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# *Preparing Banks for the Next Round of Challenges While the Sun Is Still Shining*

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The impact of COVID-19 on the world's economy will quickly challenge financial institutions and non-bank lenders. In February 2020, bank regulators touted that the so-called "problem bank list" was at an all-time low,[1] and the Federal Reserve published a hypothetical stress scenario for banks to address in 2020 stress tests that assumed a global recession in which the U.S. unemployment rate rose by 6.5 percentage points to 10%.[2] Given that the Federal Reserve recently estimated that 40% of Americans could not pay an unexpected $400 expense[3] and the St. Louis Federal Reserve President James Bullard estimates that the unemployment rate could exceed 32%,[4] banks appear to be heading towards unprecedented challenges.

In the shadow of the 2008 Financial Crisis, Congress adopted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), imposing a host of regulatory requirements in order to prevent future financial turmoil. In the decade that has followed, banks and their holding companies have increased their capital, endured stress tests, and developed contingency and resolution plans to be implemented in the event of a future crisis. Regulators are now authorizing banks to use their Dodd-Frank-imposed capital and liquidity buffers as they respond to the challenges presented by the effects of COVID-19.[5] These buffers were designed to provide banking organizations with a means to support the economy in adverse situations—such time is, apparently, now.

## I. Operationalizing Dodd-Frank Reforms to Address Challenges in the COVID-19 Period

While the financial condition of banks was strong as of December 31, 2019,[6] notwithstanding significant legislative and regulatory programs to stimulate and maintain the economy,[7] challenges from the COVID-19 pandemic will likely result in a wave of loan and mortgage defaults and late payments as businesses and consumers face ongoing financial challenges.[8] The current crisis could also impact banks with significant third-party relationships and those that rely on income from third parties, such as from fintechs marketing a bank's products and services to consumers. For example, Moven, a challenger bank, notified customers that their accounts would be closed by April 30, 2020.[9] Banks and their third- party relationships also may face new cyber-challenges that were not prevalent during the 2008 financial crisis, as institutions lose focus on their cyber-defenses to address pressing existential issues. In addition to economic factors impacting banks, the Federal Deposit Insurance Corporation (the "FDIC") is facing its own challenges, with over 40% of its employees eligible for retirement over the next five years, which the FDIC acknowledges could deplete its institutional experience and knowledge during a crisis.[10]

Regrettably, this perfect storm of adversity could result in bank insolvencies and the appointment of the FDIC as receiver for some institutions. As only a few banks have failed over the past few years, a new generation of bankers has never experienced a severe economic downturn; moreover, seasoned bankers have not recently dealt with the mighty arsenal of weapons available to regulators to protect the safety and soundness of insured banks in the United States. These provisions at the bank level primarily target supervisory resolution of capital, managerial, and operational deficiencies. Foremost among these are the Prompt Corrective Action ("PCA"), Operational and Managerial Standards ("OMS"), Troubled Condition ("TC"), Individual Minimum Capital Directive ("IMCR") rules, and the "traditional" enforcement powers (collectively, "Regulatory Intervention Rules").

At the holding-company level for the largest banks, Title II to the Dodd-Frank Act implemented an orderly liquidation regime to quickly and efficiently liquidate large, complex financial holding companies. In the post-Dodd-Frank decade, banks and their holding companies with total consolidated assets of $50 billion and nonbank financial companies designated by the Financial Stability Oversight Council ("FSOC") have been preparing and filing with the Federal Reserve and FDIC resolution plans, commonly known as "living wills," describing the company's unique strategy for rapid and orderly resolution in the event of material financial distress or failure of the company.[11] The resolution process set forth in companies' living wills, which many felt would never be triggered, also provides a roadmap for specific company failures. While living wills could be implicated, the pre-Dodd-Frank rules also provide a formidable and comprehensive system for bank resolutions that been relatively dormant since the 2008 financial crisis.

As the COVID-19 crisis provides an opportunity for these regulatory weapons to be taken out of mothballs and directed at banks and their holding companies, we are revisiting and updating the powers that we summarized in our client alert during the 2008 financial crisis –*"Shock and Awe": When Banking Agencies Unleash Their Regulatory Weapons.*[12] Given the broad authority under the Regulatory Intervention Rules available to the federal bank regulators, to significantly impact the operations and management of banks and their holding companies, it is extremely important to understand the scope of these rules, their consequences and how to mitigate their adverse effect. Failure to (a) anticipate and prevent potential actions that may be taken by a regulator under these rules, and (b) adequately address issues presented when subjected to these rules, can result in a downward spiral of supervisory and enforcement actions—ranging from CAMELS exam rating downgrades, memoranda of understanding, supervisory agreements, cease and desist orders, and civil money penalties to, in the case of troubled institutions, a potential death spiral ending in government seizure.

## II. Key Regulatory Intervention Rules: What Can Regulators Do and How?

### Section 38 of the FDIA: The PCA Rules – What Are They?

Section 38 of the FDIA establishes a comprehensive PCA framework to address capital deficiencies and supervisory problems of banks. The PCA system is indexed primarily, but not exclusively, to capital levels as the trigger of regulatory intervention. As such, it is a system of escalating supervisory oversight and scrutiny, operating restrictions, sanctions, and penalties based primarily on a bank's capital levels. It is composed of five (5) major categories: Well Capitalized, Adequately Capitalized, Undercapitalized, Significantly Undercapitalized and Critically Undercapitalized. Of these, the three (3) most significant categories are Well Capitalized, Adequately Capitalized, and Undercapitalized, discussed below. As a bank's capital condition deteriorate, federal regulators can increasingly restrict a bank's operations, culminating with closing down the bank if necessary.

PCA directives are considered to be a type of enforcement order under the enforcement provisions of Section 8 of the FDIA and failure to comply with a PCA directive can result in cease and desist orders, civil money penalties, bans from the banking industry, and judicial enforcement measures.

### *Well Capitalized – Not to Be Confused With "Things Are Fine"*

As the name implies, a well-capitalized bank is one that "significantly exceeds" all of its required capital requirements. Being well capitalized generally puts the bank outside of the regulatory zone of concern for purposes of the PCA rules. However, it is not by any means a shield from regulatory consequences or action under the Regulatory Intervention Rules, because of two major exceptions: first, under the PCA rules, well-capitalized institutions may actually be reclassified as "adequately capitalized" by a regulator (see discussion below), based on criteria other than capital, if a regulator concludes that the bank is in an unsafe or unsound condition, or is engaged in unsafe or unsound practices and has not corrected the deficiency. The regulator has to provide written notice of its intent to reclassify a bank downward. Procedures do exist to permit banks to contest the need for a reclassification and can require the regulator to order an informal hearing. Second, a well-capitalized bank can become subject to an IMCR (discussed below) if a regulator believes a bank does not have sufficient capital to support its portfolio or operational risk.

### *Adequately Capitalized – Why Are We Here and How Do We Get Out?*

Becoming "adequately capitalized," or otherwise being downgraded from well capitalized by a regulator has two major regulatory consequences in addition to higher FDIC-Insurance premiums:

- a general prohibition on accepting brokered deposits (subject to waiver), and
- possible imposition of certain PCA restrictions.

*Section 29 of the FDIA – Restrictions on Brokered Deposits*

Section 29 of the FDIA prohibits any bank that is adequately capitalized from directly or indirectly accepting, renewing, or rolling over any brokered deposits, absent applying for and receiving a waiver from the FDIC. On a case-by-case basis, the FDIC may waive the prohibition upon a finding that brokered deposit activities pose no safety and soundness risk to a bank. Frequently, in granting a waiver, the FDIC will limit the volume of brokered deposits an adequately capitalized bank may accept. Moreover, waivers may be revoked at any time.

From a liquidity and funding perspective, it is important to note that Section 29 captures a wide variety of deposit origination activity that may not, on first glance, appear to be "brokered" deposits in a market sense; thus, for example, Section 29 specifically includes within its scope any employee of a bank who directly or indirectly engages in the solicitation of deposits from offering interest rates that are significantly higher (i.e., 75 bp) than the prevailing rate in the bank's normal market area.

While the FDIC has proposed changes to its regulations implementing Section 29 to revise the framework for analyzing whether deposits should be deemed to be brokered,[13] these proposed regulations are not yet in effect and, in sum, do not make substantial changes to the current framework. As a result, most deposits currently treated as brokered, appear to remain brokered under the new regime. Accordingly, even if the FDIC adopts a final regulation during the current crisis, it is unclear whether the revised framework will provide significant relief.

*Sections 38(d) and (e) of the FDIA – Operating Restrictions*

A regulator may also require an adequately capitalized institution to comply with one or more of the restrictions in Sections 38(d) and (e) as if the institution were undercapitalized. These restrictions include:

- prohibition on capital distributions;
- prohibition on payments of management fees to controlling parties;
- requirement to submit a capital restoration plan;
- restrictions on asset growth; and
- prior regulator approval for acquisitions, branching, and entering new lines of business – essentially prohibiting growth.

Adequately capitalized status significantly increases supervisory oversight over a bank and can be the prelude to becoming undercapitalized, absent raising additional capital to become well capitalized again, or engaging in a merger or acquisition transaction.

Supervisory or enforcement action typically is imposed by a regulator in this situation. However, when a regulator determines that a bank has a realistic chance of resolving its capital challenges in a short-time frame, a regulator may forbear for a short period of time from seeking a formal supervisory or enforcement action.

### *Undercapitalized – For Whom the Bell Tolls?*

Once a bank has reached the undercapitalized level, it has likely been subject to a cease and desist order and other formal supervisory sanctions, and becomes subject to a broad menu of operating and managerial restrictions:

- capital distributions prohibited;
- payment of management fees to controlling person prohibited;
- a capital restoration plan required within 45 days of becoming undercapitalized;
- asset growth prohibited or restricted, or require bank to shrink;
- prior approval by a regulator required for acquisitions, branching, and new lines of business;
- regulator may require sale of securities, or, if grounds for conservatorship or receivership exists, direct the bank to merge or be acquired;
- restrict affiliate transactions;
- restrict or prohibit activities of the bank or its subsidiaries determined to pose excessive risk to institution;
- require institution to elect new directors, dismiss directors or senior executive officer, or employ qualified senior executive officers to improve management;

- prohibit acceptance of deposits from correspondent banks;
- require prior approval of capital distributions by holding companies;
- require a holding company to divest the bank, the bank to divest subsidiaries, and/or the holding company to divest other affiliates;
- require bank to take any other action a regulator determines will "better achieve" PCA objectives;
- prohibit material transactions outside the usual course of business;
- prohibit amending the institution's bylaws/charter;
- prohibit any material changes in accounting methods; and
- prohibit golden parachutes, change in control, or excessive compensation or bonuses prohibited.

**Section 32 of the FDIA: Troubled Condition Rules – Understanding the Consequences of Being in "Troubled Condition"**

Pursuant to Section 32 of the FDIA, the Troubled Condition rules provide that a bank must notify its regulator at least 30 days before adding or replacing any member of its board of directors, employing any person as a senior executive officer, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive position if at least one of the following circumstances applies:

- a bank does not comply with its minimum capital requirements;
- a bank is in "troubled condition;"
- the regulator has notified a bank, in connection with its review of a capital restoration plan required under Section 38 of the FDIA, that a notice is required; or
- a bank is a holding company and is in "troubled condition."

The term "troubled condition"[14] means:

- 4 or 5 composite CAMELS rating;
- a holding company designated by a regulator to either (a) have an unsatisfactory CAMELS rating, or (b) notified in writing by the regulator that it has an "adverse effect" on its bank subsidiary;
- the bank or holding company is subject to any formal supervisory or enforcement action or PCA relating either to safety and soundness and financial viability, unless otherwise notified by the regulator; or
- the bank or holding company is otherwise informed in writing that it is in troubled condition.

A regulator can waive the prior notice requirement and permit an individual to serve as a director or senior executive officer before filing a notice if the regulator issues a written finding that:

- delay would threaten the safety or soundness of the bank;
- delay would not be in the public interest; or
- other extraordinary circumstances exist that justify waiver of prior notice.

The TC rules essentially subject all senior officer and directors' changes to prior regulatory approval, and will include scrutiny of proposed compensation arrangements for such individuals, including golden parachute limitations. A troubled condition designation also generally results in significant supervisory and/or enforcement action under current regulatory policies.

### IMCR Rules

Under the IMCR rules, minimum capital levels higher than those generally required under the general capital rules may be required by a regulator. An IMCR may be established upon a determination that the bank's capital is or may become inadequate in view of its "circumstances," which can include:

- a bank receiving special supervisory attention;
- a bank that has or is expected to have losses resulting in capital inadequacy;
- a bank that has a high degree of exposure to credit, prepayment, interest rate, credit concentration, non-traditional activities, or similar risks;
- poor liquidity or cash flow;
- high proportion of off-balance sheet risks;
- excessive growth presenting supervisory problems;
- inadequate underwriting policies, standards, or procedures for loans or investments;
- may be adversely affected by the activities or condition of its holding company, affiliates, subsidiaries, or other persons or entities with whom it has significant business relationships, including credit concentration;
- portfolio with weak credit quality or a significant likelihood of financial loss, or loans in nonperforming status, or in which borrowers fail to comply with prepayment terms;
- record of operational losses above peer averages, management deficiencies, or poor record of supervisory compliance.

The IMCR rules specify that an appropriate IMCR cannot be determined solely through the application of "a rigid mathematical formula or wholly objective criteria." The IMCR rules state that the decision in great part will necessarily be "based on the subjective judgment grounded in the agency expertise" of the regulator.

The regulator must notify a bank in writing of a proposed IMCR, schedule for compliance with the new requirement and the specific cause for determining that an IMCR is necessary. A bank must respond within 30 days, the time period for response may be shortened by a regulator for good cause. In such scenarios, a bank may offer any "information on whether an IMCR is required, what the IMCR should be and schedule for compliance." Based on a review of the bank's response, the regulator will issue a written decision on the IMCR. Upon receipt of the decision by the bank, it becomes binding and represents final agency action.

### Section 39 of the FDIA: OMS Rules

Section 39 requires all regulators to establish safety and soundness standards. Section 39 of the FDIA supplements the capital-based PCA system with a complementary scheme designed to address non-capital safety and soundness-related managerial and operational standards. Pursuant to Section 39, the regulators have adopted the Interagency Guidelines Establishing Standards for Safety and Soundness. The Interagency Statement primarily addresses prescribed (1) operational managerial standards, and (2) prohibitions on compensation that constitute an unsafe and unsound practice. A bank will be subject to an enforcement action under Section 8 of the FDIA if, after being notified that it is in violation of one or more safety and soundness standards under Section 39, the bank fails to submit an acceptable Safety and Soundness Compliance Plan ("SSCP") or fails in any material respect to implement an accepted SSCP. Section 39 does not in any manner limit the authority of a regulator under any other provision of law to take any other supervisory or enforcement action to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices.

The rules specify the required content of SSCPs. Upon receipt of a SSCP, the regulator generally will provide written notice within 30 days of whether the plan has been approved or seek additional information regarding the plan. Failure to comply with an accepted plan will likely result in formal enforcement action.

### "Traditional" Enforcement Actions

The "traditional" enforcement powers granted to the regulators under Section 8 of the Federal Deposit Insurance Act is significant. Whenever a bank is in an unsafe or unsound condition, is engaging or about to engage in an unsafe or unsound condition or violating or has violated a law, rule, or regulation or condition imposed in writing, a regulator may initiate cease and desist proceedings against the bank or individuals or entities affiliated with the bank. Such proceedings may be preceded by an informal enforcement action such as a memorandum of understanding or supervisory agreement. Under certain conditions, a regulator may seek to formally remove individuals from participating in the affairs of the bank and of any other insured depository institution[15] and may seek to impose civil money penalties against both the bank and the individuals participating in its affairs. Far more common than PCA directives, these enforcement powers are frequently used by the regulators to effect changes in a bank or holding company where a regulator has concerns.

Important to remember is that, while there are various procedural safeguards built into the traditional enforcement powers (e.g., notice, opportunity for a hearing before an administrative law judge, right to appeal), these proceedings, in practice, highly favor the regulators. Virtually, all enforcement actions are resolved by consent between a regulator and the bank or individual; it is the rare case that goes through the administrative hearing process, and rarer still is the bank or individual that ultimately prevails.

**Facing Waterloo**

While a regulator has significant weapons to address problem banks, ultimately the regulators are under a statutory obligation to resolve troubled banks in a manner that avoids or minimizes losses to the Deposit Insurance Fund. To meet such goal each regulator possesses an ultimate weapon—the authority to appoint the FDIC as receiver or conservator over the affairs of a problem bank. Such action can only occur if a bank triggers one of the statutory grounds for the appointment of a receiver and grounds exist based on capital, unsafe, or unsound practices or management failures. At this point, all shareholder interests are eliminated, the bank's board of directors and management are typically replaced, and the bank is either sold, in whole or in part, through a FDIC bidding process or, in rare circumstances, liquidated.

To fully understand the challenges facing a problem bank, it is important for boards of directors and bank management to understand when regulators are authorized to seize a problem bank.

Grounds for receivership[16] based upon a bank's capital include situations when a bank[s]:

- assets are less than its obligations to its creditors (commonly known as capital insolvency);
- is likely unable to pay its obligations or meet its depositors' demands in the normal course of business (commonly known as liquidity insolvency);
- is critically undercapitalized;
- has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the bank to become adequately capitalized without federal assistance;
- is undercapitalized and (1) has no reasonable prospect of becoming adequately capitalized, (2) fails to become adequately capitalized when required to do so, (3) fails to submit a capital restoration plan acceptable to its regulator within time frames prescribed, or (4) materially fails to implement its capital restoration plan; and
- otherwise has insufficient capital.

Moreover, grounds for receivership exist based upon violations of law or unsound practices, such as:

- a substantial dissipation of assets or earnings due to any violation of statute or regulation or any unsafe or unsound practice;
- a violation of law or regulation, or an unsafe or unsound practice or condition, that is likely to cause insolvency or substantial dissipation of assets or earnings, weaken the bank's condition, or otherwise seriously prejudice the interests of the bank's depositors of the Deposit Insurance Fund; or
- the bank is in an unsafe or unsound condition to transact business.

Finally, a receivership can be imposed due to a variety of critical management failures, such as:

- the bank's board of directors has fewer than five members;

- a willful violation of a final cease and desist order; or
- concealment of the bank's books, papers, records or assets, or refusal to submit the bank's books, papers, records, or affairs for inspection to a bank examiner.

A regulator merely has to document a problem that the bank triggers on one ground, but frequently will cite to multiple grounds to mitigate challenges to its use of its ultimate weapon.[17]

## III. Action Plan: What Should Banks Be Doing Now?

### *Be Aware of Danger Signs*

It is important for banks and their holding companies to be aware of the danger signs that may lead to the imposition by their regulator(s) of the Regulatory Intervention Rules.

If any of the following occurs, a bank and its holding company are well advised to promptly retain outside counsel experienced in bank regulatory, supervisory, and enforcement matters to assist in formulating strategies designed to minimize the potential application of—or, hopefully, seeking to avoid – the consequences of the Regulatory Intervention Rules:

- increasing borrower defaults;
- CAMELS component or overall rating downgrade below a 2;
- significant exam criticism;
- capital deficiencies;
- loan portfolio issues that may impact capital levels or pose increased risk;
- economic conditions in the bank's market area that may adversely impact the bank's residential, consumer, or construction lending activities;
- actual or threatened MOUs, supervisory agreements, consent orders, or cease and desist orders; and
- formal or informal regulatory directives related to capital, dividends, stock repurchases, reducing classified assets restrictions, or growth regarding either a specific bank or holding company.

### *Potential Action Required*

At minimum, good business planning, adequately responding to exam criticisms, and/or potential supervisory or enforcement action is extremely important and not to be understated. Depending on the regulatory or business issues presented (or perceived by the regulator(s)), the following actions may be required by a bank and/or its holding company:

1. Successful renegotiation, forbearance or extension of terms of lines of credit or other borrowings to avoid default events;
2. Monitor the financial soundness of material third party service providers, including relationships with fintechs;

3. Monitor sources of liquidity:
   - Brokered deposits;
   - Uninsured depositors;
   - Silent deposit outflows:
     - electronically-initiated withdrawals;
     - teller cash;
     - vault cash;
     - official checks; and
   - FHLB securing of collateral.
4. Capital raising transactions through private placements, or public offerings of equity or debt securities;
5. Potential strategic merger or business combinations:
   - identification of key advisors (investment bankers, accountants, and attorneys);
   - preparation of non-disclosure agreements with appropriate parties; and
   - creation of virtual and/or physical data-rooms.
6. Strategic sales of assets or business lines with the goal(s) of (a) selling classified assets, (b) selling good assets to raise capital, and/or (c) narrowing business focus to core bank products or services;
7. Upgraded/updated compliance risk management policies and staffing;
8. Potential securities disclosure of adverse business or regulatory developments through Form 8-K and press releases;
9. Successful negotiation of supervisory or enforcement actions with relevant regulator(s);
10. Possible board and/or management changes;
11. Review of employment agreements and identification of potential golden parachute provisions;
12. Physical separation of bank records from holding company records;

    where records are electronically maintained, ensure availability to each entity in the event of a bank seizure; and

   - review of policies as to what constitutes bank and holding company property to ensure that records are properly retained by each entity.

13. Customer education programs addressing maximization of FDIC deposit insurance strategies;
14. Review of and potential increases of D&O insurance and indemnification coverage;
15. Preparation of communication plans within a bank, holding company as well as with customers;
    - appoint authorized spokespeople;
    - monitor social media; and
    - monitor traditional media.

## Conclusion

Being strategically prepared to handle an actual or threatened launch of the Regulatory Intervention Rules by a regulator will go a long way to minimizing their potential impact. Forewarned is forearmed.

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[1] FDIC Release, Feb. 25, 2020, available at: https://www.fdic.gov/news/news/press/2020/pr20018.html. As noted in such release as of December 31, 2019, only 51 banks had CAMELS ratings of 4 or 5 (the lowest of the potential ratings). In 2010, 884 institutions had CAMELS ratings of 4 or 5.

[2] Press Release, Board of Governors of the Federal Reserve System, Feb. 6, 2020, available at: https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200206a.htm.

[3] Federal Reserve Report on the Economic Well-Being of US Holdings in 2018-May 2019, May 2019, available at: https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm.

[4] *See* CNBC.com, Coronavirus job losses could total 47 million, unemployment rate may hit 32%, Fed estimates, March 30, 2020, available at https://www.cnbc.com/2020/03/30/coronavirus-job-losses-could-total-47-million-unemployment-rate-of-32percent-fed-says.html.

[5] Joint Release, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency, March 19, 2020, available at: https://www.fdic.gov/news/news/financial/2020/fil20020.html?source=govdelivery&utm_medium=email&utm_source=govdelivery.

[6] FDIC Release, Feb. 25, 2020, available at: https://www.fdic.gov/news/news/press/2020/pr20018.html.

[7] Paul Hastings has established significant resources to address the COVID-19 crises, available at: https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events.

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[8] Banks were granted an optional 30-day grace period to file their first quarter call reports, which will delay public reporting of the industry's health, as well as immediate changes in their capital levels that can be triggered upon filing its call report as set forth at 12 C.F.R. §325.102(b)(1). *See* FDIC Release, March 25, 2020, *available at* https://www.fdic.gov/news/news/financial/2020/fil20028.html.

[9] *See American Banker*, "Why Moven, one of the first challenger banks is calling it quits" (March 27, 2020).

[10] *See* FDIC Office of Inspector General Report – Top Management and Performance Challenging Facing the Federal Deposit Insurance Corporation, Feb. 2020, available at https://www.fdicoig.gov/sites/default/files/attachments/OIGFinalTMPCs-02-13-20.pdf.

[11] *See* Section 165(d) of Dodd-Frank, as implemented by the regulations of the Federal Reserve at 12 C.F.R. Part 243. The public portions of living will are available on the website of the Federal Reserve.

[12] *See* "Shock and Awe: When Banking Agencies Unleash Their Regulatory Weapons," July 2008, available at: https://www.paulhastings.com/publications-items/details/?id=cd75de69-2334-6428-811c-ff00004cbded.

[13] *See* FDIC Release, Dec. 12, 2019¸ available at https://www.fdic.gov/news/news/press/2019/pr19121.html.

[14] *See* 12 C.F.R. § 5.51(c)(7).

[15] During the 2008 financial crisis, formal enforcement actions frequently required independent reviews of management, to ensure that management have the appropriate expertise and qualifications. Based upon such reviews, boards of directors of banks terminated management officials, eliminating the need for the FDIC to take formal action.

[16] *See e.g.*, 12 U.S.C. § 1821(c).

[17] In rare circumstances, failed banks can seek judicial relief from the FDIC appointed as a receiver. *See e.g.*, *United Western Bancorp v. OTS and FDIC*, filed in January 2011 and dismissed in March 2013. Paul Hastings was counsel to the outside directors of United Western Bancorp. *See release available at:* https://www.paulhastings.com/news/details/?id=c89ad769-2334-6428-811c-ff00004cbded.