Notificants may consummate a proposed acquisition sixty days after acceptance of a notice, unless the Board disapproves the acquisition, the Board extends the sixty-day period, or the notificant requests suspension of the processing period.[432] Notificants may consummate a proposed acquisition before the expiration of the sixty-day period if the Board or Reserve Bank issues a notice of its intention not to disapprove the notice.[433]

The Board has the discretion to extend the sixty-day review period for thirty additional days. The Board may further extend the review period an additional two times, for not more than forty-five days each, if it determines that (i) any acquiring person has not furnished all the required information; (ii) any material information submitted is substantially inaccurate; (iii) the Board is unable to complete the investigation of an acquiring person because of inadequate cooperation or delay by that person; or (iv) additional time is needed to investigate and determine that no acquiring person has a record of failing to comply with the requirements of the Bank Secrecy Act.[434] If the Board extends the review period, it notifies the acquiring person of the reasons for the extension, including a statement of information, if any, deemed incomplete or inaccurate.[435]

A notificant may also request suspension of the processing period for a CIBCA notice.[436] A suspension may be requested for a variety of reasons, such as allowing time for a notificant to respond to matters raised by the Board or in public comments or allowing time for the Board to determine the accuracy of information provided in a notice.[437] A notificant's request for suspension of the processing period

---

[432] 12 C.F.R. §§ 225.43(d)(1)(i) (2018), 238.33(d)(1)(i) (2018).
[433] 12 C.F.R. §§ 225.43(d)(1)(ii) (2018), 238.33(d)(1)(ii) (2018).
[434] 12 C.F.R. §§ 225.43(d)(2) (2018), 238.33(d)(2) (2018).
[435] *See, e.g.*, Letter from Sidney M. Sussan, Assistant Director, to John F. Stuart, Esq., Manatt, Phelps, Rothenberg & Phillips, 1989 Fed. Res. Interp. Ltr. LEXIS 212 (Dec. 15, 1989).
[436] 12 C.F.R. §§ 225.43(d)(2), 238.33(d)(2) (2018).
[437] *See, e.g.*, Letter from Jennifer J. Johnson, Assoc. Sec'y, to [REDACTED BY BOARD], 1989 Fed. Res. Interp. Ltr. LEXIS 248 (Oct. 16, 1989); Letter

may allow the Board to avoid disapproval of a notice based upon lack of information.

2. Commitments, Conditions, or Limitations

The Board may take action upon a notice subject to commitments or conditions that require the notificant to consult with the Board before acquiring additional shares of the subject institution.[438] The Board or Reserve Bank may also limit the further acquisition of voting shares by a notificant or any person without prior approval.[439] A limitation may be imposed when the financial wherewithal of a person or group is insufficient to unequivocally support acquisition of 100% of a BHC, SLHC, or SMB, such as when a notificant uses debt to fund an acquisition.[440]

The Board also may require an acquiring person to take or not take action as a condition of non-disapproval of a CIBCA notice (e.g., contribute capital,[441] cause compliance with enforcement action,[442]

---

from Scott G. Alvarez, Assistant Gen. Counsel, to William T. Quicksilver, Manatt, Phelps, Rothenberg & Phillips, 1989 Fed. Res. Interp. Ltr. LEXIS 290 (Aug. 15, 1989); Letter from William W. Wiles, Sec'y, to Paul E. McElwee, Assistant Gen. Counsel, Northwestern Mutual Life Ins. Company, 1985 Fed. Res. Interp. Ltr. LEXIS 72 (Sept. 16, 1985).

[438] BD. GOVERNORS FED. RESERVE SYS., *supra* note 252.

[439] 12 C.F.R. § 225.42(a)(2) (2018). *See also* 62 Fed. Reg. 9316 (Feb. 28, 1997); BD. GOVERNORS FED. RESERVE SYS., *supra* note 252 ("Approvals granted by the Federal Reserve under the Change in Bank Control Act may be subject to commitments or conditions that require the filer to consult with appropriate Federal Reserve staff before acquiring further shares of the subject banking organization.").

[440] *See, e.g.,* Letter from William W. Wiles, Sec'y, to Craig L. Reeves, Pres., First Nat'l Bank in Clayton, 1997 Fed. Res. Interp. Ltr. LEXIS 235 (Jan. 7, 1997) (granting relief from commitment to obtain approval before purchasing additional stock if such purchase is to be funded with debt); Letter from Jennifer J. Johnson, Assoc. Sec'y, to Tennyson W. Grebenar, Esq., Rothgerber, Appel, Powers & Johnson, 1991 Fed. Res. Interp. Ltr. LEXIS 86 (July 8, 1991) (conditioning approval of Notice on approval of the Federal Reserve Bank of Kansas City prior to purchasing additional stock if such purchase is to be funded with debt).

[441] *See, e.g.,* Letter from William W. Wiles, Sec'y, to James L. Clayton, 1995 Fed. Res. Interp. Ltr. LEXIS 62, at 2 (Oct. 10, 1995) (deciding not to disapprove the acquisition in part because of the commitment to inject capital into the affected institution); Letter from James McAfee, Assoc. Sec'y, to [REDACTED BY BOARD] 1985 Fed. Res. Interp. Ltr. LEXIS 35, at 1 (June

obtain approval prior to purchasing additional stock if funded with debt,[443] service *pro rata* share of debt in accordance with individual guaranty,[444] not seek or accept extension of credit from bank subsidiary of affected institution,[445] and cause the designation of suitable management officials and directors[446]).

3. Determination Not to Disapprove

The Board or appropriate Reserve Bank may determine not to disapprove a notice based upon its review of the statutory factors.[447] The Board and Reserve Banks issued 5,812 notices of intention not to disapprove from 1979 to 2017.[448] If the Board or Reserve Bank notifies the notificant in writing of its intention not to disapprove the acquisition, the notificant may consummate the proposed transaction even if it is before the expiration of the sixty-day notice period.[449] A non-disapproval allows the acquiring person to consummate the proposed acquisition in compliance with the law.[450] A non-disapproval does not create an implied-in-fact contract to forbear supervisory action against the affected institution.[451]

11, 1985) (deciding not to disapprove the proposed acquisition based upon notificant's commitment to inject additional capital into institution).

[442] *See, e.g.,* Letter from James McAfee to [REDACTED BY BOARD], *supra* note 441 (deciding not to disapprove the proposed acquisition based upon commitment to cause institution to comply with terms of the FDIC cease and desist order against its subsidiary).

[443] *See, e.g.*, Letter from Jennifer J. Johnson to Tennyson W. Grebenar, *supra* note 440.

[444] *See, e.g.*, Letter from James McAfee, Assoc. Sec'y, to [REDACTED BY BOARD], 1985 Fed. Res. Interp. Ltr. LEXIS 68, at 1 (Sept. 12, 1985).

[445] *See, e.g.,* Letter from Jennifer J. Johnson, Assoc. Sec'y, to David F. Bolger, 1993 Fed. Res. Interp. Ltr. LEXIS 272, at 1 (Nov. 9, 1993).

[446] *See, e.g.*, Letter from Margaret McCloskey, Deputy Secretary, to Julie Kunetka, Kirkland & Ellis LLP, 2014 Fed. Res. Interp. Ltr. LEXIS 12, at 1 (July 21, 2014).

[447] 12 C.F.R. §§ 225.43(h), 238.32(h) (2018).

[448] *See infra* Appendix A for statistics related to processing of CIBCA notices.

[449] 12 C.F.R. §§ 225.43(d)(ii), 238.32(d)(ii) (2018) ("The notificant(s) may consummate the proposed transaction before the expiration of the sixty-day period if the Board notifies the notificant(s) in writing of the Board's intention not to disapprove the acquisition.").

[450] *Id.*

[451] Sinclair v. United States*,* 56 Fed. Cl. 270, 281 (2003) (finding that OCC's non-disapproval of lender's acquisition of federally insured bank did not

The Board considers substantive public comments in reaching its decision, and often addresses such comments in reaching determinations not to disapprove CIBCA notices.[452] Generally, a substantive comment relates to the statutory criteria for Board review specified by the CIBCA.[453] The Board's non-disapprovals of a few notices are summarized below to illustrate its action.

a) Competition

The Board considers whether a proposed acquisition of control would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking.[454] For example, the Board received comments from Mercantile Bancorp of Quincy, Illinois (Mercantile) opposing a CIBCA notice to acquire twelve percent of the voting shares of Mercantile based upon the competitive impact of the proposed acquisition.[455] Mercantile alleged that the effect of the proposed acquisition would be to substantially lessen competition in the banking markets where Mercantile's subsidiary banks and the banks controlled by the notificant competed directly, and that the notificant may attempt to influence the ability of Mercantile to expand into new markets and, thereby, substantially lessen competition in those banking markets.[456] In its review of the notice, the Board presumed that the notificant would control Mercantile as a result of the proposed acquisition, and, consequently, reviewed the competitive effects of the proposal as if the transaction would result in the affiliation of Mercan-

---

create implied-in-fact contract to forbear regulatory actions, which interfered with lender's business plan for sub-prime lending that was submitted to OCC in lender's CIBCA notice).

[452] 12 C.F.R. §§ 225.43(c)(6), 238.32(c)(6) (2018) ("[T]he Board shall consider all public comments received in writing within the period specified . . . .").

[453] BD. GOVERNORS FED. RESERVE SYS., DIV. OF BANKING SUPERVISION & REGULATION, SR 97-10, GUIDANCE ON PROTESTED PROPOSALS (Apr. 24, 1997). *See also supra* note 405 and accompanying text.

[454] 12 U.S.C. § 1817(j)(7)(A) and (B) (2012). *See, e.g.,* Letter from Robert deV. Frierson to R. Dean Phillips, *supra* note 420, at 1 ("The Board may disapprove a proposed acquisition of control if, among other factors, the proposal would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking.").

[455] Letter from Robert deV. Frierson to R. Dean Phillips, *supra* note 420.

[456] *Id.*

tile with other depository institutions controlled by the notificant.[457] Mercantile and banks controlled by the notificant directly competed in two banking markets.[458] After reviewing the percentage of total deposits that would be controlled by the combined organizations in those markets, the impact of the combination on the Herfindahl-Hirschman Index, and the number of remaining competitors, the Board concluded that the proposed acquisition was not likely to result in any significant adverse effects on competition in any relevant banking market.[459]

b) Financial Condition of Acquiring Person

The Board considers whether the financial condition of any acquiring person or the future prospects of the institution might jeopardize the financial stability of the depository institution or prejudice the interests of the institution's depositors.[460] For example, in its action on a notice to acquire up to fifty-five percent of the voting shares of Greater Pacific Bancshares, Inc. of Whittier, California (Greater Pacific), the Board considered a comment that questioned the financial resources of the notificants to consummate the proposed acquisition.[461] The Board concluded that the notificants had sufficient financial resources to consummate the proposed acquisition, including the ability to comply with a commitment to maintain the bank subsidiary

---

[457] *See id.* (presuming the notificant's ownership of more than ten percent of the voting shares means the "Notificant would acquire control of Company as a result of the proposed acquisition and, consequently, [the Board] has reviewed the competitive effects of the proposal as if the transaction would result in the affiliation of Company and the Phillips Chain . . . .").

[458] *Id.*

[459] *Id*. at 1–2. (finding the Herfindahl-Hirschman Index indicates "the market would continue to be moderately concentrated"); *Cf.* Letter from Griffith L. Garwood, Deputy Sec'y, to Farrell D. McAtee, President, Decatur Cty. Nat'l Bank (June 5, 1980) (finding that consummation of proposed acquisition would not have adverse effects on competition in any relevant market even though the acquiring persons were associated with other banking organizations because those organizations were located in separate banking markets some distance from the affected bank).

[460] Letter from Jennifer J. Johnson, Deputy Sec'y, to Zubair Kazi et al., 1997 Fed. Res. Interp. Ltr. LEXIS 240 (Aug. 26, 1997) (considering whether the notificant has "the financial resources to consummate the proposal and fulfill this commitment").

[461] *Id.* at 2.

of Greater Pacific at the well capitalized level.[462] Additionally, in its action on a notice to acquire up to thirty percent of the voting shares of another BHC, the Board considered comments asserting that the potential liability of the notificant in a lawsuit involving real estate developed by the notificant may impair his financial condition.[463] The Board concluded that the facts of record did not support the commenters' allegations that the financial resources of the notificant would not be in the interests of the depositors or in the public interest.[464]

c) Competence, Experience, or Integrity of Acquiring Person or Any Proposed Management Personnel

The Board considers whether the competence, experience, or integrity of any acquiring person or any proposed management personnel indicate that it would not be in the interest of the bank's depositors or in the interest of the public to permit the notificants to control a depository institution.[465] For example, in its action on a notice to acquire control of Penn Bancshares, Inc., Pennsville of New Jersey (Penn), the Board considered comments from Penn's president contending that the failure of a bank with which the notificant was associated raised adverse considerations.[466] The Board found that the notificant owned 2.3% of the failed bank and found no facts to indicate that the notificant exercised a controlling influence over the manage-

[462] *Id.* ("The Board concludes that Notificants have sufficient financial resources to consummate the proposal and to comply with the commitment.").
[463] *See* Letter from Jennifer J. Johnson to [REDACTED BY BOARD], *supra* note 437 (considering whether the potential liability associated to a lawsuit filed related to an acquirer's condominium complex would impair his financial condition).
[464] *See id.* (concluding the record does not support a finding that the notificant's financial resources would not be in interest of the depositors of the bank subsidiary or public's interest).
[465] *See* Letter from Jennifer J. Johnson, Deputy Sec'y, to Edward N. Barol, Esq., Dilworth Paxson, LLP, 1998 Fed. Res. Interp. Ltr. LEXIS 18, at 1 (Mar. 26, 1998) (considering "the competence, experience, or integrity of the acquiring individuals or of any proposed management personnel" in deciding whether not to disapprove the notice).
[466] *Id.* at 2 (reviewing comments concerning the failure of a successor institution of Penn).

ment or policies of the failed bank.[467] Additionally, in its action on the proposed acquisition of First Denver Corporation, and indirect acquisition of its subsidiary First National Bank of Denver (First National), both of Denver, Colorado, the Board considered a commenter's allegations of the notificant's mismanagement and breach of fiduciary duty as managing partner of another BHC.[468] The Board also considered the responses of the notificant, comments from the OCC and FDIC, the notificant's history of involvement with First National, and the fact that the proposed acquisition sought to address identified weaknesses at First National and provide it additional capital. The Board then reached its determination not to disapprove the acquisition.[469]

4. Determination to Disapprove

While the Board or Reserve Banks may determine not to disapprove CIBCA notices filed with the Federal Reserve System,

---

[467] Letter from Jennifer J. Johnson to Edward N. Barol, *supra* note 465.

[468] Letter from Jennifer J. Johnson, Deputy Sec'y, to Terry K. Crest, President, First Nat'l Bank of Denver, 1992 Fed. Res. Interp. Ltr. LEXIS 209, at 1 (Aug. 18, 1992) (considering comments concerning a managing partner's mismanagement and breach of a fiduciary duties).

[469] *Id*. *See also* Letter from Margret McCloskey Shanks to Barton, Esq., Bodman, *supra* note 202 (considering comment raising concerns of competence and integrity based on allegations of self-dealing and violations of law and regulation); Letter from Jennifer J. Johnson, Deputy Sec'y, to Ernest J. Panasci, Esq., Slivka Robinson Waters & O'Dorisio, 1997 Fed. Res. Interp. Ltr. LEXIS 292 (Mar. 25, 1997) (considering comment raising concerns about management qualifications of proposed management official); Letter from Jennifer J. Johnson, Deputy Sec'y, to David T. Chen, President & CEO, American Pacific Bank, 1996 Fed. Res. Interp. Ltr. LEXIS 266 (Sept. 16, 1996) (considering comment raising concerns about integrity of notificant based upon violation of securities regulations and objecting to low purchase price of shares); Letter from William W. Wiles, Sec'y, to Barnabas D. Horton, President, Rawlins Bancshares, Inc., 1996 Fed. Res. Interp. Ltr. LEXIS 231 (May 30, 1996) (considering comment raising concerns about the competence and experience of notificant); Letter from Jennifer J. Johnson to Derwood Knight, *supra* note 295 (considering comment raising competence, experience, and integrity concerns based on allegations that notificant involved in violations of federal and state securities laws, criminal law and the Board's Regulation O).

only the Board may determine to disapprove a notice.[470] Nevertheless, Board disapprovals of CIBCA notices are rare. The Board disapproved only twelve notices from 1979 to 2017. Nine of the notices were filed prior to the acquisition of voting securities.[471] Three of the disapprovals involved notices to retain voting securities acquired without the Board's prior review.[472] The disapproval letters in two instances included an order to divest of voting securities within ninety days.[473] One of the disapprovals involved a proposed acquisition by foreign nationals.[474] The Board provided each of the acquiring persons with a written statement of basis for disapproval in accordance with the requirements of the CIBCA.[475] In disapproving notices, the Board reached its determination based on one or more of the following

---

[470] *See* 12 U.S.C. § 1817(j)(7) (2012); 12 C.F.R. §§ 225.43(h), 238.33(h), and 265.11(c)(5)(iv) (2018).

[471] Letter from Robert deV. Frierson, Sec'y, to Donald J. Vaccaro, CEO/ President, TicketNetwork, 2013 Fed. Res. Interp. Ltr. LEXIS 12 (Sept. 13, 2013) (Urban Financial Group, Inc.); Letter from Jennifer J. Johnson, Assoc. Sec'y, to John Kost, Esq., Fredrikson & Byron, P.A., 1993 Fed. Res. Interp. Ltr. LEXIS 286 (Nov. 18, 1993) (Waubun Bancshares, Inc.); Letter from Jennifer J. Johnson, Assoc. Sec'y, to Robert H. Garwood, 1993 Fed. Res. Interp. Ltr. LEXIS 124 (Mar. 31, 1993), Nine Tribes Bancshares, Inc.); Letter from William W. Wiles, Sec'y, to Robert V. Bubel, Senior Assoc., The Secura Group, 1990 Fed. Res Interp. Ltr. LEXIS 66 (Mar. 14, 1990) (Sunbelt Bancshares Corp.); Letter from William W. Wiles, Sec'y, to [REDACTED BY BOARD] (Jan. 16, 1986); Letter from William W. Wiles, Sec'y, to [REDACTED BY BOARD] (Apr. 5, 1985); Letter from James McAfee to Leonard A. Pelullo, Vice Chairman, The Dominion Bank of Denver (Mar. 9, 1983); Letter from James McAfee, Assoc. Sec'y, to James W. Singer, Singer and Associates, Inc. (Mar. 3, 1982) (First United Bancshares, Inc.); Letter from Griffith L. Garwood to Farrell D. McAtee, *supra* note 459 (Russell State Bancshares, Inc.).

[472] Letter from Robert deV. Frierson to Carl V. Thomas, *supra* note 190 (First Western Bank); Letter from William W. Wiles, Sec'y, to Luther May, Jr. (May 31, 1991) (First Coleman Bancshares, Inc.); Letter from William W. Wiles, Sec'y, to James W. Sharrock, Esq., McAfee & Taft, 1987 Fed. Res. Interp. Ltr. LEXIS 80 (June 17, 1987) (Republic Bancshares, Inc.).

[473] Letter from Robert deV. Frierson to Carl V. Thomas, *supra* note 190; Letter from William W. Wiles to Luther May, Jr., *supra* note 472.

[474] Letter from William W. Wiles to Robert V. Bubel, *supra* note 471.

[475] *See* 12 U.S.C. § 1817(j)(3) (2012) ("Within three days after its decision to disapprove any proposed acquisition, the appropriate Federal banking agency shall notify the acquiring party in writing of the disapproval. Such notice shall provide a statement of the basis for the disapproval.").

statutory factors (i) financial condition of the acquiring person; (ii) competence, experience, and integrity of the acquiring person or any proposed management personnel; (iii) failure to provide information; and (v) failure to provide required prior notice.[476]

a) Financial Condition of Acquiring Person

The Board disapproved three CIBCA notices based in part upon the notificant's lack of financial resources. In its disapproval of a notice to retain voting shares of First Coleman Bancshares, Inc. of Coleman, Texas (First Coleman), a BHC, the Board stated: "The Board also has considered Notificant's weakened financial condition. Notificant's investment in First Coleman was entirely financed with debt. Notificant is without significant personal resources and is currently unemployed."[477] Similarly, the Board disapproved a notice to acquire all of the outstanding voting shares of Nine Tribes Bankshares, Inc. (Nine Tribes), a BHC, based upon financial considerations.[478] In disapproving the acquisition, the Board stated:

> [T]he Board has carefully considered your recently submitted financial information and your representation that you no longer have the financial resources to purchase Nine Tribes. . . . In this regard, you have represented that the funding source for this proposal is impaired and alternative sources are unavailable.[479]

Additionally, the Board disapproved a notice to acquire voting shares of First Western Bank, Cooper City, Florida (First Western), an SMB, both individually and as part of a group of shareholders acting in concert, based in part upon the notificant's lack of financial resources.[480] The Board stated: "Your financial statements also do not indicate any independent financial resources that would be available, if necessary, to address Bank's capital requirements."[481]

---

[476] 12 U.S.C. § 1817(j)(7) (2012).
[477] Letter from William W. Wiles to Luther May, Jr., *supra* note 472.
[478] Board, H.2. 1993, No. 14, Apr. 3, 1993, at 2; Letter from Jennifer J. Johnson to Robert H. Garwood, *supra* note 471.
[479] Letter from Jennifer J. Johnson to Robert H. Garwood, *supra* note 471.
[480] Letter from Robert deV. Frierson to Carl V. Thomas, *supra* note 190.
[481] *Id.*

In order to determine the financial condition of the acquiring person, the Board must verify the identity of the acquiring person.[482] The CIBCA requires a notice to include information about the identity of each acquiring person or person on behalf of whom the acquisition is to be made, a statement of the assets and liabilities of each acquiring person, and the source of funds used or to be used in making the acquisition with details of borrowing, if any, undertaken for the purpose of the acquisition.[483] The Board conducts its own investigation of each person named in a notice as a person by whom and for whom an acquisition is made.[484] In this regard, the Board's disapproval of the notice to acquire voting shares of First Western stated:

> You have not provided documentation of the identity, source, and amount of funds that you have used to acquire [bank] shares, and you have not disclosed the manner in which you would fund your purchase of additional shares up to 10 percent. . . . Similarly, other Notificants have not provided any information to verify the source of funds they used to acquire their [bank] shares. . . . The inability to verify the source of funds used by you and Notificants is of special concern because of evidence that you and Notificants may be acting on behalf of a third party to acquire control of [bank].[485]

The financial condition of the acquiring person may impact the ability of the person to service debt related to a proposed acquisition. The Board disapproved two notices based in part on acquirer debt associated with the proposal.[486] First, the Board disapproved a notice to retain voting shares of Republic Bancshares, Inc., Oklahoma City (Republic), a BHC, based upon the "substantial debt" incurred by the proposed acquirer to purchase the voting shares and the acquirer's

---

[482] *See* Notice, *supra note* 320.

[483] *See supra* notes 325–34 and accompanying text (discussing the notice requirements of CIBCA).

[484] 12 U.S.C. § 1817(j)(2)(B) (2012).

[485] Letter from Robert deV. Frierson to Carl V. Thomas, *supra* note 190 (disapproving a notice to acquire voting shares).

[486] Letter from William W. Wiles to James W. Sharrock, *supra* note 472; Letter from Griffith L. Garwood to Farrell D. McAtee, *supra* note 459.

"almost complete reliance" on earnings from Republic to service the debt.[487]

Second, the Board disapproved a notice to acquire voting shares of Russell State Bancshares, Inc. of Russell, Kansas (RSB), a one-bank BHC, based in part upon the financial condition of two of the proposed purchasers.[488] Reviewing the facts in light of the statutory factors, the Board noted: "[T]wo of the purchasers will assume substantial personal debt in connection with the acquisition. . . . [T]he Board finds that the financial condition of several of the purchasers, as it relates to the transaction, is such that it might jeopardize the financial stability of [RSB's subsidiary bank]."[489]

b) Competence, Experience, or Integrity of Acquiring Person

The Board disapproved several proposed acquisitions based in part upon the notificant's lack of competence or experience. For example, the Board's disapproval of the notice to acquire voting shares of RSB also was based in part upon the competence and experience of

---

[487] Letter from William W. Wiles to James W. Sharrock, *supra* note 472. *See also* Letter from William W. Wiles, Sec'y, to [REDACTED BY BOARD] (Apr. 5, 1985), in which the Board stated:

> As part of the acquisition, the acquiring parties proposed to pay . . . cash, and to assume contract and other indebtedness held by [the bank]. . . . The acquiring parties proposed to service this indebtedness . . . with dividends generated by [the bank]. However, financial projections submitted with the notice and information from [the bank's] most recent examination indicates that revenues from this source would not be sufficient to service the assumed indebtedness. . . . In addition, the acquiring parties indicated in the notice that no additional funds would be available from outside sources to service the proposed indebtedness or to contribute any additional capital to [the bank].

The Board concluded that the "financial aspects of the proposed acquisition do not satisfy the financial standard set forth in section (j)(7)(C) of the Control Act." In other words, the Board disapproved the notice in part because of the financial condition of the acquiring person. *Cf.*, Letter from James McAfee to Leonard A. Pelullo, *supra* note 471 ("Based upon an evaluation of the information in the record, the Board concluded that the financial aspects of the proposal did not satisfy the financial standard set forth in the Control Act.").

[488] Letter from Griffith L. Garwood to Farrell D. McAtee, *supra* note 459.

[489] *Id.* at 2.

proposed purchasers and proposed management.[490] All of the purchasers were associated with other banking organizations.[491] The Board noted:

> [T]he banking organizations with which [purchasers] are associated are highly leveraged, generally lack managerial expertise, and as a result have experienced some difficulties in recent years under present management. In light of these and other facts of record, the Board finds that the competence and experience of the acquiring persons and of proposed management personnel of RSB indicate that it would not be in the interest of the public to permit acquisition by [purchasers] of control of RSB.[492]

The Board disapproved a notice to acquire voting shares of Sun Belt Bancshares Corporation, Conroe, Texas (Sun Belt), a BHC, and thereby acquire indirectly its subsidiary bank, based in part upon lack of experience and competence of the notificants.[493] The Board stated:

> Notificants' actions since becoming associated with [Sun Belt and the bank] indicate a serious failure to become familiar with and to comply with applicable United States statutes governing the ownership of a bank and transactions between affiliates of banks. In addition, Notificants are individuals with little or no experience in operating or managing a bank. During the period that Notificants have been associated with [the bank], Notificants have caused [the bank] to become involved in a number of significant business transactions that [the bank] has been ill-equipped to conduct in a manner consistent with prudent banking practices. For the reasons discussed in this letter, and in light of the current condition of [the bank], the Board believes that the experience and competence of

---

[490] Letter from Griffith L. Garwood to Farrell D. McAtee, *supra* note 459.
[491] *Id.*
[492] *Id*.
[493] Letter from William W. Wiles to Robert V. Bubel, *supra* note 471. *See also* Interamericas Investments, Ltd. v. Bd. of Governors, 111 F.3d 376, 381 (5th Cir. 1997).

> Notificants indicate that it is not in the interests of the depositors of [the bank] or in the public interest to permit Notificants to control [the bank].[494]

Finally, the Board disapproved notices to purchase voting shares of Waubun Bancshares, Inc. of Waubun, Minnesota (Waubun) and Urban Financial Group, Inc. (Urban Financial), both BHCs, relying in part upon the proposed purchaser's lack of competence, experience, and integrity.[495] The Board's disapproval of the acquisition of voting shares of Urban Financial stated:

> The Board also is required to consider your managerial competence and experience. You do not have any experience in the banking industry and have not provided evidence of any formal training or education related to banking or the financial sector. You also have not identified any persons with banking experience whom you would recruit to take over key decision making roles at [the subsidiary bank].[496]

The Board also disapproved notices based in part upon the notificant's lack of integrity. Specifically, the Board drew negative conclusions about the integrity of proposed acquirers of shares of Urban Financial based on the outstanding arrest warrants, failure to disclose or explain arrests, and failure to explain government investigations into business practices.[497] In addition, the Board relied in part upon two outstanding warrants for the acquiror's arrest in disapproving a notice to purchase voting shares of Waubun.[498]

---

[494] Letter from William W. Wiles to Robert V. Bubel, *supra* note 471.
[495] Letter from Jennifer J. Johnson to John Kost, *supra* note 471 (Waubun Bancshares, Inc.); Letter from Robert deV. Frierson to Donald J. Vaccaro, *supra* note 471 (Urban Financial Group, Inc.).
[496] Letter from Robert deV. Frierson to Donald J. Vaccaro, *supra* note 471.
[497] *Id.*
[498] *Id*. ("In addition, the Board has also considered. . . two outstanding warrants.").

c) Competence, Experience, or Integrity of Proposed Management Personnel

The Board disapproved a notice to acquire sixty percent of the voting shares of Royal Dominion, Ltd., Denver, Colorado (Royal Dominion), a one-bank BHC, based in part upon the managerial aspects of the proposed acquisition.[499] The Board stated:

> In further evaluating the effect of this acquisition on [Royal Dominion and its bank subsidiary], the Board also evaluated the managerial resources set out in the notice, including your management record at [the bank subsidiary and the bank's] present management. Based on an evaluation of the information in the record, the Board concluded that the managerial aspects of the proposal did not satisfy the managerial standard set forth in the Control Act.[500]

Two other disapprovals illustrate that while some aspects of a proposed acquisition may be satisfactory, unfavorable aspects of a proposal can result in the Board's disapproval of an acquisition. In its disapproval of a proposed acquisition of voting shares of a BHC in 1985, the Board noted the satisfactory managerial resources of the acquiring persons, but viewed them as "insufficient to outweigh the substantially unfavorable financial aspects of the proposed acquisition."[501] In its disapproval of an acquisition of voting shares of a different BHC in 1986, the Board noted favorable action related to managerial resources, but found that there had been insufficient time to demonstrate improvement:

> The Board noted that the financial condition of [BHC] and [its subsidiary bank] is less than satisfactory, and that the boards of directors of [BHC] and [the bank], which include two members of the acquiring group, failed to take action in the past to

[499] Letter from James McAfee to Leonard A. Pelullo, *supra* note 471.
[500] *Id*.
[501] Letter from William W. Wiles, Sec'y, to [REDACTED BY BOARD] (Apr. 5, 1985) ("Although the managerial resources of the acquiring parties were satisfactory, they were insufficient to outweigh the substantially unfavorable financial aspects of the proposed acquisition.").

> prevent financial and managerial practices that contributed to the deteriorated condition of [BHC] and [the bank]. Although the acquiring parties have indicated that they have recently taken a more active role in the affairs of [BHC] and [the bank] and have recently instituted corrective measures, the Board concluded that insufficient time has elapsed for the proposed new ownership and management to demonstrate a sustained record of improvement at [BHC] and [the bank] that would warrant approval of the Notice.[502]

d) Failure to Furnish Information and Failure to File Required Prior Notice

The failure of acquiring persons to provide information required by the Board was cited as a factor in the Board's disapproval of CIBCA notices filed in connection with the acquisition of voting shares of First Coleman, First Western, Royal Dominion, Sun Belt, and Urban Financial.[503] Furthermore, the Board viewed the failure of acquiring persons to file a required prior notice negatively in its disapprovals of notices to acquire voting shares of First Coleman and First Western.[504]

E. Consummation

Change in bank control proposals may be consummated immediately upon receipt of non-disapproval, unless a waiting period is required because of a filing made pursuant to the HSRA.[505]

---

[502] Letter from William W. Wiles, Sec'y, to [REDACTED BY BOARD] (Jan. 16, 1986).

[503] *See* Letter from James McAfee to Leonard Pelullo, *supra* note 471; *see* Letter from William Wiles to Robert Bubel, *supra* note 471; *see* Letter from William Wiles to Luther May, *infra* note 472; *see* Letter from Robert Frierson to Carl Thomas, *supra* note 190; *see* Letter from Robert Frierson to Donald Vaccaro, *supra* note 471.

[504] Letter from William W. Wiles, to Luther May, Jr., *supra* note 472; Letter from Robert deV. Frierson to to Carl V. Thomas, *supra* note 190 ("All shares held by you and Notificants were acquired without prior notice to the Board under the CIBC Act. For the reasons stated below, the Board has disapproved the notice.").

[505] *Notice*, supra note 320, at 1 ("Transactions subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a), which applies

However, even if an acquisition would trigger a HSRA filing based upon asset size or transaction value, an acquiring person under the CIBCA may avoid a filing with the FTC and DOJ by providing copies of information filed with the Board to the FTC and DOJ at least thirty days prior to consummation.[506]

An acquiring person's authority to consummate a change in control transaction expires one year from the earliest date on which the transaction could have been consummated unless the consummation period is extended by the Board.[507] For the Board to consider an extension of the one-year consummation period, the notificant must submit current financial and other information.[508]

F. Appeal

1. Board Hearing

An acquiring party has ten days following receipt of notice of intent to disapprove a notice to request an administrative hearing at which all issues are to be determined on the record.[509] Only an acquiring person may request such a formal hearing.[510] No administrative hearings have been held to date.

2. Judicial Review

If the Board disapproves a notice following a hearing, any acquiring person may obtain review of the agency decision in the U.S. Court of Appeals in the circuit in which the home office of the bank to

---

to certain very large transactions, require a pre-merger filing with the Federal Trade Commission and the Department of Justice."). *See also* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 18a (2012)).

[506] 16 C.F.R. § 802.8(b) (2018). *See also OCC Licensing Manual*, *supra* note 9, at 15.

[507] Letter from James McAfee to A.A. Sommer, Jr., *supra* note 416 ("In accordance with Federal Reserve System practice, the Reserve Bank established this one-year limitation . . . .").

[508] Memorandum from Legal Div. to Fed. Reserve Bd. of Governors, 1987 Fed. Res. Interp. Ltr. LEXIS 15 (Sept. 21, 1987) ("The Reserve Bank replied that in order to do so, Culverhouse would have to submit current financial statements and cost of acquisition data.").

[509] 12 U.S.C. § 1817(j)(4) (2012).

[510] *Id.*

be acquired is located or in the Court of Appeals for the D.C. Circuit, by filing a notice of appeal with the court within ten days of the order disapproving the acquisition and simultaneously sending a copy of the notice of appeal to the appropriate federal banking agency.[511] The Board must certify and file in the court of appeals the record upon which its disapproval was based.[512] The Board's findings may be set aside if determined to be arbitrary and capricious or to violate the procedures of the CIBCA.[513]

3. No Private Cause of Action

The CIBCA does not by its terms establish a private right of action permitting third parties to enforce its provisions.[514] Regulations Y and LL state that no person who submits comments or information related to a CIBCA notice thereby becomes a party to the proceeding, nor acquires any standing or right to participate in the Board's consideration of a notice or appeal or contest the Board's action on the notice.[515] The Board's regulations reflect its longstanding view that private parties do not have standing to challenge Board action under

---

[511] 12 U.S.C. § 1817(j)(5) (2012).

[512] 12 U.S.C. § 1817(j)(5) (2012) ("The appropriate Federal banking agency shall promptly certify and file in such court the record upon which the disapproval was based.").

[513] *Id.* ("The findings of the appropriate Federal banking agency shall be set aside if found to be arbitrary or capricious or if found to violate procedures established by this subsection."). *See also* Sletteland v. Federal Deposit Ins. Corp., 924 F.2d 350, 353–54 (D.C. Cir. 1981). In this case affirming the FDIC decision disapproving a person as a controlling shareholder, the court held that the "FDIC did not abuse its discretion in determining that Peder Sletteland's 'competence, experience, or integrity' indicated that it would not be in the interest of the Bank's depositors or the public to approve his acquisition as controlling shareholder." *Id.*

[514] Congress explicitly provided a right of judicial review only to the party whose notice has been disapproved. The BHCA, on the other hand, provides for appeal by an "aggrieved" party, which may include a commenter on an application. 12 U.S.C. § 1848 (2012). The CIBCA does not contain a similar provision. 12 U.S.C. § 1817(j)(4) (2012).

[515] 12 C.F.R. §§ 225.43(c)(7) ("No person (other than the acquiring person) who submits comments or information on a notice filed under this subpart shall thereby become a party to the proceeding or acquire any standing or right to participate in the Board's consideration of the notice or to appeal or otherwise contest the notice or the Board's action."), 238.33(c)(7) (2018).

the CIBCA.[516] While early cases implied a private right of action,[517] more recent decisions rejected such a right.[518]

[516] 62 Fed. Reg. 9316–17 (Feb. 28, 1997) ("The Board has long held, and a federal court has agreed, that private parties do not have legal standing to challenge agency action under the CIBC Act.").

[517] Riggs Nat'l Bank v. Allbritton, 516 F. Supp. 164, 182 (D.D.C. 1981) (finding tender offer enjoined pending determination whether defendant complied with the CIBCA); First Ala. Bancshares, Inc. v. Lowder, No. CV 81-M-0325, 1981 U.S. Dist. LEXIS 17987 (N.D. Ala. 1981); Mid-Continent Bancshares, Inc. v. O'Brien, No. 81-1395-C(C), 1981 U.S. Dist. LEXIS 17419 (E.D. Mo. 1981) (while acknowledging some courts found an implied right of action, the court held that no private right of action is implied). *See also* Kenneth L. Betts, *The Change in Bank Control Act of 1978: Does it Give Rise to a Private Cause of Action?*, 72 KY. L.J. 671 (1984) (concluding that factors enumerated in Cort v. Ash, 422 U.S. 66 (1975), support finding a private cause of action—standing to sue or at least right to seek injunctive relief); Edward E. Bintz, *The Change in Bank Control Act—a Line of Defense for Target Banks?*, 52 GEO. WASH. L. REV. 459 (1984) (supporting injunctive relief through private action but not standing to appeal).

[518] Lingle v PSB Bancorp, Inc., 123 F. App'x. 496, 501 (3d Cir. 2005); Liberty Bell Bank v. Deitish, No. 08–0993, 2008 U.S. Dist. LEXIS 71303, at *11 (D.N.J. Sept. 9, 2008) ("[T]he Court holds that the CBCA does not confer a private right of action."); Tex. First Nat'l Bank v. Wu, 347 F. Supp. 2d 389, 389 (S.D. Tex. 2004) ("CBCA did not confer a private right of action."); Nat'l Bank of Georgia v. First Nat'l Bank, 723 F. Supp. 1501, 1503–06 (N.D. Ga. 1989) ("[N]o private right of action exists under the CBCA."); Ameribanc Inv'rs Grp. v. Zwart, 706 F. Supp. 1248, 1257 (E.D. Va. 1989) ("In sum, implication of a private right of action under the CCA does not meet the Cort requirements."); Centerre Bancorp v. Kemper, 682 F. Supp. 459, 462 (E.D. Mo. 1988) (stating "no private right of action can be implied"); Gianakas v. Siensa, 649 F. Supp. 1033, 1033 (N.D. Ill. 1986) ("No private right of action exists for violations of Change in Bank Control Act of 1978."); Quaker City Nat'l Bank v. Hartley, 533 F. Supp. 126, 129 (S.D. Ohio 1981) ("No private cause of action exists under the Change in Bank Control Act of 1978."). *See also* Daniel B. Hodgson & John L. Douglas, *The Change in Bank Control Act: A Screening Statute Transformed*, 1 BANKING EXPANSION RPTR. 1, 11–12 addressing courts' interpretations of the issue regarding a potential private right of action under the CIBCA).

VII. Investigative and Enforcement Action

A. Investigative Action

The appropriate federal banking agencies may conduct investigations to determine compliance with the CIBCA.[519] The CIBCA includes authority for the agencies to conduct an investigation to determine whether any person has filed inaccurate, incomplete, or misleading information, or otherwise is violating, has violated, or is about to violate the CIBCA or any regulation.[520] The CIBCA and FDIA each include authority for the agencies to administer oaths, take depositions, and issue subpoenas in connection with enforcement proceedings.[521]

B. Enforcement Action

The appropriate federal banking agency also may take action to enforce the CIBCA.[522] The CIBCA includes authority for the appropriate federal banking agency to take enforcement action against any person that violates the CIBCA or any regulation or order issued by the agency under the CIBCA.[523] In addition, the FDIA includes authority for the appropriate federal banking agency to take enforcement action against any institution-affiliated party (IAP) for any

---

[519] 12 U.S.C. § 1817(j)(15)(a) (2012) ("The appropriate Federal banking agency may exercise any authority vested in such agency.").
[520] 12 U.S.C. § 1817(j)(15)(a) (2012).
[521] 12 U.S.C. §§ 1817(j)(15) (2012), 1818(n) (2012). *See* Adams v. Bd. of Governors of Fed. Reserve Bd., 855 F.2d 1336, 1342–43 (8th Cir. 1988). In *Adams,* the Board exercised its supervisory control over a BHC pursuant to the BHCA, CIBCA, and Federal Reserve Act when it examined records of a national bank with respect to an individual seeking to finance the purchase of stock of a BHC through loans from the national bank. Although the Board could have invoked subpoena power under 12 U.S.C. §§ 1818(n) and 1820(e) if necessary to obtain documents, it was not required to resort to such compulsory process). *See also* Application to Enforce Admin. Subpoena of the Bd. of Governors of the Fed. Reserve Sys. v. Interfinancial Servs., 104 F. Supp. 2d 39, 42 (D.D.C. 2000) (evaluating administrative subpoena *duces tecum*, seeking brokerage firm records of stock transactions affecting ownership of a registered BHC, was sufficiently narrowly tailored to be enforceable, in investigation by the Board into whether 12 U.S.C. § 1817 had been violated).
[522] 12 U.S.C. § 1817(j)(15)(B) (2012).
[523] 12 U.S.C. § 1817(j)(15)(B) (2012).

violations of law, regulation, order, or condition imposed in writing, or written agreement.[524] Enforcement action arising from violations of the CIBCA and its related regulations and orders falls within the scope of this general authority under the FDIA.[525] The definition of an IAP includes a person who has filed or is required to file a notice pursuant to the CIBCA.[526] IAPs are subject to enforcement action by the appropriate federal banking agency, including issuance of a cease and desist order (C&D),[527] assessment of a civil money penalty (CMP),[528] and removal or prohibition from participating in the affairs of a financial institution.[529] The appropriate federal banking agency may also seek a divestiture order through the appropriate district court.[530]

As the appropriate federal banking agency for review of the acquisition of control of a BHC, SLHC, or SMB, the Board may take investigative or enforcement action related to the CIBCA pursuant to the CIBCA or FDIA. The Board's use of its authority to take enforcement action related to the CIBCA is addressed below.

The Board has jurisdiction to take enforcement action against any person who files or should file a CIBCA notice in connection with the acquisition of voting securities of SMBs, BHCs, or SLHCs, regardless of the reason for the filing or failure to file a notice.[531] However, the willful, knowing, reckless, or negligent failure of a person to file a notice is more likely to result in the Board taking enforcement action against the acquiring person than an inadvertent violation.[532] The Board may pursue orders to assess a CMP, impose a

---

[524] 12 U.S.C. § 1818(b)(1), (3) (2012).
[525] 12 U.S.C. § 1818(b)(1), (3) (2012).
[526] 12 U.S.C. § 1813(u)(2) (2012); Pub. L. No. 101-73, § 204, 103 Stat. 193 (Aug. 9, 1989) (adding persons who filed or are required to file a CIBCA notice to the definition of IAP by FIRREA).
[527] 12 U.S.C. § 1818(b)(1), (3) (2012) (outlining authority for C&Ds).
[528] 12 U.S.C. § 1818(i) (2012) (outlining authority for assessment of penalties); *see also* 12 U.S.C. § 1813(v) (2012).
[529] 12 U.S.C. § 1818(e) (2012) (outlining the authority for removal and prohibition).
[530] 12 U.S.C. § 1817(j)(15)(B)(ii) (2012). *See also* 12 U.S.C. § 1818(i)(1) (2012).
[531] 12 U.S.C. §§ 1817(j)(15)(B) and 1818(b)(1) and (3) (2012).
[532] BD. GOVERNORS FED. RESERVE SYS., DIV. OF BANKING SUPERVISION & REGULATION, SR 03-19, GUIDANCE ON CHANGE IN BANK CONTROL PROCEDURES (Nov. 19, 2003) ("[V]iolations of the requirement to file a change in bank control notice may result in the Federal Reserve taking enforcement action against the relevant person(s) in appropriate circumstances, including

C&D, remove or prohibit a person from participating in the affairs of a financial institution, or require divestiture of voting securities to enforce the CIBCA and related regulations and orders.[533] The Board also may enforce compliance with a commitment made in relation to the CIBCA through several mechanisms: (i) the CMP provision of the CIBCA; (ii) a control proceeding under the BHCA; or (iii) cease-and-desist authority under section 8 (b) of the FDIA.[534]

The Board has used its authority to issue C&Ds, CMPs, removal or prohibition orders, and divestiture orders to enforce the requirements of the CIBCA.[535] In some situations, the Board sought a

---

those involving willful or negligent misconduct."). As enacted in 1978, subsection (j)(15) of the CIBCA authorized the imposition of CMPs for willful violation of its provisions. Change in Bank Control Act of 1978, Pub. L. No. 95-360, 92 Stat. 3641, 602 (1978). In 1986, subsection (j)(15) was redesignated as subsection (j)(16). Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 1360 (1986) (stating amendments to the Change in Bank Control Act). In 1989, the "willfulness" requirement was eliminated by FIRREA for conduct occurring after its enactment by the amendment of subsection (j)(16). Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, § 907, 103 Stat. 468 (Aug. 9, 1989). FIRREA substituted "knowing" and "reckless" as mental states for tiers of CMP liability. *Id.* *See also* S. REP. No. 101-19, at 378 (1989) ("Current law permits the agencies to assess a civil penalty . . . for willfully violating the Change in Bank Control Act. . . . This section eliminates . . . the requirement that violations be 'willful.'"); Miller v. Fed. Deposit Ins. Corp., 906 F.2d 972, 975–76 (4th Cir. 1990) (holding that summary judgment was appropriately entered in favor of FDIC on its claim for CMPs against individual pursuant to CIBCA on grounds that he had acquired control of bank without providing sixty days' prior notice of the proposed acquisition, since there was no dispute that the individual had "willfully" violated that CIBCA because he had admitted at deposition that he "knew" that he was violating the CIBCA).

[533] 12 U.S.C. § 1467a(g)(4)–(5). *See also* 12 U.S.C. § 1467a(i)(2)–(3).

[534] Letter from Michael Bradfield, Gen. Counsel, to Henry T. Rathbun, Esq., Wilmer, Cutler & Pickering, 1982 Fed. Res. Interp. Ltr. LEXIS 22 (Oct. 7, 1982).

[535] 12 U.S.C. §§ 1817(j)(15)(B), 1818(b)(1), & (3), 1818(e), & 1818(i) (2012). *See also* Joint Order to Cease and Desist, Assessing Civil Money Penalties, and Prohibit re Charles Kushner and The NorCrown Trust, Docket Nos. FRB 05-010-B-HC, 05-010-CMP-HC, 05-010-B-I, 05-010-CMP-I, 05-010-E-I and FDIC 04-224e & FDIC-04-223k (Feb. 15, 2005) [hereinafter NorCrown Order] (stating The NorCrown Trust will transfer its shares of NorCrown Bank to a voting trust, Charles Kushner is prohibited from participating in the affairs of a financial institution, and The NorCrown Trust and Charles Kushner pay civil money penalties of $12.5 million and $2.5 million,

single type of enforcement action, while in other situations the Board to sought a combination of enforcement actions.[536] The Board almost always takes enforcement action with the consent of the person involved.[537] Contested proceedings before an ALJ have been rare.[538] The following subsections briefly summarize some of the actions taken by the Board to enforce the CIBCA.

1. The NorCrown Trust

In 2005, the Board and FDIC issued a joint consent order that required The NorCrown Trust, an unregistered BHC (NorCrown

---

respectively). Order by Consent re Incus Co. and Carlos Hank Rhon (May 29, 2001) [hereinafter Incus Order] (stating that respondents will pay a fine, shares will be reallocated, and the chairman will resign as a result of the enforcement action); Order of Prohibition and Assessment of Civil Money Penalty upon Consent re Bob L. Sellers, Docket Nos. 98-029-E-I2, 98-029-CMP-I2 (Apr. 6, 1999) [hereinafter Sellers Order] ("[T]he Board of Governors . . . issues this combined Order to Cease and Desist and Order of Assessment of Civil Money Penalty . . . ."); Order upon Consent re Donald R. Horton, Docket Nos. 93-077-B-I, 09-077-CMP-I (July 12, 1994) [hereinafter Horton Order] ("[The Board issues this combined] . . . Order to Cease and Desist and Order of Assessment of a Civil Money Penalty . . ."); Western Bank, 91 Fed. Res. Bull. 446, 450–51 (2005) [hereinafter Western Bank Proceeding] (June 1, 2005) ("The Board therefore orders that the attached Order of Protection issue against Respondent Carl Thomas, and that the attached Cease and Desist Order be issued against all Respondents.").

[536] NorCrown Order, *supra* note 535, at 2–3 ("[The Board and FDIC issue] by consent this Joint Order to Cease and Desist, Order Assessing Civil Money Penalties, and Order of Prohibition . . . ."). *See also* Incus Order, *supra* note 535 (stating that respondents will pay a fine, shares will be reallocated, and the chairman will resign as a result of the enforcement action); Sellers Order, *supra* 535 at 3–4 ("[T]he Board of Governors . . . issues this combined Order to Cease and Desist and Order of Assessment of Civil Money Penalty . . . ."); Horton Order, *supra* note 535, at 2–3 ("Order to Cease and Desist and Order of Assessment of a Civil Money Penalty . . . ."). *But see* Western Bank Proceeding, *supra* note 535, at 3–4 ("The Board therefore orders that the attached Order of Protection issue against Respondent Carl Thomas, and that the attached Cease and Desist Order be issued against all Respondents.").

[537] NorCrown Order, *supra* note 535, at 1 (stating order issued with consent). *See also* Incus Order, *supra* note 535, at 1; Sellers Order, *supra* 535; Horton Order, *supra* note 535, at 3–4.

[538] *See, e.g.*, Western Bank Proceeding, supra note 535, at 1 (entering cease-and-desist order against all respondents after a contested hearing).

Trust) and Charles Kushner to (i) pay CMPs totaling at least $12.5 million; and (ii) divest The NorCrown Trust's ownership of more than ninety-nine percent of the voting shares of NorCrown Bank, Livingston, New Jersey, through transfer of the bank shares to a voting trust.[539] In addition, the joint order prohibited Mr. Kushner from participation in the affairs of a financial institution and from voting for a director or serving as an IAP of a financial institution.[540] The consent order arose from allegations that NorCrown Trust and Mr. Kushner violated the CIBCA, the BHCA, or both, in a series of transactions that led to the formation of NorCrown Trust without the Board's approval to become a BHC.[541]

2. First Western Bank

From 1999 to 2005, the Board issued enforcement actions against Carl Thomas and thirty-six other persons related to the acquisition of voting securities of First Western, an SMB, arising from alleged and adjudicated violations of the CIBCA, its implementing regulations, and a divestiture order.[542] Many respondents entered into consent C&Ds with the Board whereby they agreed (i) not to serve as an officer, director, agent, or employee of First Western without prior approval of the Board; (ii) not to knowingly acquire any additional legal, beneficial, or other interests in First Western; and (iii) not to directly or indirectly engage or participate in any violation of the CIBCA.[543] However, Carl Thomas and seventeen other respondents

[539] NorCrown Order, *supra* note 535, at 1.
[540] *Id.* (describing the enforcement action against NorCrown Trust and Charles Kushner).
[541] *Id.* (describing the behavior that led to the enforcement action).
[542] *See generally* Western Bank Proceeding, *supra* note 535 (describing enforcement actions against First Western, Carl Thomas, and thirty-six other people).
[543] Order by Consent re William Barber, *et al*., Docket No. 99-027-B-I6 (Sept. 24, 1994). *See also* Order by Consent re Solomon King, Docket No. 99-027-B-I7 (Jan. 13, 2000) (setting forth enforcement action taken against King); Order by Consent re James R. Sellers and R&T Foundation, Docket Nos. 99-027-B-IAP1, 99-027-B-I18 (Mar. 17, 2000) (setting forth the enforcement action taken against R&T and Sellers); Order by Consent re Frederick K. Wall and Sunshine Financial issued by Board of Governors of the Federal Reserve System., Docket Nos. 99-027-B-IAP2, 99-027-B-I19 (Mar. 8, 2000) (describing enforcement action against Sunshine Financial and Wall).

contested the Board's action.[544] After a notice of charges and hearing before an ALJ, the Board issued a C&D against Carl Thomas and the other respondents.[545] The Board also prohibited Carl Thomas from participating in any manner in the conduct of the affairs of any financial institution and from voting for a director or serving or acting as an IAP of any financial institution.[546]

3. Laredo National Bancshares

In 2001, the Board settled its administrative enforcement proceeding against Incus Co., Ltd. (Incus), and Carlos Hank Rhon of Mexico City, Mexico, Incus's registered owner, arising out of an alleged violation of commitments made by Mr. Rhon and Incus to the Board in a CIBCA notice and BHCA application involving the acquisition of voting shares of Laredo National Bancshares, Laredo, Texas (Laredo), a BHC.[547] The Board settled the matter when (i) Mr. Rhon and Incus agreed to pay $40 million to the U.S. Treasury; (ii) Incus agreed to place its Laredo shares into a voting trust; (iii) Mr. Rhon agreed to resign as chairman and director of Laredo's board and not otherwise be involved in its management or operation; and (iv) Mr. Rhon agreed not to serve as a chairman, director, or controlling shareholder of other United States banking organizations without the Board's prior approval.[548]

4. First National Summit Bankshares

In 1999, the Board and OCC jointly issued a consent order of prohibition against Bob L. Sellers, a former IAP of First National Summit Bankshares of Crested Butte, Colorado (Summit), a former BHC, arising out of his alleged acquisition of more than twenty-five percent of the outstanding voting shares of Summit without prior approval from the Board and his alleged misrepresentations and omis-

---

[544] Western Bank Proceeding, *supra* note 535, at 1.
[545] *Id.*
[546] Order of Prohibition upon Consent re Carl V. Thomas, Docket Nos. 99-027-(20)-(41), 99-027-CMP-I (20)-(41), 99-027-E-I- (20) (June 7, 2005).
[547] Incus Order, *supra* note 535, at 1.
[548] *Id. See also* Letter from W. Arthur Tribble letter, Vice President, Fed. Reserve Bank of Dallas, to Mark E. Plotkin, Esq., Covington & Burling (Nov. 6, 2001) (approving Eugene A. Ludwig and Evan G. Galbraith as co-trustees of voting trust to control 71.5% of Laredo's voting shares).

sions of fact in connection with regulatory filings with the Board and OCC.[549] The Board also issued a consent order assessing a CMP of $100,000 against Mr. Sellers.[550]

5. Provident Bancorp of Texas, Inc.

In 1994, the Board issued a combined consent CMP and C&D order against Donald R. Horton, arising out of his acquisition of voting securities of Provident Bancorp of Texas, Inc., Dallas, Texas (Provident), a BHC, whereby he allegedly violated the CIBCA, breached his fiduciary duty, and engaged in unsafe and unsound practices.[551] The order required Mr. Horton to (i) pay a $100,000 CMP; (ii) pay $500,000 in restitution to Provident's subsidiary bank; (iii) contribute $6.5 million in capital to Provident's subsidiary bank; and (iv) divest Provident voting securities into a voting trust.[552] The Board also prohibited Mr. Horton from serving as a director or officer of any insured depository institution without prior Board approval.[553]

---

[549] Sellers Order, *supra* 535, at 4 (setting forth enforcement proceedings against Seller). The Board also issued a combined C&D and CMP order against Paul P. Piper, Jr., a former IAP of both Summit and its bank subsidiary. Without admitting to any allegations, Mr. Piper consented to the issuance of the order assessing a CMP of $25,000 in connection with his alleged involvement in the acquisition of control of more than twenty-five percent of the outstanding voting shares of Summit by Mr. Sellers without the prior approval from the Board. Combined Order by Consent re Paul P. Piper, Jr. , Docket Nos. 98-029-E-I2, 98-029-CMP-I2 (Apr. 6, 1999) (setting forth Board enforcement actions against Piper).

[550] Sellers Order, *supra* note 535, at 4.

[551] *See generally* Horton Order, *supra* note 535. *See also* Order of Assessment of Civil Money Penalties re Michael L. Riddle, et al., Docket Nos. 95-0420B-I-1, 95-0420B-I-2, 95-042-CMP-I1, 95-042-CMP-I2 (May 19, 1997) (Board enforcement action against Riddle, Jones, DuCote and Averett); Bill Atkinson, *Texan Accused in Bank Takeover to Pay $7.1 M Under Fed Order*, AM. BANKER, July 20, 1994, at 6; Press Release, FED. RESERVE BD., Announcement of Public Administrative Hearing against Park T. Jones (Apr. 22, 1997) (on file with author).

[552] Horton Order, *supra* note 535, at 1.

[553] *Id.* at 3 ("[Horton] cannot, without the prior written approval of the Board of Governors . . . act as a director, officer, employee, controlling stockholder or agent for an insured depository institution or holding company thereof . . .").

C. Voluntary Action

1. Divestiture

A person may voluntarily take action to cure a violation of the CIBCA. Often, the failure to file a required CIBCA notice in connection to the acquisition of voting securities of a BHC, SLHC, or SMB is inadvertent.[554] While the Board may take enforcement action against any person who fails to file a required notice regardless of the reason for the failure to file the notice, the Board may exercise forbearance, refraining from the pursuit of sanctions, if the person immediately divests of the voting securities resulting in the inadvertent violation,[555] or if the person demonstrates a good faith effort to file a notice with required information.[556] Furthermore, while the Board may require the filing of a CIBCA notice even after divestiture of voting securities, the Board may determine that such a filing would not serve a regulatory or supervisory purpose.[557]

Although the Board might not take enforcement action against an acquiring person in response to a single inadvertent violation of the

---

[554] FED. RESERVE BD., *supra* note 252, at 1 ("Recently, there have been some inadvertent incidents of unauthorized changes of ownership involving state member banks and bank holding companies."). *See also* Robert T. Smith, *CIBC Act Compliance Challenges*, 34 ARK. BUS. 23, 23 (June 12, 2017) ("Inadvertent violations have grown more common given the increase in estate planning-related stock transfers by shareholders planning the next generation of ownership.").

[555] *See, e.g.*, Letter from Sidney M. Sussan, Assistant Dir., to Catherine Stauber, Vice President, Giant Bay Ress. Ltd., 1991 Fed. Res. Interp. Ltr. LEXIS 190 (Oct. 16, 1991) (acknowledging withdrawal of notice by the notificant based on a reduction of ownership interest).

[556] *See, e.g.*, Letter from Jennifer J. Johnson, Assoc. Sec'y, to Neal L. Petersen, 1991 Fed. Res. Interp. Ltr. LEXIS 260 (Dec. 27, 1991) (granting a short time extension to file the notice while all necessary information is waiting to be received).

[557] *See, e.g.,* Letter from Neal L. Petersen, Gen. Counsel, to Benedict Rafanello, Asst. Vice President, Fed. Res. Bank of N.Y., 1981 Fed. Res. Interp. Ltr. LEXIS 41 (Feb. 12, 1981) ("On the basis of the above and other facts of record, it is the opinion of the Board's Legal Division that while [TEXT REDACTED BY THE AGENCY] . . . did violate . . . the Board's Regulation Y, no regulatory or supervisory purpose would be served by taking any enforcement action. . ., particularly in view of [TEXT REDACTED BY THE AGENCY] prompt action to reduce its share interest in [TEXT REDACTED BY THE AGENCY] to less than 10 percent.").

CIBCA, a subsequent violation by an acquiring person is less likely to be viewed as inadvertent, which may cause the Board to take enforcement action against the person, such as disapproval of a CIBCA notice, assessment of a CMP, or an order to divest of voting securities.[558]

2. Remedial Notice

If a person desires to retain voting securities of a BHC, SLHC, or SMB already acquired without providing the notice required by Regulation Y or LL, the Board may accept a remedial filing without disapproving the notice or imposing sanctions.[559] A remedial notice should include all of the information required by the Notice and IBFR forms for an acquiring person, even if the Board would have accepted less information if the notice had been filed in a timely manner.[560] For instance, a person who acquires voting securities through inheritance pursuant to a will is permitted to file an abbreviated notice within ninety days of the acquisition without publication.[561] When such a notice is not filed within the specified time period, the Board may require all of the information required for a prior notice, as well as

---

[558] BD. GOVERNORS FED. RESERVE SYS., *supra* note 252 (recognizing "that the complexity of an ownership position sometimes does not lend itself to easy interpretation of the requirements to file a notice" and that there had been some recent "inadvertent incidents" but emphasizing "the importance of understanding the requirements for filing notice under the [CIBCA].").

[559] *See, e.g.*, Letter from Jennifer J. Johnson, Assoc. Sec'y, to Charles T. Doyle, 1990 Fed. Res. Interp. Ltr. LEXIS 325 (Oct. 26, 1990) ("Based on the information of record in this case, including the inadvertent nature of the Notificant's failure to obtain prior approval for the acquisition, the Secretary has determined not to disapprove the proposed retention of shares."); Letter from William W. Wiles to James W. Sharrock, *supra* note 472 (granting up to one year from the date of the letter to divest of the shares acquired without prior approval); Letter from Barbara R. Lowrey, Assoc. Sec'y, to [REDACTED BY BOARD], 1985 Fed. Res. Interp. Ltr. LEXIS 55 (Aug. 5, 1985) (deciding not to disapprove the proposed acquisition).

[560] BD. GOVERNORS FED. RESERVE SYS., *supra* note 252 ("In most cases, such a violation of the [CIBCA] is addressed by the person immediately filing a notice to the Federal Reserve requesting authority to retain the acquired shares.").

[561] *Id.* (stating that "acquisition of voting shares through inheritance" only requires "after-the-fact notice" and "the appropriate Reserve Bank must be notified within ninety days after the acquisition").

publication.[562] However, the Board may waive some information requirements for a remedial notice from a person owning, controlling, or holding a small number of shares.[563] In any event, the remedial notice should include an explanation of the circumstances that resulted in the violation and a description of the actions that have been taken by the person to ensure against any further violations of the CIBCA.[564] Furthermore, a person who files a remedial notice should not acquire additional voting securities until the appropriate Reserve Bank issues notice of its intention not to disapprove the acquisition (e.g., suspend automatic purchases through a dividend reinvestment plan).

VIII. Safety and Soundness

Many changes in control occurring in the 1960s resulted in departures from safety and soundness, deterioration in financial condition, and failure of financial institutions.[565] This experience prompted Congress to amend the FDIA to require reports from insured banks in the event of changes in its chief executive officer or directors for twelve months after a change in control and to require reports from

---

[562] *Id.* ("In most cases, such a violation of the [CIBCA] is addressed by the person immediately filing a notice to the Federal Reserve requesting authority to retain the acquired shares.").

[563] 12 C.F.R. §§ 225.43(a)(2), 238.33(a)(2) (2018) ("The Board may waive any of the information requirements of the notice if the Board determines that it is in the public interest.").

[564] BD. GOVERNORS FED. RESERVE SYS., *supra* note 252 ("The filing should include an explanation of the circumstances that resulted in the violation, and a description of the actions that have been (or will be) taken by the filer(s) to ensure no further violations of the statute."). *See also e.g.*, Letter from Jennifer J. Johnson to Rod Jones, *supra* note 357 ("Based on all the facts of record, the Board has determined not to disapprove the retroactive notice. . . . The record also indicates that Notificants have taken steps to ensure that they will comply with federal banking laws in the future.").

[565] *See* H.R. RPT. NO. 88-1792, *supra* note 29, at 5–6 (discussing the failure of financial institutions in the 1960s). Federal statutes do not define the phrase "unsafe or unsound practice." However, the testimony of John E. Horne, Chairman of the FHLBB, is often cited as the authoritative definition. 112 CONG. REC. 26474 (daily ed. Oct. 13, 1966) ("Generally speaking, an 'unsafe or unsound practice' embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operations, the possible consequences of which, if continued, would be abnormal risk or loss or damaged to an institution, its shareholders, or the agencies administering the insurance funds.").

insured banks if they extend credit secured by twenty-five percent or more of the voting securities of an insured bank.[566] It also prompted Congress to enact the Financial Institutions Supervisory Act of 1966 (FISA), which authorized the appropriate federal banking agency to issue a C&D against an insured bank engaged in an unsafe and unsound banking practice, as well as remove bank officers and directors for breach of fiduciary duty.[567]

A change in control impacts the frequency of safety and soundness examinations of insured depository institutions.[568] Generally, the appropriate federal banking agency is required to conduct a full-scope, on-site examination of insured depository institutions at least once every twelve months, but the agencies are permitted the conduct of such examinations at least once every eighteen months for institutions with total assets of $3 billion or less if they meet specified criteria.[569] An institution is not eligible for the eighteen-month exami-

---

[566] Pub. L. No. 88-593, 78 Stat. 940 (Sept. 12, 1964), *supra* note 29, at 941 (stating that a report is required whenever an insured bank makes a loan secured by 25% or more of its outstanding stock or makes any changes or replacement of its chief executive officer or of any director occurring in the next twelve-month period, including in its report a statement of the past and current business and professional affiliations of the new chief executive officer or directors).

[567] Pub. L. No. 89-695, § 202, 80 Stat. 1028, 1046 (Oct. 16, 1966) (discussing when the federal banking agencies may issue a C&D for violations or unsound practices); FISA also granted parallel authority to the FHLBB for savings associations. Pub. L. No. 89-695, § 101, 80 Stat. 1028 (Oct. 16, 1966). 112 Cong. Rec. 26474 (defining "unsafe or unsound practice).

[568] 12 U.S.C. § 1820(d)(4)(E) (2012).

[569] 12 U.S.C. § 1820(d) (2012); Pub. L. No. 115-174, 132 Stat. 1296 (2018) (establishing minimum frequency requirements for examination of insured depository institutions); FDICIA, § 203(a), 105 Stat. 2291 (Dec. 19, 1991) (establishing minimum frequency requirements for examination of U.S. branches and agencies of foreign banks); subsequently amended, Pub. L. No. 104-208, section 2214, 110 Stat. 3009–411 (Sept. 30, 1996), amending § 7(c)(1)(C) of the International Banking Act of 1978, codified at 12 U.S.C. § 3105(c)(1)(C); Pub. L. No. 114-94, § 83001, 129 Stat. 1312, 1796 (Dec. 4, 2015); Interim Final Rule, 81 Fed. Reg. 10,063 (Feb. 29, 2016), amending 12 C.F.R. § 208.64 (summarizing the extended examination cycle for certain small insured depository institutions and U.S. branches and agencies of foreign banks); Final Rule, 81 Fed. Reg. 90,949 (Dec. 16, 2016); 12 C.F.R. § 211.26(c) (2018). *See also* Board, Division of Banking Supervision and Regulation, *Updates to Examination Cycle for Certain State Member Banks and U.S. Branches and Agencies of Foreign Banking Organizations*, SR 1807,

nation cycle if a person has acquired control of the institution in the preceding twelve-month period in which a full-scope, on-site examination would have been required but for the eighteen-month examination cycle.[570] The statutory maximum for the length of time between examinations does not alter the Board's authority to examine institutions under its supervision more frequently.[571] SMBs are examined alternately by Reserve Banks and a state supervisory agency pursuant to the Alternate Examination Program (AEP).[572] Generally, examinations by state agencies under the AEP satisfy federal examination frequency requirements.[573] However, an SMB that undergoes a change in control must be examined by the appropriate Reserve Bank within twelve months of the change in control.[574]

IX. Special Situations

Acquisitions of voting shares of banking organizations by certain types of persons raise nuanced questions under the CIBCA, frequently as a result of the nexus between the CIBCA and the BHCA or HOLA, as applicable. This section addresses special considerations under the CIBCA when an acquiring person is associated with an employee stock ownership plan, investment advisor, private equity firm, chain or parallel-owned banking organization, unsolicited or hostile acquisition proposal, or sovereign wealth fund. It is also critical

---

Oct. 1, 2018 (providing an update on recent changes to the criteria for SMBs and U.S. branches and agencies of foreign banks to be eligible for an expanded eighteen-month examination cycle).

[570] 12 U.S.C. § 1820(d)(4)(E) (2012).

[571] 12 U.S.C. § 1820(d)(7) (2012).

[572] Letter from Stephen C. Schemering, Deputy Dir., Bd. of Governors of the Fed. Reserve Sys. (June 24, 1999), https://www.federalreserve.gov/boarddocs/srletters/1999/SR9917.HTM [http://perma.cc/Q8T9-Z8NS] ("Under the Alternate Examination Program (AEP), certain mutually agreed upon state member banks are examined in alternate years by a state supervisory agency, in lieu of an examination conducted by the Federal Reserve.").

[573] 12 U.S.C. § 1820(d)(3) (2012) ("The examinations required . . . may be conducted in alternate 12-month periods, as appropriate, if the appropriate Federal banking agency determines that an examination of the insured depository institution conducted by the State during the intervening 12-month period carries out the purpose of this subsection.").

[574] *Cf.* Board, *Commercial Bank Examination Manual* (Oct. 2016). https://www.federalreserve.gov/publications/files/cbem-1000-201704.pdf [https://perma.cc/8QSY-JLZ6] (last visited Dec. 1, 2018).

for investors in BHCs, SLHCs, and insured depository institutions to understand that conformance with the CIBCA does not equate conformance with either the BHCA or HOLA, as applicable. As previously noted, the nuanced considerations under the BHCA or HOLA are beyond the scope of this article. Therefore, this section only makes passing reference to those considerations.

A. Employee Stock Ownership Plans

As with any other "person" subject to the CIBCA's requirements, an employee stock ownership plan (ESOP) that proposes to acquire voting securities of a banking organization should carefully consider the possible application of the CIBCA and BHCA or HOLA. Similarly, ESOP trustees must consider whether they have a separate filing obligation related to their service as a fiduciary for an ESOP. The filing requirements vary depending upon the level of ownership, control, or power to vote held by the ESOP and its trustees.[575] If applicable thresholds are crossed by either an ESOP or one or its trustees (in aggregation with other shares owned, controlled, or voted by the trustee), both the ESOP and trustee must join in filing a CIBCA notice.[576]

1. ESOP Acquisition of up to 9.9%

Generally, when an ESOP acquires up to 9.9% of voting securities of a BHC, no filing is required under the BHCA or CIBCA.[577] The CIBCA does not require a filing because the acquisition is below the ten percent threshold that may trigger a filing requirement.[578] However, if a bank subsidiary of a BHC serves as trustee for a banking organization's ESOP, the BHC and its bank subsidiary may be required to file applications under the BHCA, if the

---

[575] *See* Robert C. Pozen, *Fed Policy on ESOPs Depends on the Amount of Stock Held*, AM. BANKER, Mar. 25, 1986, at 4.

[576] 12 C.F.R. §225.41(c) and (d) (2018) (providing that voting securities owned, controlled, or held with the power to vote by persons presumed to be acting in concert shall be combined for analyzing control under the CIBCA).

[577] Pozen, *supra* note 575, at 4 ("[T]he Fed has not required any application for ESOPs with less than 10% of a holding company's stock, unless the ESOP was formed in connection with another transaction itself requiring an application under the Bank Holding Company Act—for example, certain redemptions of holding company stock.").

[578] 12 C.F.R §§ 225.41(c), 238.31(c) (2018).

ESOP acquires five percent or more of the voting securities of the banking organization, and the bank subsidiary possesses sole discretionary authority to exercise voting rights over the shares held by the ESOP.[579]

2. ESOP Acquisition of 10% to 24.9%

An ESOP that plans to acquire between 10% and 24.9% of the voting securities of a BHC, SLHC, or SMB, must file notice pursuant to the CIBCA prior to acquiring the shares if the affected institution has securities registered under section 12 of the Exchange Act or if the ESOP would become the single largest shareholder (or be part of a group that is larger than the single largest shareholder).[580] As discussed in section VI above, compliance with the CIBCA requirements is relatively straightforward—filing a notice prior to acquisition, review for competence, experience, integrity, financial condition of the acquirer, competitive concerns, the financial stability of the affected institution, and the impact on the Deposit Insurance Fund. Complication arises, however, because ESOPs are treated by the Board as companies, and thus an ESOP could potentially come under the ambit of the BHCA or HOLA if the ESOP: (i) acquires twenty-five percent or more of a class of voting shares; (ii) controls the election of a majority of directors; or (iii) exercises a controlling influence over the management or policies of the affected institution.[581]

3. ESOP Acquisition of Twenty-Five Percent or More

If an ESOP proposes to acquire control of twenty-five percent or more of any class of voting securities of BHC or SLHC, the ESOP may need to file a BHCA or HOLA application because the acquisition of such an amount constitutes control under the applicable

---

[579] 12 U.S.C. § 1842(a)(1)–(3) (2012).
[580] 12 C.F.R §§ 225.41(c), 238.31(c) (2018).
[581] 12 U.S.C. § 1841(a)(2) (2018). *See also* First Nat'l Bank of Blue Island Employee Stock Ownership Plan v. Board of Governors, 802 F.2d 295 (7th Cir. 1986) (affirming the Blue Island order); Blue Island, 71 FED. RES. BULL. 804 (1985); Letter from Jennifer J. Johnson, Assoc. Sec'y, to Patrick A. Burrow, Esq., Ramsey, Bridgforth, Harrelson, and Starling, 1991 Fed. Res. Interp. Ltr. LEXIS 243 (Dec. 17, 1991).

statute.[582] However, under HOLA, an ESOP is specifically permitted to acquire up to twenty-five percent of a class of stock without triggering a need to file an application for pre-approval.[583] This exemption is available only if the ESOP is acquiring the stock of the sponsoring thrift or SLHC, not for the acquisition by an unrelated stock ownership plan.[584]

4. ESOP Acquisition of Additional Shares

Even if a HOLA application is not required, any new acquisition of voting securities by an existing ESOP may require a CIBCA notice. Because of the change from OTS regulations to Board regulations, ESOPs holding voting securities of an SLHC are now subject to CIBCA notice requirements with respect to acquisitions up to twenty-five percent of a class of voting securities of an SLHC, even if an ESOP's acquisitions of shares was previously reviewed under the CIBCA.[585] Therefore, an ESOP that plans to purchase any additional shares of an SLHC is required to file a prior notice under the CIBCA with the appropriate Reserve Bank if applicable control thresholds apply.

---

[582] Under the OTS regulation, the acquisition of up to twenty-five percent of class of stock by a tax-qualified employee stock benefit plan was exempt from application requirements. *See* 12 C.F.R. § 574.3(c)(vii) (2011). However, the Board did not transfer this exemption to Regulation LL. 12 C.F.R. § 238.32 (2011); 76 Fed. Reg. 56,508, 56,542 (Sept. 13, 2011). The OTS regulation was removed effective Oct. 11, 2018, 82 Fed. Reg. 47,083, 47,084 (Oct. 11, 2017).

[583] Letter from Jennifer J. Johnson to Patrick A. Burrow, *supra* note 581 ("ESOP will not, without the Board's prior approval, acquire 25 percent or more of any class of the voting securities or otherwise acquire control of any bank or bank holding company.").

[584] *Id*.

[585] Under the OTS regulation, the acquisition of up to twenty-five percent of class of stock by a tax-qualified employee stock benefit plan was exempt from application requirements. *See* 12 C.F.R. § 574.3(c)(vii) (2011). However, the Board did not transfer this exemption to Regulation LL. 12 C.F.R. § 238.32(a)(1)(i) (2011; 76 Fed. Reg. 56,508, 56,542 (Sept. 13, 2011). The OTS regulation was removed effective Oct. 11, 2018. 82 Fed. Reg. 47,083, 47,084 (Oct. 11, 2017).

5. Trustee Filing Requirements

The voting power of persons who serve as trustees of ESOPs raise additional concerns under the CIBCA and the Board's Regulations Y or LL. Natural persons serving as trustees may be officers, directors, or employees of the sponsoring institution, and may also own, control, or hold power to vote securities of the institution outside of the shares of the ESOP (e.g., individually, jointly with a spouse, other immediate family member, or through a trust separate from the ESOP), thereby raising questions of aggregation of voting power held by such persons.[586] For instance, a bank officer who otherwise may own only a fraction of a percentage of an SMB's shares in his or her personal capacity, but who serves as trustee or nominee for the bank's ESOP, may have power to vote more than ten percent of the bank's shares and, therefore, may need to join a notice filed by the ESOP and provide biographical and financial information to support the filing.

Companies (such as non-depository trust companies) may serve as trustees, including stand-alone trust companies and subsidiaries of the sponsoring BHC or SLHC.[587] If a company is proposed as trustee for an ESOP, the trustee must determine whether it would have a filing obligation under either the BHCA or the HOLA, as appropriate, or if it would qualify for the fiduciary exemption in section 3 of the BHCA or section 10(e) of the HOLA.[588]

The voting power of ESOP trustees over "allocated" and "unallocated" shares also must be considered.[589] All shares in the ESOP, whether or not they are allocated, are likely to be attributed to the trustee when analyzing control under the CIBCA.[590] Even if an

---

[586] *Id.*

[587] 12 U.S.C. §§ 1467a(e)(1)(A)(iii)(l), 1841(a)(5)(A), 1842(a)(A) (2012).

[588] 12 U.S.C. §§ 1467a(e)(1)(A)(iii)(l), 1841(a)(5)(A), 1842(a)(A) (2012) ("Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity . . . ").

[589] *See* Letter from Scott G. Alvarez, Assoc. Gen. Counsel, to H. Rodgin Cohen, Esq., Sullivan & Cromwell, 1996 Fed. Res. Interp. Ltr. LEXIS 70 (May 22, 1996) (considering both the allocated and unallocated shares when making voting power determinations).

[590] Based on limited precedent, the allocated vs. unallocated distinction is not relevant in a CIBCA analysis context—both types of shares could be counted to determine a person's overall control of shares. *See* Letter from Scott G. Alvarez to H. Rodgin Cohen, *supra* note 589 ("As long as the aggregate of all allocated shares, unallocated shares, and shares controlled by members of the Committee individually represent less than 10 percent of the outstanding

ESOP trustee holding ten percent or more of a BHC qualifies for the fiduciary exemption from a filing under the BHCA or HOLA, the trustee may be required to file a notice pursuant to the CIBCA.[591]

Voting shares of a banking organization owned by an ESOP for the benefit of the ESOP sponsor's employees are attributed to each trustee that has voting power. As noted above, this attribution can lead to significant aggregation consequences for natural persons because voting securities held by an ESOP must be aggregated with other voting securities owned, controlled, or held with the power to vote by its trustees. All of these voting securities must be aggregated as part of a CIBCA notice. Furthermore, a proposed change in trustee for an ESOP in a controlling position also would require prior notice pursuant to the CIBCA.

B. Investment Advisors

Investment advisors for registered investment companies raise their own set of concerns under the CIBCA (and, correspondingly, under the BHCA and HOLA). The multiple investment vehicles managed by large investment advisors may pose aggregation concerns under these statutes. Although an investment advisor would not have ownership of the shares of the banking organization in most respects (the underlying investment vehicles would; the only exception being separate accounts held on the books of the investment advisor), such advisors generally retain dispositional control over the shares. In most cases, the investment manager tells the underlying investment company when to buy or sell securities and votes the shares as well. A standard approach for an investment advisor to address the control concerns for investments aggregating to a level between 10% and

---

voting shares of Bancshares, staff would not recommend that the Board object to Committee voting shares not directed by plan participants without filing a CIBCA notice."). However, allocated vs unallocated distinction may remain relevant under BHCA. *See* Letter from J. Virgil Mattingly Jr., Gen. Counsel, to Dennis Rilinger, Esq., Watson, Esq., Marshall & Enggas, 1993 Fed. Res. Interp. Ltr. LEXIS 51, n.1 (Jan. 21, 1993) ("ESOP is administered by United Missouri Bank of Kansas City, N.A. and Mercantile Bank of Kansas City. The ESOP participants direct the trustees' vote of the allocated shares; unallocated shares are voted according to the same percentages as are the allocated shares. Thus, the trustees exercise no discretion in voting the shares held by the ESOP.").

[591] *OCC Licensing Manual*, *supra* note 9, at 3 (stating its own filing exceptions from the notice requirements of 12 C.F.R. 5.50 (2018)).

24.9% of a class of voting securities has been for an investment advisor to file a CIBCA notice for each BHC, SLHC, or SMB in which the aggregate dispositional control or voting power equals or exceeds ten percent, and simultaneously provide passivity commitments with respect to these institutions, thus negating the controlling influence concern arising under either the BHCA or HOLA, as applicable. However, in a series of letters beginning in 2002 and continuing through 2016. Board staff did not recommend that the Board find that acquisitions made within certain parameters would cause investment advisors and entities that they advise to control a BHC or bank for purposes of the BHCA, to control a BHC, SLHC, or SMB for purposes of the CIBCA, or to control an SLHC or savings association for purposes of the HOLA or CIBCA.[592]

---

[592] Letter from J. Virgil Mattingly, Jr., Gen. Counsel, to James P. Ryan, Vice President & Senior Counsel, The Capital Group Companies, Inc. (Aug. 13, 2002),https://www.federalreserve.gov/boarddocs/legalint/BHC_ChangeInControl/2002/20020813 [https://perma.cc/2CHE-GFUD] (last visited Aug. 30, 2017) (advising that the Capital Group companies and affiliated entities collectively may acquire up to fifteen percent of any class of voting securities of a bank or bank holding company without being deemed to have acquired control of that institution under the BHCA or CIBCA when the acquisition complies with certain conditions). *See also* Letter from [redacted by Board] to Jeffrey Hare, Esq., DLA Piper LLP, 2016 Fed. Res. Interp. Ltr. LEXIS 12 (Apr. 27, 2016) (similarly advising the T. Rowe Price Group, Inc. and affiliated entities that collectively they may acquire up to fifteen percent of any class of voting securities of a BHC, Bank, SLHC, or SA without being deemed to have acquired control of that institution under the BHCA, HOLA, or CIBCA when the acquisition complies with certain conditions). *See also* Letter from Scott G. Alvarez, Gen. Counsel, to Satish M. Kini, Esq., Debevoise & Plimpton LLP, 2013 Fed. Res. Interp. Ltr. LEXIS 10 (Apr. 11, 2013) (advising that The Vanguard Group, Inc. and affiliated entities collectively may acquire up to fifteen percent of any class of voting securities of a BHC, SMB, SLHC, or SA without being deemed to have acquired control of that institution under the BHCA, HOLA, or CIBCA when the acquisition complies with certain conditions); Letter from Scott G. Alvarez, Gen. Counsel, to Rebecca H. Liard, Esq., Debevoise & Plimpton LLP (Dec. 20, 2007), http://www.federalreserve.gov/boarddocs/legalint/BHC_ChangeInControl/2007/20071220.pdf [https://perma.cc/AZ37-38XF] (last visited Aug. 30, 2017) (advising that Davis Selected Advisors, L.P. and affiliated entities collectively may acquire up to fifteen percent of any class of voting securities of a BHC or bank without being deemed to have acquired control of that institution under the BHCA CIBCA when the acquisition complies with certain conditions); Letter from Scott G. Alvarez, Gen. Counsel, to Thomas

C. Private Equity Firms

Private equity firms that seek to acquire ownership positions of a banking organization between 10% and 24.9% also create special concerns. As with any company, the Board must review such proposals for compliance with the CIBCA and the BHCA or HOLA.[593] Although compliance with the CIBCA may be relatively simple, due to the regulation's focus on ownership of voting securities only, the controlling influence standards of the BHCA and HOLA create difficulties for private equity funds, which often seek to change the management and/or policies of target investments in order to increase shareholder value and deliver capital gains to the fund's investors.[594]

Generally, one (or sometimes multiple) private equity funds "anchor" a recapitalization proposal by investing in up to 24.9% of the newly-issued common stock.[595] Anchor investors frequently will be required to file a CIBCA notice in connection with the proposal due to the significant ownership interest each would acquire (i.e. more than ten percent, or becoming the single largest shareholder).[596]

When multiple private equity funds participate in the same transaction or capital raise (frequently called "club deals"), the joint endeavor usually raises questions regarding whether all or a subset of the funds comprising the "club" should be treated as an association[597]

M. Mistele, Chief Operating Officer and Gen. Counsel, Dodge & Cox (Dec. 19, 2007), http://www.federalreserve.gov/boarddocs/legalint/BHC_ChangeInControl/2007/20071219.pdf [https://perma.cc/B5QW-AV2Q] (last visited Aug. 30, 2017) (advising that Dodge & Cox, and affiliated entities collectively, may acquire up to fifteen percent of any class of voting securities of a BHC or bank without being deemed to have acquired control of that institution under the BHCA or CIBCA when the acquisition complies with certain conditions).

[593] *See generally* Ravi R. Desai, *Private Equity Investments in Financial Institutions and How to Avoid Becoming a Bank Holding Company*, 13 N.C. BANKING INST. 385 (2009) (identifying regulatory requirements for private equity firms seeking to acquire ownership positions of banking organizations).

[594] Ravi R. Desai, *Private Equity Investments in Financial Institutions and How to Avoid Becoming a Bank Holding Company,* 13 N.C. BANKING INST. 385 (2009).

[595] *Id.*

[596] *Id.*

[597] For purposes of the BHCA, there are two general ways to form an "association" under Board precedent. First, multiple entities, each of which are under common control by the same person and which invest in a common

under the BHCA, and whether the group members should be considered a group acting in concert for purposes of the CIBCA. Determining the existence of a group acting in concert for CIBCA purposes is driven primarily by whether the facts suggest any joint understanding or parallel action toward acquiring control of a depository organization, irrespective of the existence of an express, written agreement.[598] Any form of agreement or coordination, even if not pursuant to a contract, shareholder agreement, or other binding document, may result in a finding of a group subject to CIBCA notice requirements.

In general, the only circumstance involving contemporaneous investments found not to constitute the existence of a group acting in concert is contemporaneous investments by unrelated parties, acting independently and without knowledge of the others. For instance, in 2007, Board staff opined that several private equity investors, each of which proposed to acquire between 9.1% and 9.5% of the total equity and between 9.6% and 9.9% of the voting securities of Doral Holdings LP, which would acquire ninety percent of the voting shares of Doral

---

target, may be deemed to be "incapable of independent action." *See* Letter from Theodore E. Allison, Sec'y, to William C. Beaman, Clerk, U.S. Dist. Court Wyo., 1978 Fed. Res. Interp. Ltr. LEXIS 15 (Nov. 17, 1978). *See also* Commerce Bank Corporation, 66 FED. RES. BULL. 506 (1980) (disapproving application by entities under common control viewed as an association under the BHCA). However, common control and common investments do not automatically compel the Board to find an association exists. *See, e.g.*, Arlington Bancorp, Inc., 67 FED. RES. BULL 726, fn. 2 (1981) (finding that seven BHCs could be a "company" but no supervisory purpose served by requiring an application in connection with the specific proposal). Second, multiple entities, none of which are under common control, but which invest in a common target and are subject to an agreement regarding control of the target, can be considered a "constructive company." WISCUB, Inc., 65 FED. RES. BULL. 773, 777 (1979) (finding that due to a lack of formal or informal agreement or "formalized structure" credit union members are not collectively or individually considered a company or BHC); Letter from Theodore E. Allison, Sec'y to John P. Roemer, Esq., Wickert & Fuhrman, 1977 Fed. Res. Interp. Ltr. LEXIS 36 (Sept. 13, 1977) (regarding Tri City National Bank of West Allis, *aff'd*, Cent. Bank v. Bd. of Governors, No. 77-1937 at 3 (D.C. Cir. 1978)) (finding BHCA definition of "association" contemplates a formal structure or entity).

[598] 12 C.F.R. §§ 225.41(b)(2), 238.31(b)(2) (2018) ("Acting in concert includes knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a [BHC, SMB, or SLHC] whether or not pursuant to an express agreement.")

Financial Corporation, would not raise concerns under the BHCA.[599] While Doral Holdings LP would become a BHC, the investors in this limited partnership were not considered an association under the BHCA or considered to be a group acting in concert under the CIBCA, although they were required to provide various passivity and independence commitments.

So-called "silo" structures, in which one or more funds submit to BHC regulations to take control of a bank, without affecting any of the firm's other investments, raise complicated issues under the BHCA, HOLA, and the CIBCA.[600] For purposes of the CIBCA, the concerns generally focus on the level of interactions between separate investment "arms" and whether such affiliated funds should be viewed as a group acting in concert.[601] The degree of overlap among limited partners of various separate private equity funds under control of the same set of persons can be important in this context.[602] However, in general, silo structures pose more challenging questions in the BHCA and HOLA contexts,[603] which are beyond the scope of this article.

---

[599] Letter from Scott G. Alvarez to B. Robbins Kiessling, *supra* note 243 (explaining that the small size of each individual investor's voting and equity investment, passivity commitments, and independence representations related to Doral Entities led staff not to recommend that the Board find the proposal would allow an investor to exercise a controlling influence over any Doral Entity). *See also* Ravi R. Desai, *Private Equity Investments in Financial Institutions and How to Avoid Becoming a Bank Holding Company*, 13 N.C. BANKING INST. 385, 400–02 (2009) (reviewing "controlling influence" considerations under the BHCA and "acting in concert" concerns under the CIBCA in the context of private equity investments in banking organizations). More recently, to address BHCA and HOLA "constructive company" questions, often in widespread capital raises in which several investors make simultaneous acquisitions of shares of a bank or holding company, Board staff has requested and obtained anti-association commitments. *See*, *e.g.*, Letter from Scott G. Alvarez, Gen. Counsel, to Judith Muncy, Esq., Barak Ferrazano Kirschbaum & Nagelberg LLP, 2010 Fed. Res. Interp. Ltr. LEXIS 9 (Mar. 2, 2010).

[600] Desai, *supra* note 594.

[601] *Id.*

[602] *Id.*

[603] *See generally* H. 2, 2016, No. 45 (Nov. 10, 2016) (listing, by Federal Reserve District, applications for Bank Holding Companies and bank mergers); Letter from Robert Mahalik, Examining Officer, Fed. Reserve Bank of Dallas, to Brian D. Christiansen, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP, Feb. 11, 2016 (approving JLL Associates G.P. FCH, LLC, New York, New York; JLL Associates FCH, L.P.; JLL Partners Fund FCH, L.P.; and

The Board previously has found that simultaneous investment, coupled with other common investment activities among a group of investors, was sufficient to deem the investors to be a group acting in concert under the CIBCA.[604] The Board also has found that pooling funds for the purpose of purchasing shares and using a common agent to facilitate a transaction as factors in deeming investors to be a group acting in concert under the CIBCA.[605] However, the Board has also held under the CIBCA that simultaneous investment, facilitated by a common agent that also acquired shares in the deal, was insufficient to determine the agent was acting in concert with the group of investors that filed a CIBCA notice.[606]

JLL/FCH Holdings I, LLC to acquire Pioneer Bancshares, Inc., Dripping Springs, Texas, and indirectly acquire Pioneer Bank SSB); Letter from E. Ann Worthy, Vice President, Fed. Reserve Bank of Dallas, to Paul S. Levy, Member, JLL Assocs. G.P. FCH, LLC, Nov. 7, 2007 (approving JLL Associates G. P. FCH, L.L.C., New York, New York to become a bank holding company and to acquire an interest in FC Holdings, Inc., Houston, Texas, and indirectly acquire FC Holdings of Delaware, Inc., Wilmington, Delaware; First Community Bank-The Woodlands, National Association, Tomball, Texas; First Community Bank Central Texas, N.A., Meridian; First Community Bank Fort Bend, N.A., Sugar Land; and First Community Bank San Antonio, N.A., San Antonio). H.2., 2007, No. 7 (Feb. 19, 2007)). *See also* Chip MacDonald, *Private Equity Investments in Financial Services Firms: Threading the Regulatory Needle*, BLOOMBERG L. REP., Vol. 4, No. 2 (2011), https://www.jonesday.com/files/Publication/83688577-07ac-4642-b72e-a98a0e6db999/Presentation/PublicationAttachment/76eae7e6-9df2-4292-9d73-af56e77c05e1/macdonald%20private%20equity%20investments%20in%20financial%20services%20firms.pdf (last visited July 14, 2017); Sidley Austin, *Regulatory Developments Regarding Acquisitions of Failed Depository Institutions*, FIN. INST. REG. UPDATE, July 9, 2009.

[604] Letter from Jennifer J. Johnson, Deputy Sec'y, to Calvin P. Brasseaux, Esq., Stone, Pigman, Walther, Wittmann & Hutchinson, L.L.P, 1996 Fed. Res. Interp. Ltr. LEXIS 114 (Sept. 12, 1996).

[605] Letter from Jennifer J. Johnson, Deputy Sec'y, to Bennet S. Koren, Esq., McGlinchey Stafford Lang, 1996 Fed. Res. Interp. Ltr. LEXIS 263 (Sept. 12, 1996).

[606] Letter from James McAfee, Assoc. Sec'y, to H. Rodgin Cohen, Esq., Sullivan & Cromwell, 1987 Fed. Res. Interp. Ltr. LEXIS 126 (Aug. 5, 1987).

D. Chain Banking and Parallel-owned Banking Organizations

A "chain banking" organization exists when one or more independently chartered BHCs, SLHCs, or banks are controlled by the same individual, family, or group of individuals who are closely associated in their business dealings.[607] Concerns that chain banks could circumvent market concentration and commercial activities limitations under the BHCA were among the influences that led to the passage of the CIBCA.[608] The CIBCA, and Regulations Y and LL, permit the responsible federal banking agency to disapprove of a transaction that would result in a monopoly, lessen competition or restrain trade in a manner not offset by any public benefits, or otherwise result in an adverse effect to the Deposit Insurance Fund.[609] The BHCA, however, remains the primary statutory tool for the Board to review chain banking structures.[610]

---

[607] *OCC Comptroller's Handbook, Related Organizations* (Aug. 2004) at 21, https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/related-organizations/pub-ch-related-organizations.pdf (last visited Mar. 28, 2019).

[608] Interstate Chain Banking, Majority Staff Report to Subcommittee on Financial Institutions Supervision, Regulation and Insurance, Committee on Banking Finance and Urban Affairs, May 20, 1985, at 7. *See also* Roger D. Rutz, *Chain Banking, Competition, and the Change in Bank Control Act of 1978*, 59 NEB. L. REV. 234 (1980).

[609] 12 U.S.C. § 1817(j)(7)(A) (2012); 12 C.F.R. §§ 225.43(h)(1), 238.33(h)(1) (2018).

[610] *See, e.g.*, First National Bank Shares, Ltd., 80 FED. RES. BULL. 159 (1994); Arvest Bank Group, Inc., 78 FED. RES. BULL. 445 (1992). Under the BHCA, the financial and managerial resources of chain bank organizations are reviewed on a comprehensive basis, as cogently set forth in the Nebraska Banco case, a denial of a BHCA filing in which the Board stated that, in analyzing the financial and managerial resources of an applicant that is part of a chain of one-bank holding companies, the Board would look beyond the applicant to the other banks that are part of that chain, noting that such analysis was appropriate because of the "interdependence of the banks in a chain of commonly-owned one-bank holding companies and the distinct possibility that the financial and managerial resources of one or more of the banks in the chain may be used to support the operations of other members of the banking group." Nebraska Banco, Inc., 62 FED. RES. BULL. 638, 639 (1976) (illustrating the Board using its power of denial when reviewing chain banking structures). *See also* Dakota Bancshares, Inc., 69 FED. RES. BULL. 442, 444 (1983).

A "parallel-owned" banking organization involves at least one domestic BHC, SLHC, or bank and at least one *foreign* bank that is controlled by the same individual, family, or group of individuals who are closely associated in their business dealings.[611] Processing a CIBCA notice that creates a parallel-owned banking organization is generally more complex and time consuming than an ordinary CIBCA notice.[612] Such organizations raise supervisory concerns because no single supervisor can exercise consolidated supervision over all of the banks controlled by the same individual or group of individuals.[613] Accordingly, when faced with an application in which a parallel-owned organization is involved, the federal banking agencies seek to fully understand the overall strategy and management of the parallel-owned banking organization and its impact on domestic depository organizations, the extent that the foreign bank is supervised by home-

---

[611] Joint Press Release, Bd. of Governors of the Fed. Reserve Sys., Fed. Deposit Ins. Corp., Office of the Comptroller of the Currency, Office of Thrift Supervision, Agencies Outline Risks of Parallel-Owned Banking Organizations (Apr. 23, 2002), http://www.federalreserve.gov/boarddocs/press/general/2002/20020423/default.htm [https://perma.cc/UQL7-ZTVG] ("A parallel-owned banking organization consists of a U.S. depository institution and a foreign bank that are both controlled directly or indirectly by one person or group of persons who are closely associated in their business dealings or act in concert.").

[612] Joint Press Release, *supra* note 611. *See also OCC Licensing Manual*, *supra* note 9, at 9. The manual also lists typical commitments. For supervisory concerns related to parallel-owned banking organizations, *see* Bank Related Organizations 4052.1, *Commercial Bank Examination Manual*, Federal Reserve Board, 7–8 (Apr. 2010), http://www.federalreserve.gov/boarddocs/supmanual/cbem/4000.pdf [https://perma.cc/E6BY-CALZ] (providing supervisory concerns related to parallel-owned banking organizations). For an example of an OCC non-disapproval of parallel-banking organization acquisition, see OCC Conditional Approval 1154, Office of the Comptroller of the Currency (Apr. 25, 2016), https://www.occ.gov/topics/licensing/interpretations-and-actions/2016/ca1154.pdf [https://perma.cc/2W7A-TML3] (Nduom Investor Group acquisition of Illinois-Service Federal Savings & Loan Association).

[613] Letter from Margaret McCloskey Shanks, Deputy Sec'y of the Bd, Fed. Reserve Sys., to Alcides I. Avila, Esq., Avila, Rodriguez, Hernandez, Mena, & Ferri LLP (Sept. 17, 2013).
https://www.federalreserve.gov/bankinforeg/LegalInterpretations/bhc_changeincontrol20130917.pdf [https://perma.cc/MW7K-6ZCR] (approving the notice on behalf of Guido Edwin Hinojosa Cardoso to acquire a controlling interest in Anchor Commercial Bank).

country regulators, the condition and activities of such foreign affiliates, and how affiliates might affect the domestic bank.[614] Such supervisory concerns are in addition to the concerns addressed in the standard analysis of the background and financial wherewithal of the individual filing the change in control notice. Review typically results in expanded informational requirements from both the institutions involved and from the persons who commonly control the institutions and possibly can include various commitments to provide information on an ongoing basis and to restrict activities of the depository organizations and their affiliates, including cessation of affiliate transactions.[615]

E. Unsolicited Acquisition Proposals and Hostile Takeovers

Unsolicited acquisition proposals and hostile takeover efforts usually raise CIBCA issues because they involve the purchase of voting securities or solicitation of proxies of a target institution. Of course, a person is required to file a CIBCA notice if the proposed acquisition of voting securities of a banking organization would cross applicable filing thresholds. The solicitation of proxies may or may not require the filing of a notice. The statutory text of the CIBCA does not provide an exemption from the prior notice requirement for voting rights acquired through proxy solicitations.[616] The Board, however, included an expansive CIBCA proxy solicitation exemption in Regulations Y and LL, allowing persons to acquire voting rights in connection with a proxy solicitation for purposes of conducting business at a shareholder's meeting, provided that the proxies are revocable and terminate within a reasonable period of time after the meeting.[617] In a letter regarding Glen Burnie Bancorp, the Board reviewed a situation in which three shareholders sought sufficient voting shares through a proxy solicitation to remove the chief executive officer of the holding company and possibly replace the majority of the company's board of

---

[614] Joint Press Release, *supra* note 611.
[615] *See id*. *See also OCC Licensing Manual, supra* note 9, at 22.
[616] 12 U.S.C. § 1817(j) (2012).
[617] 12 C.F.R. §§ 225.42(a)(5), 238.32(a)(5) (2018). *See also supra* notes 293–95 and accompanying text.

directors.[618] The Board noted the regulatory CIBCA exemption and explicitly "recognized as a matter of policy that shareholders may exercise control outside of the CIBCA's requirements by voting shares for the purpose of removing existing management at an annual meeting."[619] In that same letter, the Board also reaffirmed a holding from a previous case, which concluded that the policies of the CIBCA would not require prior notice for a group of shareholders who sought to change management through a proxy solicitation.[620] When read together, the combination of the Board's CIBCA proxy solicitation exemption and its policy accommodations for shareholders seeking to exercise their rights provides shareholders with significant leeway under the CIBCA. When the Board assumed authority to regulate SLHCs, it carried its Regulation Y exemption for voting power acquired by proxy over into Regulation LL.[621]

F. Sovereign Wealth Funds

Sovereign wealth firms also pose unique supervisory concerns with respect to regulated investments in depository organizations and their holding companies. The Board distinguishes between foreign governments themselves, which are not treated as "companies" subject to the BHCA, and government-owned entities such as sovereign wealth funds, which are treated as companies and are subject to the

---

[618] Letter from Jennifer J. Johnson, Deputy Sec'y, to Murray A. Indick, Esq., Wilmer, Cutler & Pickering, 1995 Fed. Res. Interp. Ltr. LEXIS 160 (Mar. 6, 1995).

[619] *Id*.

[620] *Id*. at n.5 (citing Letter from William W. Wiles to H. Rodgin Cohen, *supra* note 294)).

[621] This exemption exists despite the inclusion of proxies in the statutory text of HOLA of the definition of control. While the OTS exempted short-term proxies within the HOLA context, the Board declined to do so. Although no case law or administrative interpretations exist to elucidate the Board's views with respect to holding of proxies within the HOLA context, because the Board specifically adopted its proxy solicitation exemption in the CIBCA portion of Regulation LL, but neither carried forward the OTS exemption nor promulgated its own exemption in the HOLA portions of Regulation LL, the Board may conclude that the statute provides no flexibility for a company to acquire via proxies the power to vote more than twenty-five percent of any class of a SLHC's voting securities without prior approval.

BHCA.[622] The position that the BHCA does not apply to foreign governments themselves has long been held by the Board.[623]

The Board has not addressed the status of foreign governments under the CIBCA. However, the acquisition of ten percent or more of any class of voting securities of a BHC, SLHC, or SMB by a company owned by a foreign government is subject to the Board's review under the CIBCA.[624] "Unlike the BHCA, which imposes ongoing restrictions on the nonbanking activities of corporate owners of banks as well as ongoing reporting, examination, capital, and other requirements, the CIBCA does not impose any activity limitations or any ongoing supervisory requirements on owners of banks."[625] Therefore, the filing of a CIBCA notice by a sovereign wealth fund would not lead to limitations on its investments. However, sovereign

---

[622] *Sovereign Wealth Funds*, *Before the Subcomm. on Domestic & Int'l Monetary Pol'y, Trade, & Tech., & the Subcomm. on Cap. Mkts., Ins., & Gov't Sponsored Enterprises, H. Comm. on Fin. Servs,.* 110th Cong., (2008) (statement of Scott G. Alvarez, General Counsel) [hereinafter *Alvarez SWF Testimony*] (stating that the Board distinguishes between foreign governments and government owned entities for the purpose of the BHCA). *See also* 12 U.S.C. § 1841(b) (2012); Pauline B. Heller & Melanie L. Fein, FEDERAL BANK HOLDING COMPANY LAW 2.03[10] (3d Ed. 2011); John L. Walker & Mark J. Chorazak, *Sovereign Wealth Funds: The Evolving Legal and Regulatory Landscape,* Washington Legal Foundation, Critical Legal Issues Working Paper Series (Aug. 2008), http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub739.pdf?sfvrsn=2 [https://perma.cc/GJ24-BAGM].

[623] Statement of Governor John P. LaWare, House Committee on Banking, Finance and Urban Affairs, 1992, 78 FED. RES. BULL. 495, 487–498 (1992). *See also* Banca Commerciale Italiana, 68 FED. RES. BULL. 423, 425 (1982); Societe Generale/Sogelease Corp., 67 FED. RES. BULL. 453 (1981); Banco Exterior de Espana, S.A., 66 FED. RES. BULL. 504 (1980); Banco Exterior de Espana, S.A., 63 FED. RES. BULL. 1079 (1977); Korea Exchange Bank, 39 Fed. Reg. 20,423 (1974); Banque Nationale de Paris, 58 FED. RES. BULL. 311 (1972); Banco di Roma, 58 FED. RES. BULL. 930 (1972); Letter from William W. Wiles, Secretary, to Patricia S. Skigen, Esq., Willkie Farr & Gallagher, 1988 Fed. Res. Interp. Ltr. LEXIS 200 (Aug. 19, 1988).

[624] *Alvarez SWF Testimony*, *supra* note 622, at 4 ("Investments by sovereign wealth funds . . . may . . . require approval from a federal banking agency under the Change in Bank Control Act (CIBC Act). Prior approval from the Federal Reserve under the CIBC Act generally is required for any acquisition of 10 percent or more of any class of voting securities of a state member bank or bank holding company.").

[625] *Id.*

wealth funds may structure investments to avoid filings with federal banking agencies.[626] For instance, in 2008, the Kuwait Investment Authority, the Abu Dhabi Investment Authority, and the Government of Singapore Investment Corporation each acquired less than ten percent of Citigroup's voting equity.[627] By acquiring less than ten percent (and by acquiring shares on the open market without any agreements or understandings with other investors), each avoided triggering notice under the CIBCA.[628]

X. Conclusion

The CIBCA is an important part of the regulation of the ownership and control of banking organizations in the United States. Congress enacted the CIBCA to close a gap in the regulatory structure, requiring the federal banking agencies to review proposed acquisitions of control of banking organizations by domestic and foreign persons and groups of persons to preserve competition and protect depositors and the public from persons who might threaten the health and stability of banking organizations. The federal banking agencies fulfill their responsibilities under the CIBCA through the promulgation of regulations, provision of interpretative guidance, action on specific acquisition proposals, and enforcement of the law and regulation through

---

[626] *Id.*

[627] *Id*. at 2. However, the Government of Singapore Investment Corporation subsequently planned to increase its investment in Citigroup and filed a CIBCA notice. *See also* Letter from Robert DeV. Frierson, Deputy Sec'y, to Daniel M. Rossner, Esq., Sidley Austin LLP, 2009 Fed. Res. Interp. Ltr. LEXIS 21 (Mar. 24, 2009) (advising that (i) the Board determined not to disapprove the notice under the CIBCA filed by the Government of Singapore Investment Corporation Pte. Ltd. (GIC) to acquire up to 19.9% of the voting shares of Citigroup, New York, New York, as part of a share exchange offer and (ii) GIC would not be deemed to control Citigroup or its subsidiary banks under the Bank Holding Company Act as a result of its participation in the share exchange offer); Press Release, Kuwait Investment Authority, KIA Announces Participation in Citi Group and Meryl Lynch (July 14, 2007) (announcing Kuwait's investment in Citi Group Convertible Preferred Securities); Eric Dash & Andrew R. Sorkin, *Fund in Abu Dhabi to Pay $7.5 Billion for 4.9% of Bank*, N.Y. TIMES, Nov. 27, 2007, at C1 (describing the United Arab Emirates' investment in Citigroup).

[628] *Alvarez SWF Testimony*, *supra* note 622, at 4 ("Most sovereign wealth funds . . . have structured their investments so as not to trigger the thresholds for review and approval under either the BHC Act or the CIBC Act.").

formal and informal means. Based upon forty years of regulatory experience, the CIBCA largely accomplishes the purposes for which it was enacted. This article seeks to promote compliance with the CIBCA and its implementing regulations by summarizing the Board's regulations, interpretations, practices, and enforcement activities. The authors hope the article is helpful to persons contemplating the acquisition of control of banking organizations and the legal counsel who advise them.

Schedule A

Change in Bank Control Act Notices Processed[629]

	Board		FDIC		OCC			
Year	Not Disapproved	Disapproved	Not Disapproved	Denied	Acted On	Not Disapproved	Disapproved	Withdrawn
1979	39	0	120	1[630]	49	48	1	1
1980	74	1	206	3[631]	44	42	2	2
1981	91	0	212	1[632]	96	93	3	2
1982	152	1	182	0	88	84	4	5
1983	161	1	212	3	72	70	2	3
1984	167	0	137	0	80	75	5	6
1985	188	1	153	6	86	74	12	6
1986	217	1	118	3	71	54	4	13
1987	204	1	79	1	60	41	8	11
1988	198	0	87	2	42	34	4	4
1989	250	0	68	2	55	48	3	4
1990	248	1	79	0	42	32	5	5

[629] Based on public sources: Board, FDIC, and OCC annual reports and OCC Quarterly Journal.
[630] Nine notices withdrawn.
[631] Nine notices withdrawn.
[632] Seven notices withdrawn.

	Board		FDIC			OCC			
Year	Not Disapproved	Disapproved	Not Disapproved	Denied	Acted On	Not Disapproved	Disapproved	Withdrawn
1991	183	1	65	2	15	6	6	3
1992	145	0	74	5	25	21	4	4
1993	192	2	56	0	26	21	5	4
1994	167	0	50	0	16	15	1	0
1995	148	0	45	1	16	16	0	0
1996	162	0	46	0	13	13	0	2
1997	184	0	28	0	24	24	0	0
1998	167	0	34	0	12	11	1	5
1999	141	1	31	0	13	13	0	1
2000	134	0	28	0	9	8	1	3
2001	114	0	21	0	17	17	0	0
2002	161	0	31	0	10	9	1	0
2003	120	0	30	0	10	9	1	0
2004	125	0	18	0	14	13	0	1[633]

[633] No activity, considered abandoned.

	Board		FDIC			OCC			
Year	Not Disapproved	Disapproved	Not Disapproved	Denied	Acted On	Not Disapproved	Disapproved	Withdrawn
2005	111	0	9	0	17	17	0	0
2006	98	0	2	1	8	4	0	4
2007	106	0	15	2	6	0	0	0
2008	124	0	28	0	4	4	0	0
2009	119	0	18	0	7	7	0	3
2010	115	0	33	0	5	5	0	0
2011	133	0	21	0	6	6	0	0
2012	140	0	26	0	6	6	0	0
2013	154	1	22	0	6	6	0	1
2014	131	0	15	0	9	9	0	0
2015	152	0	20	0	11	11	0	1
2016	163	0	14	0	9	9	0	0
2017	134	0	17	0	7	7	0	0
Total	5,812	12	2,450	33	1,106	982	73	94

% of actions disapproved by each agency	
Board	.23%
FDIC	1.34%
OCC	7.43%
% of actions disapproved by all agencies	1.26%