

WHO'S LOOKING OUT FOR THE BANKS?

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When the Gramm-Leach-Bliley Act authorized financial conglomeration in 1999, Professor Arthur Wilmarth, Jr. presciently predicted that diversified financial holding companies would try to exploit their bank subsidiaries by transferring government subsidies to their nonbank affiliates. To prevent financial conglomerates from taking advantage of their insured depository subsidiaries in this way, policymakers instructed a bank's board of directors to act in the best interests of the bank, rather than the bank's holding company. This symposium Article, written in honor of Professor Wilmarth's retirement, contends that this legal safeguard ignores a critical conflict of interest: the vast majority of large-bank directors also serve as board members of their parent holding companies. These dual directors are therefore poorly situated to exercise the independent judgment necessary to protect a bank from exploitation by its nonbank affiliates. This Article proposes to strengthen bank governance—and better insulate banks from their nonbank affiliates—by mandating that some of a bank's directors be unaffiliated with its holding company. As long as banks are permitted to affiliate with nonbanks, this reform is essential to ensure that someone is looking out for the well-being of insured depository institutions.

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INTRODUCTION

Two decades ago, Congress passed the Gramm-Leach-Bliley Act and, in doing so, repealed the Glass-Steagall Act's Depression-era separation between commercial banking and other financial activities.¹ At the time, Professor Arthur Wilmarth, Jr. stood nearly alone in opposing this so-called financial modernization.² Permitting commercial banks to affiliate with

1. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12, 15, and 19 U.S.C.) (repealing 12 U.S.C. § 377 (1933)). The Act passed overwhelmingly by votes of 90–8 in the Senate and 362–57 in the House of Representatives. 145 CONG. REC. 11,551, 13,917 (1999).

2. Compare Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215, 437–75 (presenting numerous critiques of Gramm-Leach-Bliley), with J. Robert Brown, Jr., *The "Great Fall": The Consequences of Repealing*

investment banks and insurance companies, Wilmarth warned, would undermine the banking system by shifting firms' focus from socially productive lending to risky speculation and capital markets activities.³

Twenty years later, Wilmarth's concerns appear to have been warranted. After Gramm-Leach-Bliley, nearly all large bank holding companies (BHCs) quickly took advantage of the opportunity to expand into nontraditional business lines.⁴ The 2008 financial crisis expedited this transition, as JPMorgan and Bank of America acquired investment banks Bear Stearns and Merrill Lynch, respectively.⁵ Meanwhile, the largest remaining investment banks, Goldman Sachs and Morgan Stanley, themselves became BHCs.⁶ Today, the largest financial conglomerates routinely generate much of their profits from capital markets activities, while their traditional bank lending has dropped to historic lows.⁷ Thus, in the decades since Gramm-Leach-

the Glass-Steagall Act, 2 STAN. J.L. BUS. & FIN. 129, 130 n.5 (1995) ("Commentators have almost unanimously called for an end to Glass-Steagall."), Adam Nguyen & Matt Watkins, *Financial Services Reform*, 37 HARV. J. ON LEGIS. 579, 582–83 (2000) ("Commentators have generally praised the enactment of the Gramm-Leach-Bliley Act"), and Jane E. Willis, *Banks and Mutual Funds: A Functional Approach to Reform*, 1995 COLUM. BUS. L. REV. 221, 226 n.25 ("[A]lmost all of the academic literature argue[s] for . . . a repeal of Glass-Steagall"). A few scholars opposed Gramm-Leach-Bliley, though none as emphatically and comprehensively as Wilmarth. See, e.g., Brown, *supra* at 130 (suggesting that the repeal of Glass-Steagall "will provide, at best, marginal benefits while causing considerable damage to the securities markets"); Bernard Shull & Lawrence J. White, *The Right Corporate Structure for Expanded Bank Activities*, 115 BANKING L.J. 446, 448 (1998) (asserting that financial conglomeration "carries some risks and requires appropriate structuring and enforcement").

3. See Wilmarth, *supra* note 2, at 312–407 (documenting the expansion of large banks into capital markets).

4. See Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 MINN. L. REV. 171, 184 (2019).

5. *Id.* at 186.

6. See Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Board Approves, Pending a Statutory Five-Day Antitrust Waiting Period, the Applications of Goldman Sachs and Morgan Stanley to Become Bank Holding Companies (Sept. 21, 2008), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20080921a.htm> [<https://perma.cc/C96Z-KT8T>].

7. See, e.g., Imani Moise & Laura Noonan, *Boom on Wall Street Powers U.S. Bank Profits*, FIN. TIMES (Apr. 14, 2021), <https://www.ft.com/content/5cc8f198-345f-4a21-997f-acc841c7b39b> [<https://perma.cc/3BSL-KYJS>] (reporting that "breakneck growth in investment banking fees" and "buoyant capital markets" helped financial conglomerates earn higher-than-expected profits despite stagnant loan revenue); Shahien Nasiripour & Felice Maranz, *Lending Slump Worries Investors Even as U.S. Bank Profits Soar*, BLOOMBERG (Apr. 15, 2021, 12:01 PM), <https://www.bloomberg.com/news/articles/2021-04-15/bank-shares-slump-with-investors-worried->

Bliley, the United States' largest financial companies transformed from consumer- and commercial-oriented lenders into capital market-driven financial conglomerates, just as Wilmarth predicted.

One of Wilmarth's primary concerns about Gramm-Leach-Bliley was that financial conglomerates might exploit their depository institution subsidiaries to benefit their nonbank affiliates.⁸ Banks, of course, enjoy several forms of government support.⁹ For example, the Federal Deposit Insurance Corporation (FDIC) guarantees bank deposits, providing a reliable and cheap source of funding for insured institutions.¹⁰ Banks may access the Federal Reserve's discount window for liquidity.¹¹ And banks perceived as systemically important obtain market funding at artificially low rates because creditors believe the government would not allow them to fail.¹² Collectively, this "federal safety net" provides a valuable subsidy to insured depository institutions.¹³ In the absence of Glass-Steagall's structural separations, Wilmarth justifiably worried that a bank's nonbank affiliates would seek to avail themselves of this subsidy through preferential loans, asset sales, or other intra-company transactions.¹⁴

Exploitation of bank subsidiaries by their parent holding companies is problematic for several reasons. When a bank transfers its federal safety net to a nonbank affiliate, it extends the scope of government subsidies and encourages the affiliate to take excessive risks.¹⁵ Moreover, expanding the federal safety

about-lending-comeback [<https://perma.cc/ZX9Q-W5NZ>] (noting historically low loan-to-deposit ratios at the largest U.S. banks).

8. Wilmarth, *supra* note 2, at 446–50.

9. *See id.* at 447 n.1033.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See* Myron L. Kwast & S. Wayne Passmore, *The Subsidy Provided by the Federal Safety Net: Theory and Evidence*, 17 J. FIN. SERVS. RSCH. 125, 125–32 (2000); ANDREAS LEHNERT & WAYNE PASSMORE, *THE BANKING INDUSTRY AND THE SAFETY NET SUBSIDY* 1, 18–27 (1999), <https://www.federalreserve.gov/pubs/feds/1999/199934/199934pap.pdf> [<https://perma.cc/VJX9-QFHJ>].

14. *See* Wilmarth, *supra* note 2, at 449, 456–57.

15. *Cf.* Frederick Furlong, *Federal Subsidies in Banking: The Link to Financial Modernization*, FED. RSRV. BANK OF S.F., ECON. LETTER (Oct. 24, 1997), <https://www.frbsf.org/economic-research/publications/economic-letter/1997/october/federal-subsidies-in-banking-the-link-to-financial-modernization> [<https://perma.cc/BF42-V6ML>] ("Because a bank's cost of obtaining funds from the safety net does not fully reflect its risk, the gross subsidy increases with the riskiness of a bank, creating incentives for risk-taking.").

net to nonbank affiliates distorts competition with rival firms that are unaffiliated with a depository institution and therefore do not receive comparable subsidies.¹⁶ Further, unsound loans to or asset purchases from a nonbank affiliate may impair a bank's financial condition, threatening its depositors and other creditors.¹⁷

Thus, when a bank operates as part of a broader financial conglomerate, stakeholders should—at least in theory—seek to protect the depository institution from exploitation by its affiliates. Optimally, regulators would establish rules preventing the conglomerate from taking advantage of its depository institution subsidiary. Supervisors would closely monitor firms' compliance with these restrictions. And the bank's directors and officers would zealously safeguard the bank's interests in all dealings with its parent company and other affiliates.

This Article contends, however, that despite—or perhaps because of—escalating conglomeration in the U.S. financial sector, *no one* is currently looking out for the banks. Consider the bank regulatory agencies. Affiliate transaction limits in sections 23A and 23B of the Federal Reserve Act ostensibly shield banks from exploitation by their nonbank affiliates.¹⁸ But, as Professor Wilmarth and Professor Saule Omarova have documented, these safeguards are underenforced.¹⁹ Regulators routinely waive or water down limits on inter-affiliate transactions—especially during times of crisis.²⁰ Prioritizing the stability of financial conglomerates over the condition of their bank subsidiaries, the

16. See Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1621 (2007) (concluding that extending the federal safety net to a depository institution's nonbank affiliates would “create serious distortions and competitive imbalances in our economy”).

17. See, e.g., Helen A. Garten, *Subtle Hazards, Financial Risks, and Diversified Banks: An Essay on the Perils of Regulatory Reform*, 49 MD. L. REV. 314, 354 (1990).

18. Federal Reserve Act § 23A, 12 U.S.C. § 371c (limiting a Federal Reserve member bank's covered transactions with a single affiliate to 10 percent of the bank's capital and surplus and its covered transactions with all affiliates, in aggregate, to 20 percent of the bank's capital and surplus); Federal Reserve Act § 23B, 12 U.S.C. § 371c-1 (requiring all transactions between a Federal Reserve member bank and its affiliates to be on market terms); see also 12 U.S.C. § 1828(j) (applying sections 23A and 23B inter-affiliate transaction rules to insured nonmember banks).

19. See Wilmarth, *supra* note 16, at 1596–98; Saule T. Omarova, *From Gramm-Leach-Bliley to Dodd-Frank: The Unfulfilled Promise of Section 23A of the Federal Reserve Act*, 89 N.C. L. REV. 1683, 1685–91 (2011).

20. See Omarova, *supra* note 19, at 1702–63 (documenting regulatory exemptions to section 23A's inter-affiliate transaction limits).

agencies permit value to seep out of—or risk to migrate into—insured depository institutions.²¹ Moreover, even if the regulatory agencies wanted to enforce inter-affiliate transaction limits, the statutory restrictions are typically easy for companies to evade and difficult for supervisors to monitor effectively.²² The regulatory agencies, therefore, are unlikely to stop financial conglomerates from taking advantage of their bank subsidiaries.

Equally troubling—and less well understood—is that bank directors cannot be counted on to protect the very banks they represent. That is because the vast majority of bank directors serve simultaneously as directors of their banks' parent companies. Drawing on a hand-collected dataset, this Article exposes significant overlaps between the boards of the United States' largest financial conglomerates and their bank subsidiaries.²³ These overlaps create conflicts of interest that potentially undermine the safety and soundness of the banking system. U.S. banking law presumes that bank directors zealously protect the interests of their depository institutions.²⁴ For example, Federal Reserve rules require a bank's directors to preapprove certain transactions with its affiliates.²⁵ But since many bank directors also serve on the board of their bank's parent company—and are accountable to the parent company's shareholders—they are ill-suited to protect the bank from exploitation by its affiliates.

Consider the United States' largest financial conglomerate, JPMorgan Chase & Co. In 2020, ten individuals, including chief executive officer (CEO) Jamie Dimon, served on the company's board.²⁶ Those same ten individuals comprised the board of the

21. *See id.* at 1690. In addition to waiving section 23A inter-affiliate transaction limits, regulators have weakened several other regulations designed to shield insured depository institutions from their nonbank affiliates. *See infra* Section II.C.

22. *See* Omarova, *supra* note 19, at 1768; Wilmarth, *supra* note 16, at 1597; Wilmarth, *supra* note 2, at 449, 456.

23. *See infra* Section II.B.

24. *See, e.g.*, OFF. OF THE COMPTROLLER OF THE CURRENCY, THE DIRECTOR'S BOOK: THE ROLE OF A NATIONAL BANK DIRECTOR 21 (1997), https://ithandbook.ffiec.gov/media/22024/occ-director_book_role_nat_bank_director.pdf [<https://perma.cc/HN6L-XDHP>] (“[T]he primary duty of the subsidiary bank’s board of directors is to protect the bank.”).

25. 12 C.F.R. § 223.41(d)(5) (2021) (providing that a bank’s purchase of assets from an affiliate in connection with an internal corporate reorganization is exempt from section 23A’s quantitative limits only if, among other things, “[a] majority of the member bank’s directors reviews and approves the transaction before consummation”).

26. JPMORGAN CHASE & CO., ANNUAL MEETING OF SHAREHOLDERS: PROXY STATEMENT 26 (2021), <https://www.jpmorganchase.com/content/dam/jpmc/>

firm's lead bank subsidiary, JPMorgan Chase Bank, N.A., with Dimon also serving as CEO of the bank.²⁷ Thus, the ten people who were responsible for safeguarding the bank's \$3 trillion in assets were, at the same time, in charge of maximizing the holding company's value, including its substantial nonbank activities.²⁸ Since extending the bank's federal safety net to its nonbank affiliates could improve the holding company's performance, JPMorgan's directors faced an inherent conflict of interest.²⁹ And JPMorgan is not alone. Approximately half of the largest banks in the United States have board membership that overlaps entirely with their holding company boards.³⁰

This Article recommends that policymakers should strengthen bank governance—and better insulate banks from their nonbank affiliates—by requiring at least some of a bank's directors to be unaffiliated with its parent holding company. Mandating that a bank appoint directors who do not work for or otherwise represent the holding company would ensure that the bank's board is equipped to look out for the depository institution when its interests conflict with those of its nonbank affiliates. There is strong precedent, both internationally and domestically, for this approach.³¹ The Article proposes a sliding scale: financial conglomerates with significant nonbanking operations should maintain a majority of unaffiliated directors on their bank subsidiary boards, while conglomerates in which the bank is the dominant business line could have fewer unaffiliated bank directors.³² In the interests of efficiency, this requirement

jpmorgan-chase-and-co/investor-relations/documents/proxy-statement2021.pdf
[<https://perma.cc/7BPM-T67P>].

27. *Id.*

28. See *Large Commercial Banks*, FED. RESERVE, STAT. RELEASE (Dec. 31, 2020), <https://www.federalreserve.gov/releases/lbr/20201231/default.htm> [https://perma.cc/87AT-A584] (reporting that JPMorgan Chase Bank, N.A. had \$3.025 trillion in total assets as of year-end 2020).

29. This Article does not allege that the directors of JPMorgan Chase—or any other financial conglomerate—engaged in specific instances of misconduct. Rather, it contends that when a director serves on the board of both a bank and its holding company, conflicts of interest may skew the director's incentives or bias the director's judgment. See *infra* Section I.C (explaining conflicts of interest).

30. See *infra* Section II.B.

31. See *infra* Section III.A (discussing international and domestic precedent).

32. See *infra* Section III.A. In this context, an “unaffiliated” bank director need not be “independent” for purposes of the federal securities laws. 17 C.F.R. § 229.407(a) (2020) (discussing director independence standards). This Article considers a bank director to be “unaffiliated” if the director (1) is not and has never been an officer, employee, or director of the holding company or any of its nonbank affiliates and (2) is not a member of the immediate family of an officer, employee,

should apply only to BHCs with more than \$100 billion in assets and significant nonbank operations.

Professor Wilmarth urges Congress to mitigate conflicts of interest within financial conglomerates by reinstating Glass-Steagall's structural separation between commercial banking and other financial activities.³³ His proposal merits serious consideration. In the meantime, the federal banking agencies should use their existing regulatory authority to limit financial conglomerates' ability to take advantage of the federal safety net. By mandating that banks appoint directors unaffiliated with their holding company, regulators could ensure that a bank's board prioritizes the insured depository institution, rather than the holding company. This governance reform is necessary to safeguard banks and limit the imprudent expansion of the federal safety net as long as commercial banks are permitted to affiliate with investment banks, insurance companies, and other nonbank firms.

This Article contributes to a growing body of literature that promotes corporate governance reform as an essential tool for financial policymakers.³⁴ As Professors Steven Schwarcz and

or director of the holding company or any of its nonbank affiliates. Thus, for example, a bank's chief financial officer (CFO) who serves on the bank's board would be "unaffiliated" if he or she does not work for and is not an immediate family member of anyone who works for the bank's holding company or its nonbank affiliates. The CFO, however, would not be considered "independent" for purposes of the federal securities laws. *See Listed Company Manual: 303A.02(b) Independence Tests*, NYSE, https://nyse.wolterskluwer.cloud/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D-WKUS_TAL_5667%23teid-70 [https://perma.cc/5HAT-AGGW] (Jan. 11, 2013) (providing that a director is not independent if the director is an employee or executive officer of the company, including any subsidiary in a consolidated group). This Article would not alter the Office of the Comptroller of the Currency's existing guidance stating that a large national bank should maintain at least two "independent" directors on its board who are officers or employees of the bank or its parent company. *See* 12 C.F.R. pt. 30 app. D(III)(D) (2021).

33. *See* ARTHUR E. WILMARTH, JR., TAMING THE MEGABANKS: WHY WE NEED A NEW GLASS-STEAGALL ACT 336–39 (2020) (explaining how reinstating Glass-Steagall's structural separations would limit conflicts of interest).

34. *See, e.g.*, John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 64–74 (2014) (proposing expanded officer and director liability rules for systemically important financial institutions); Peter Conti-Brown, *Elective Shareholder Liability*, 64 STAN. L. REV. 409, 428–41 (2012) (proposing to eliminate limited liability shield for certain bank shareholders); Lindsay Sain Jones, *Aligning National Bank Priorities with the Public Interest: National Benefit Banks and a New Stakeholder Approach*, 58 AM. BUS. L.J. 5, 32–53 (2021) (proposing that bank directors be required to consider non-shareholder interests); Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next*

David Min have observed, regulating financial institutions' governance is often more effective than regulating the substance of their transactions because it does not require policymakers to constantly update rules in response to financial innovation and regulatory arbitrage.³⁵ Instead, corporate governance reforms—like the unaffiliated-director mandate proposed here—realign a bank's internal processes so that its leaders, who are closest to the bank's decision-making and best positioned to prevent misconduct, are more likely to exercise their authority consistent with public policy objectives.³⁶

This Article proceeds as follows. Part I explains why banks receive special subsidies and how the federal safety net puts banks at risk of exploitation by their affiliates. Part II then assesses existing legal protections to prevent financial conglomerates from taking advantage of their bank subsidiaries. It reveals that key stakeholders—including shareholders, directors and officers, and regulators—lack sufficient incentive or ability to protect depository institutions and limit the unauthorized extension of the federal safety net. Part III proposes to address this shortcoming by requiring large commercial banks to appoint at least some directors who are unaffiliated with their nonbank

Financial Crisis, 59 B.C. L. REV. 877, 923–29 (2018) (proposing limits on financial institution directors' outside commitments); Jonathan Macey & Maureen O'Hara, *Bank Corporate Governance: A Proposal for the Post-Crisis World*, 22 FED. RSRV. BANK N.Y. ECON. POL'Y REV. 85, 102–03 (2016) (proposing enhanced expertise requirements for certain bank directors); David Min, *Balancing the Governance of Financial Institutions*, 40 SEATTLE U. L. REV. 743, 746 (2017) (suggesting that banks be permitted to incorporate as benefit corporations to address corporate governance challenges); Saule T. Omarova, *Bank Governance and Systemic Stability: The "Golden Share" Approach*, 68 ALA. L. REV. 1029, 1052–58 (2017) (proposing to grant the federal government a seat on the boards of systemically important financial institutions); Steven L. Schwarcz, *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1, 28–44 (2016) (proposing a public governance duty for systemically important financial institution managers).

35. Schwarcz, *supra* note 34, at 22–23 (“[R]egulation of substance usually lags financial innovation, causing unanticipated consequences and allowing innovations to escape regulatory scrutiny. Regulating governance, by contrast, can overcome that regulatory time lag.”); Min, *supra* note 34, at 759 (“[E]xternal regulations are inherently adversarial and require regulators to play a cat and mouse game with the regulated financial institutions. . . . Thus, it is worth thinking through how we might better align the governance of financial institutions with the public policy goals that animate our external regulation of these firms.”).

36. See Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsr. Sys., Address at the Association of American Law Schools Midyear Meeting: Corporate Governance and Prudential Regulation 7–17 (June 9, 2014), <https://www.federalreserve.gov/newsevents/speech/files/tarullo20140609a.pdf> [https://perma.cc/D9EP-6ZT3].

affiliates. The Article concludes that this governance reform is essential to mitigate conflicts of interest within financial conglomerates and to ensure that someone looks out for the banks.

I. BANKS' ENDURING "SPECIALNESS"

For decades, it has been widely understood that banks are "special."³⁷ Banks safeguard customers' deposits, provide access to the payment system, and serve as a conduit for the implementation of monetary policy. In turn, banks receive special government subsidies to help them perform these critical functions. Federal subsidies, however, create the risk that when a depository institution operates as part of a broader financial conglomerate, its nonbank affiliates could attempt to avail themselves of the government safety net. This Part explains why banks are still "special" despite increasing convergence within the financial sector. It then examines the federal safety net for banks and the risk that a financial conglomerate might exploit its depository institution subsidiary to take advantage of these subsidies.

A. *Banks Are (Still) Special*

Banks are special because they perform several functions that are essential to the financial system and the broader economy. For example, banks protect customer deposits and, at the same time, use these funds to extend credit to borrowers.³⁸ In addition, banks provide the channel through which most businesses, households, and governments access the payment system to send and receive money.³⁹ Banks have also traditionally served as the primary "transmission belt" for monetary policy through which central banks adjust the money supply and

37. See, e.g., E. GERALD CORRIGAN, FED. RSRV. BANK OF MINNEAPOLIS, ANNUAL REPORT 1982: ARE BANKS SPECIAL? 5–18 (1982), https://fraser.stlouisfed.org/files/docs/historical/frbminn/1982_frb_minneapolis.pdf [<https://perma.cc/9V8Z-UU2X>].

38. See Jonathan R. Macey & Maureen O'Hara, *The Corporate Governance of Banks*, 9 FED. RSRV. BANK N.Y. ECON. POL'Y REV. 91, 97 (2003) ("[T]he principal attribute that makes banks as financial intermediaries 'special' is their liquidity production function. By holding illiquid assets and issuing liquid liabilities, banks create liquidity for the economy.").

39. See Dan Awrey & Kristin van Zwieten, *The Shadow Payment System*, 43 J. CORP. L. 775, 792 (2018).

thereby influence macroeconomic conditions.⁴⁰ In sum, many aspects of the modern economy depend on the banking system.

Depository institutions are special for a second reason: their business model creates distinctive risks. Most significantly, because banks fund long-term, illiquid assets with short-term, liquid liabilities, they are vulnerable to runs by depositors and other short-term creditors.⁴¹ Since banks are typically thinly capitalized, bank runs can lead to fire sales that quickly threaten a depository institution's solvency.⁴² Further, given interconnections among banks and other financial institutions—and the extent to which businesses and households rely on banks as a source of credit—negative externalities from bank failures can spill over to the rest of the financial sector and the broader economy.⁴³ Taken together, these risks have traditionally been cited as a primary justification for prudential regulation of the banking system.⁴⁴

Some commentators have questioned whether banks are still special, since bank-like activities have migrated outside the traditional banking system over time.⁴⁵ Today, nonbank lending companies, investment funds, and the capital markets compete with banks as a source of credit for households and businesses.⁴⁶ Money market mutual funds (MMMFs) safeguard customer funds in instruments functionally similar to bank accounts.⁴⁷

40. CORRIGAN, *supra* note 37, at 11–12.

41. See Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401, 401–02 (1983) (describing a traditional bank run on deposit funding); Gary Gorton & Andrew Metrick, *Securitized Banking and the Run on Repo*, 104 J. FIN. ECON. 425, 426–29 (2012) (describing a bank run on short-term wholesale funding).

42. See Diamond & Dybvig, *supra* note 41, at 401–02.

43. See, e.g., HAL S. SCOTT, CONNECTEDNESS AND CONTAGION: PROTECTING THE FINANCIAL SYSTEM FROM PANICS 3–6 (2016).

44. See JOHN ARMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 279–81 (2016).

45. See, e.g., Amar Gande & Anthony Saunders, *Are Banks Still Special When There Is a Secondary Market for Loans?*, 67 J. FIN. 1649 (2012); VERN MCKINLEY, GEORGE MASON UNIV., MERCATUS CTR., AFTER THE CRISIS: REVISITING THE “BANKS ARE SPECIAL” AND “SAFETY NET” DOCTRINES (2015), <https://www.mercatus.org/system/files/McKinley-Are-Banks-Special.pdf> [https://perma.cc/38MY-QWRG].

46. See generally Kathryn Fritz Dixon, *Bank and Nonbank Lending Over the Past 70 Years*, 13 FED. DEPOSIT INS. CORP. Q., no. 4, 2019, at 31 (discussing decline in bank lending relative to nonbanks).

47. See Dan Awrey, *Bad Money*, 106 CORNELL L. REV. 1, 34–39 (2020); Jonathan R. Macey & Geoffrey P. Miller, *Nondeposit Deposits and the Future of Bank Regulation*, 91 MICH. L. REV. 237, 256–60 (1992).

Cryptocurrency exchanges, peer-to-peer platforms, and other fintech companies provide alternatives for accessing the payment system.⁴⁸ Even monetary policy is no longer uniquely dependent on the banking system, as the Federal Reserve relies on open-market operations with nonbank broker-dealers to implement its macroeconomic objectives.⁴⁹ Many of these nonbanks, moreover, create financial stability risks similar to those of traditional banks.⁵⁰

Despite increasing convergence in the financial sector, however, banks remain special. While banks may no longer be *unique* relative to certain nonbank financial companies, they still serve essential economic functions and create potential systemic risks—two characteristics that warrant particular attention. As former Governor of the Bank of England Eddie George put it, “[W]hile in some respects [banks] may be less special than they were, they remain special nonetheless. They remain special in terms of the particular functions they perform . . . [a]nd they remain special in terms of the particular characteristics of their balance sheets. . . .”⁵¹ In light of banks’ enduring specialness, therefore, the government provides an expansive federal safety net to help them fulfill their core functions safely and effectively, as the next Section explains.

B. Banks (Still) Receive Special Subsidies

In recognition of banks’ special role in the economy, policymakers have traditionally granted depository institutions several types of subsidies. Safety net policies, such as federal deposit insurance and the Federal Reserve’s discount window, are generally thought to mitigate risks inherent in banking, but these programs also provide significant economic value to depository institutions. Moreover, implicit government support for

48. Awrey & van Zwieten, *supra* note 39, at 796–808.

49. Eric J. Gouvin, *Of Hungry Wolves and Horizontal Conflicts: Rethinking the Justifications for Bank Holding Company Liability*, 1999 U. ILL. L. REV. 949, 960 n.54.

50. MMMFs, for example, experience bank-like maturity mismatch and run risk, and widespread redemptions from MMMFs triggered financial market volatility in both 2008 and 2020. See FIN. STABILITY BD., POLICY PROPOSALS TO ENHANCE MONEY MARKET FUND RESILIENCE 17–24 (2021), <https://www.fsb.org/wp-content/uploads/P300621.pdf> [<https://perma.cc/6V6C-ENUM>].

51. Eddie George, Governor of the Bank of England, Are Banks Still Special?, Speech Before the IMF Seventh Banking Seminar (Jan. 29, 1997), in BANK ENG. Q. BULL., Feb. 1997, at 113, 118.

“too big to fail” (TBTF) banks allows the largest depository institutions to borrow at artificially low rates. Although policymakers tried to rein in certain bank subsidies after the 2008 financial crisis, empirical studies have confirmed that depository institutions still derive considerable value from the federal safety net.

Some bank safety net policies are explicit. Most notably, the FDIC insures customers’ bank accounts to alleviate incentives for depositors to withdraw their money in a panic.⁵² While deposit insurance reduces the risk of debilitating bank runs, it also provides banks with access to abnormally cheap funding.⁵³ Indeed, because of the FDIC’s backing, banks borrow insured deposits at close to the risk-free rate.⁵⁴ Banks pay premiums to the FDIC that, in theory, help to offset the value of deposit insurance. But the FDIC sets its premiums below an actuarially fair price, and deposit insurance thus provides banks with a significant subsidy.⁵⁵

The government supports banks through other safety net policies as well. For example, the Federal Reserve’s discount window allows banks to borrow directly from the central bank when they need liquidity.⁵⁶ Although discount window loans are typically made at a penalty rate, the Federal Reserve—in contrast to the private sector—does not charge firms to establish what amounts to a standing line of credit.⁵⁷ Access to the discount window therefore operates as a subsidy to banks.⁵⁸ Similarly, as Professor Kathryn Judge has pointed out, the government-sponsored Federal Home Loan Banks provide a valuable safety net to their member banks through subsidized advances

52. See 12 U.S.C. § 1821(a)(1) (providing that the FDIC shall insure depositors up to \$250,000 per ownership account category, per depositor, per institution).

53. See Wilmarth, *supra* note 2, at 449.

54. See Panos Konstas, *Reforming FDIC Insurance with FDIC-Sponsored Deposit Self-Insurance* 3 (Fed. Deposit Ins. Corp., Working Paper No. 2005-04, 2005).

55. See, e.g., Shih-Cheng Lee et al., *The Pricing of Deposit Insurance in the Presence of Systematic Risk*, 51 J. BANKING & FIN. 1, 3 (2015) (finding that the FDIC’s risk-based deposit insurance premiums are underpriced, especially for the largest banks, because assessment rates ignore certain aspects of a bank’s systematic risk).

56. 12 U.S.C. § 347b.

57. Joe Peek & James A. Wilcox, *The Fall and Rise of Banking Safety Net Subsidies*, in *TOO BIG TO FAIL: POLICIES AND PRACTICES IN GOVERNMENT BAILOUTS* 169, 181–82 (Benton E. Gup ed., 2004).

58. *Id.* at 181 (“[B]anks currently pay no fee to the Fed for this line of credit feature. Thus, the underpricing of the discount window services confers a safety net subsidy on banks.”).

and dividends.⁵⁹ The Federal Reserve's guarantee of banks' overdraft payments made via the Fedwire service likewise provides a safety net to depository institutions.⁶⁰

In addition to these explicit subsidies, some banks also benefit from implicit government support. Traditionally, market participants have perceived certain large, complex banks as TBTF.⁶¹ Observers assume that if such a bank were to experience distress, the government would bail out the company rather than risk a disorderly collapse that might destabilize the financial system.⁶² This perception of implicit government backing, in turn, creates significant advantages for the TBTF bank. Since market participants believe that the government will not allow a TBTF bank to collapse, creditors lend to banks perceived to be TBTF at artificially low rates.⁶³ Thus, for example, the largest banks paid almost 40 basis points less to their depositors in the lead-up to the 2008 financial crisis because of this implicit government subsidy.⁶⁴

Policymakers attempted to eliminate the TBTF subsidy after the 2008 crisis, but they were not entirely successful. Congress tried to signal through the Dodd-Frank Act's Orderly Liquidation Authority and limitations on the government's bailout powers that large, complex banks would no longer be treated as TBTF.⁶⁵ These new policies, however, did not eliminate large banks' funding advantages, suggesting that the market does not

59. Kathryn Judge, *Three Discount Windows*, 99 CORNELL L. REV. 795, 814–16, 826–27 (2014); accord Peek & Wilcox, *supra* note 57, at 183–84.

60. Peek & Wilcox, *supra* note 57, at 182–83; John R. Walter, *Can a Safety Net Subsidy Be Contained?*, FED. RSRV. BANK OF RICHMOND ECON. Q., Winter 1998, at 1, 6–7.

61. WILMARTH, *supra* note 33, at 317–18; Saule T. Omarova, *The “Too Big to Fail” Problem*, 103 MINN. L. REV. 2495, 2500–01 (2019).

62. See Nizan Geslevich Packin, *Supersize Them? Large Banks, Taxpayers and the Subsidies that Lay Between*, 35 NW. J. INT'L L. & BUS. 229, 231–32 (2014).

63. *Id.*

64. See Stefan Jacewitz & Jonathan Pogach, *Deposit Rate Advantages at the Largest Banks* 2–3 (Fed. Deposit Ins. Corp., Working Paper No. 2014-02, 2014), <https://www.fdic.gov/analysis/cfr/2014/wp2014/2014-02.pdf> [<https://perma.cc/JA5Z-NAHH>].

65. See Stephen J. Lubben & Arthur E. Wilmarth, Jr., *Too Big and Unable to Fail*, 69 FLA. L. REV. 1205, 1206–07 (2017) (discussing the Orderly Liquidation Authority); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 1001–02 (2011) (discussing limitations on the FDIC's and Federal Reserve's ability to bail out failing banks).

view the government's anti-bailout pledge as credible.⁶⁶ Moreover, large banks' funding advantages intensified as the COVID-19 pandemic emerged in early 2020.⁶⁷ Thus, the market still believes that the government will bail out banks during times of stress, thereby providing the largest banks with an implicit government subsidy.

In sum, banks continue to benefit from an expansive federal safety net. In particular, deposit insurance, discount window access, and implicit government subsidies provide considerable value to depository institutions. Because of these benefits, however, a bank's nonbank affiliates might attempt to exploit the depository institution to claim federal subsidies for themselves, as discussed in the next Section.

C. The Risk of Exploitation by Affiliates

When a bank operates as part of a diversified financial conglomerate, the conglomerate and its nonbank subsidiaries have an incentive to take advantage of the bank's federal safety net. Professor Howell Jackson has called this phenomenon the "hungry wolf" problem, noting that "holding companies are prone to prey upon their regulated subsidiaries."⁶⁸ A bank's affiliates may exploit the bank—and thereby avail themselves of federal subsidies—in several ways.

66. See Bhanu Balasubramanian & Ken B. Cyree, *Has Market Discipline on Banks Improved After the Dodd-Frank Act?*, 41 J. BANKING & FIN. 155, 165 (2014) (concluding that Dodd-Frank reduced, but did not eliminate, implicit government subsidies for firms perceived to be TBTF); Viral V. Acharya et al., *The End of Market Discipline? Investor Expectations of Implicit Government Guarantees* 30–33 (Munich Pers. RePEc Archive, Working Paper No. 79700, 2016) (finding that Dodd-Frank did not significantly reduce investors' expectations for government bailouts of large financial firms).

67. See Asani Sarkar, *Did Subsidies to Too-Big-To-Fail Banks Increase During the Covid-19 Pandemic?*, FED. RSRV. BANK OF N.Y.: LIBERTY ST. ECON. (Feb. 11, 2021), <https://libertystreeteconomics.newyorkfed.org/2021/02/did-subsidies-to-too-big-to-fail-banks-increase-during-the-covid-19-pandemic.html> [<https://perma.cc/AXY3-CNHB>] (finding that implicit subsidies to systemically important banks increased by 50 to 80 basis points during the COVID-19 pandemic).

68. Howell E. Jackson, *The Expanding Obligations of Financial Holding Companies*, 107 HARV. L. REV. 507, 512, 564–65 (1994). *But see id.* at 575 (concluding that holding-company-owned depository institutions are no more likely to fail than similarly-situated, independent depository institutions). Similar to Jackson's "hungry wolf" terminology, Professor Erik Gerding refers to the phenomenon as "subsidy transfer" and "subsidy leakage." ERIK F. GERDING, *LAW, BUBBLES, AND FINANCIAL REGULATION* 284–85 (2014).

One straightforward way a bank's affiliate might take advantage of the federal safety net is by obtaining a cheap loan from the depository institution. As discussed above, a bank's cost of capital for insured deposits is near the risk-free rate because of federal deposit insurance.⁶⁹ If a bank were to lend to a nonbank affiliate at a below-market interest rate, the nonbank could receive the benefit of federally subsidized funding.⁷⁰ That is what happened during the 2008 financial crisis, when Citibank, Bank of America, and JPMorgan Chase Bank sought to bolster their broker-dealer affiliates—which were rapidly losing funding—by lending them billions of dollars with the encouragement of the Federal Reserve.⁷¹ These types of loans are problematic, not only because they expand the federal safety net but also because they could jeopardize the depository institution's safety and soundness if the loans are not prudently underwritten.⁷²

Financial conglomerates can also exploit the federal safety net by transferring low-quality assets to their banks. When a bank buys assets from its affiliates at an inflated price, “[t]he difference between the market price of the purchased assets and the intracompany price paid can amount to a subsidized funds transfer from the bank to its affiliate.”⁷³ Even when an intracompany sale is conducted on market terms, the financial conglomerate may benefit from transferring assets to the bank

69. See *supra* note 54 and accompanying text.

70. See Walter, *supra* note 60, at 10.

71. See Omarova, *supra* note 19, at 1730–33 (characterizing these loans as “a large-scale transfer of the federal subsidy from depository institutions to their securities affiliates”). Although the three banks did not ultimately extend the full \$75 billion in inter-affiliate loans that the Federal Reserve authorized, the amount of lending required to stabilize their broker-dealer affiliates likely would have been far greater had the Federal Reserve not launched large-scale asset purchases from broker-dealers at the peak of the crisis. See Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Announces Two Initiatives Designed to Bolster Market Liquidity and Promote Orderly Market Functioning (Mar. 16, 2008), <https://www.federalreserve.gov/newsevents/pressreleases/mone-tary20080316a.htm> [<https://perma.cc/23DZ-VJCA>] (announcing the creation of the Primary Dealer Credit Facility).

72. See Wilmarth, *supra* note 16, at 1588, 1594. While the bank's loans were legally required to be “on market terms,” in practice, this standard had little effect in 2008 while credit markets were frozen. See Omarova, *supra* note 19, at 1734; Randy Benjenk, *Quixotic Regulation: Section 23A of the Federal Reserve Act and Containment of the Federal Safety Net Subsidy*, 2 HARV. BUS. L. REV. 461, 476 (2012) (“During a panic . . . there are no reasonable market terms or even good faith approximations of market terms . . .”).

73. Walter, *supra* note 60, at 11.

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because the FDIC, as the bank's insurer, bears some of the risk.⁷⁴ Thus, it is common for financial institutions to try to move risky assets into their depository institutions, such as when Citigroup transferred the vast majority of its subprime mortgage assets into Citibank in the lead-up to the 2008 financial crisis.⁷⁵ Likewise, conglomerates transferred risky asset-backed commercial paper from their affiliated MMMFs to their banks during the peak of the crisis.⁷⁶

A third way in which a financial conglomerate can exploit the federal safety net is by causing its depository institution to declare dividends and then redistributing these funds to its non-bank subsidiaries. As two banking law practitioners observed, "[t]o the extent a bank has available earnings out of which to declare dividends, it could provide subsidized funding to its BHC—for redeployment to other members of the banking group. . . ."⁷⁷ Thus, rather than transferring federal safety net benefits through preferential loans or asset purchases, a bank might simply give subsidized capital to its affiliates via dividend payments to the holding company.⁷⁸ At least two former Comptrollers of the Currency have warned of financial conglomerates taking advantage of their bank subsidiaries in this way.⁷⁹ And FDIC researchers have found empirical evidence that BHCs do, in fact, use internal dividends from their bank subsidiaries to exploit the federal safety net.⁸⁰

74. *Id.* at 10.

75. Omarova, *supra* note 19, at 1709–17, 1740–42.

76. *See id.*

77. Bevis Longstreth & Ivan E. Mattei, *Organizational Freedom for Banks: The Case in Support*, 97 COLUM. L. REV. 1895, 1913 (1997).

78. Walter, *supra* note 60, at 11–12; Benjenk, *supra* note 72, at 477–79.

79. *See Financial Modernization Legislation: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 6 (1997) (statement of Eugene A. Ludwig, Comptroller of the Currency) ("But a bank can also pay dividends to its holding company. . . . Those funds may then, in turn, be downstreamed to a holding company affiliate."); Julie L. Williams, Chief Couns., Off. of the Comptroller of the Currency, Remarks Before the American Enterprise Institute for Public Policy Research (Mar. 26, 1997), <https://www.occ.gov/news-issuances/news-releases/1997/nr-occ-1997-35.html> [<https://perma.cc/GM2Y-L36Z>] ("[S]ection 23A . . . does not limit the amount of equity, in the form of dividends, that a bank may transfer to its holding company parent.").

80. *See* Jonathan Pogach & Haluk Unal, *The Dark-Side of Banks' Nonbank Business: Internal Dividends in Bank Holding Companies* 3–4 (Fed. Deposit Ins. Corp., Working Paper No. 2018-01, 2018) (finding that BHCs use internal dividends from bank subsidiaries—but not nonbank subsidiaries—to fund both the parent's external dividends and nonbank expansion).

In addition to these standard strategies, financial engineering permits nonbanks to exploit their depository affiliates in even more complex ways. For example, a nonbank could enter into swap transactions with its bank affiliate in which the nonbank posts insufficient collateral to offset its counterparty risk.⁸¹ Similarly, a nonbank might use derivatives to transfer the economic risk of dubious assets to its bank affiliate without the bank being required to recognize those assets on its balance sheet.⁸² Alternatively, a bank could guarantee certain assets or obligations of its nonbank affiliates.⁸³ A depository institution could also provide preferential loans to an affiliate's customers or suppliers, who might then return a portion of the subsidy to the financial conglomerate when transacting with the nonbank company.⁸⁴ With the help of financial engineering, therefore, a nonbank may take advantage of its depository institution affiliate in numerous ways.

To be sure, there are legal limits on a bank's transactions with its nonbank affiliates, but these restrictions are generally inadequate to prevent exploitation. Section 23A of the Federal Reserve Act limits a bank's covered transactions with a single affiliate to no more than 10 percent of the bank's capital and prohibits a bank from purchasing low-quality assets from its affiliates.⁸⁵ Section 23B of the same statute requires transactions between a bank and its affiliates to be on market terms.⁸⁶ As Professor Saule Omarova has noted, however, Congress adopted these rules decades before the Gramm-Leach-Bliley Act permitted commercial banks to affiliate with broker-dealers, insurance

81. See Letter from Graham Steele, Staff Dir., Corps. & Soc'y Initiative, Stanford Graduate Sch. of Bus., to Legis. & Regul. Activities Div., Off. of the Comptroller of the Currency, Robert E. Feldman, Exec. Sec'y, Fed. Deposit Ins. Corp., & Ann E. Misback, Sec'y, Bd. of Governors of the Fed. Rsrv. Sys. 5–6 (Dec. 3, 2019), <https://www.fdic.gov/resources/regulations/federal-register-publications/2019/2019-margin-capital-requirements-covered-swap-entities-3064-af08-c-001.pdf> [<https://perma.cc/4CKB-H9AT>].

82. See generally Peter Conti-Brown, *A Proposed Fat-Tail Risk Metric: Disclosures, Derivatives, and the Measurement of Financial Risk*, 87 WASH. U. L. REV. 1461, 1470 (2010) (discussing off-balance-sheet contingent obligations).

83. See Transactions Between Member Banks and Their Affiliates, 67 Fed. Reg. 76,560, 76,569 (Dec. 12, 2002) (to be codified at 12 C.F.R. pt. 223) (discussing banks' guarantees of nonbank affiliates' obligations).

84. See Wilmarth, *supra* note 16, at 1594–96.

85. Federal Reserve Act § 23A, 12 U.S.C. § 371c(a). Section 23A also limits a bank's covered transactions with all affiliates, in aggregate to not more than 20 percent of the bank's capital. *Id.*

86. Federal Reserve Act § 23B, 12 U.S.C. § 371c-1.

companies, and other nonbanks.⁸⁷ When financial conglomerates expanded into new areas, bank supervisors found it difficult to police transactions with nonbank affiliates engaged in exotic financial activities not contemplated when sections 23A and 23B were enacted.⁸⁸ Professor Omarova concludes, therefore, that the Federal Reserve Act's affiliate transaction rules are "not well-suited to serve as the principal guarantee of the safety and soundness of the depository system in today's increasingly complex and dynamic financial marketplace."⁸⁹

Regulatory enforcement of bank exploitation has indeed suffered in the era of financial conglomeration. As Professor Omarova has documented, banking regulators have regularly granted exemptions from affiliate transaction limits, especially during the 2008 financial crisis.⁹⁰ In addition, the Federal Reserve still has not proposed updates to its affiliate transaction regulation to incorporate the Dodd-Frank Act's amendments strengthening sections 23A and 23B more than a decade after the statute came into force.⁹¹ Regulators have even made it easier for financial conglomerates to take advantage of their depository institutions by rolling back rules that required nonbanks to post collateral on derivative transactions with their bank affiliates.⁹² Section II.C of this Article explores these regulatory shortcomings in greater detail.

In sum, financial conglomerates have both strong incentives and ample opportunities to exploit their bank subsidiaries. At

87. Omarova, *supra* note 19, at 1689 ("At the time of [section 23A's] enactment in 1933, the statute's approach was based on the key premise that, as a result of the Glass-Steagall Act prohibitions, none of banks' nonbank affiliates would engage in securities dealing or other financial activities viewed at the time as unacceptably risky for federally insured commercial banks.").

88. *See id.* at 1768 n.370 ("[T]he limitations on affiliate transactions are generally easy to evade and difficult to enforce." (internal quotations omitted)); *see also* Wilmarth, *supra* note 16, at 1597 ("[T]he restrictions in sections 23A and 23B are complicated and difficult to enforce, and managerial evasions of those provisions are often subtle and difficult to detect." (internal citation and punctuation omitted)); Benjenk, *supra* note 72, at 476 ("[I]f depositories systematically misstate the value of transferred assets in times of illiquidity and volatility, resource-strapped regulators might have trouble policing Section 23B.").

89. Omarova, *supra* note 19, at 1690.

90. *Id.* at 1702–63.

91. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 608, 124 Stat. 1376, 1608–11 (2010) (codified at 12 U.S.C. §§ 371c, 371c-1).

92. *See* Press Release, Fed. Deposit Ins. Corp., Agencies Finalize Amendments to Swap Margin Rule (June 25, 2020, 2:00 PM), <https://www.fdic.gov/news/press-releases/2020/pr20076.html> [<https://perma.cc/46BM-TR5L>].

least in theory, therefore, stakeholders should closely monitor depository institutions to prevent exploitation and stop the inappropriate expansion of the federal safety net. As the next Part explains, however, in the modern financial system, no one looks out for the banks.

II. WHO IS LOOKING OUT FOR THE BANKS?⁹³

Despite the threat of exploitation, nobody protects depository institutions from their nonbank affiliates. In theory, shareholders, bank directors and officers, and regulators could all watch over banks and help prevent mistreatment.⁹⁴ This Part contends, however, that none of these stakeholders has both the incentive and ability to shield banks from their affiliates. In fact, each of these stakeholders may benefit when a financial conglomerate takes advantage of its depository institutions. Thus, in the U.S. financial system as currently configured, none of these parties should be counted on to look out for the banks.

A. Shareholders?

As an initial matter, shareholders are unlikely to prevent nonbanks from exploiting their bank affiliates. At present, all of the largest U.S. commercial banks are owned by publicly traded BHCs.⁹⁵ In general, a BHC shareholder benefits from maximizing the value of the parent company and, thus, has little

93. Former Comptroller of the Currency John Hawke once asked a similar question, channeling Dr. Seuss' famous story, *The Lorax*: "[W]ith apologies to Dr. Seuss, I ask this question: When an insured depository institution engages in transactions involving its parent or affiliate or insiders, 'who speaks for the bank?' Who in the corporate family is looking at these situations . . . with an independent view and with undivided loyalty to the bank?" John D. Hawke, Jr., Comptroller of the Currency, Remarks Before the American Bankers Association 8–9 (Oct. 7, 2002), <https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-78.pdf> [<https://perma.cc/VGF3-5Z2P>].

94. Bank creditors could also try to protect a bank from exploitation by its affiliates. Most bank creditors lack this incentive, however, because they are protected by federal deposit insurance. *See, e.g.*, Kress, *supra* note 4 at 189–90. Even uninsured bank creditors may not care when a financial conglomerate exploits its depository institution if such creditors' claims are short-term or they perceive the bank as TBTF. *See id.* at 191–92.

95. *Large Commercial Banks*, FED. RESRV. STAT. RELEASE (Sept. 30, 2021), <https://www.federalreserve.gov/releases/lbr/current/default.htm> [<https://perma.cc/4KR8-FSLY>] (listing the largest commercial banks and their holding companies).

incentive to care about a bank subsidiary vis-à-vis the broader financial conglomerate. Moreover, even if a BHC shareholder wanted to monitor a bank's transactions with its affiliates, the shareholder would have limited ability to oversee the financial conglomerate's inner workings.

BHC shareholders have an economic incentive to prioritize the performance of the parent holding company over the financial condition of its bank subsidiary. To the extent that preferential loans, asset transfers, or other inter-affiliate transactions increase the value of the consolidated company, rational BHC shareholders would prefer the conglomerate to exploit the bank.⁹⁶ BHC shareholders, in essence, own a put option on the bank subsidiary: the shareholders enjoy the bank's upside—including any safety net subsidies the bank transfers to its non-bank affiliates—but the FDIC bears the residual risks if the bank collapses.⁹⁷ Historically, policymakers encouraged bank shareholders to look after the depository institution by subjecting shareholders to double liability when a bank failed.⁹⁸ Double liability regimes, however, were repealed after the Great Depression.⁹⁹ Today, therefore, BHC shareholders have little incentive to look out for the bank vis-à-vis its affiliates.

Even if BHC shareholders were inclined to monitor a bank's relationships with its affiliates, they would likely find it difficult to do so. Large, complex financial conglomerates are notoriously opaque to external stakeholders.¹⁰⁰ The types of transactions through which a financial conglomerate might exploit its bank subsidiary are unlikely to be disclosed in sufficiently granular detail for BHC shareholders to observe.¹⁰¹ Accordingly, BHC

96. See, e.g., Benjenk, *supra* note 72, at 478–79 (providing an illustrative example).

97. See Ehud I. Ronn & Avinash K. Verma, *Pricing Risk-Adjusted Deposit Insurance: An Option-Based Model*, 41 J. FIN. 871, 872 (1986).

98. Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 WAKE FOREST L. REV. 31, 35–39 (1992); see also Howell E. Jackson, *Losses from National Bank Failures During the Great Depression: A Response to Professors Macey and Miller*, 28 WAKE FOREST L. REV. 919, 919 (1993).

99. Macey & Miller, *supra* note 98, at 37–39. For a proposal to reinstate non-limited liability for bank shareholders on an opt-in basis in exchange for regulatory relief, see Conti-Brown, *supra* note 34.

100. See, e.g., Marco Becht et al., *Why Bank Governance is Different*, 27 OXFORD REV. ECON. POL'Y 437, 438 (2011) (“Banks have the ability to take on risk very quickly, in a way that is not immediately visible to . . . outside investors.”).

101. A possible exception might be dividend payments from the bank to its holding company. See *supra* notes 77–79 and accompanying text. Even if dividends

shareholders lack both the incentive and the ability to protect banks from exploitation by their affiliates.

B. Directors and Officers?

Internal stakeholders are equally unlikely to stop a financial conglomerate from taking advantage of its depository institution subsidiary. Federal law instructs a bank's directors to shield the bank from exploitation by its affiliates. But these legal mandates ignore a glaring conflict of interest: most big-bank directors also sit on the board of the bank's holding company. When a bank director serves the BHC, the director has an incentive to allow the financial conglomerate to exploit the depository institution and thereby take advantage of federal subsidies. In the current system, therefore, bank directors and their appointed officers are unlikely to oversee the bank impartially.

Recognizing a financial conglomerate's incentive to take advantage of its depository institution, policymakers instruct a bank's directors to shield the bank from its affiliates. The Office of the Comptroller of the Currency's (OCC) bank directors' handbook, for example, states that the "subsidiary bank's board should ensure that relationships between the bank and its affiliates . . . do not pose safety and soundness issues for the bank. . . ." ¹⁰² The OCC further asserts that the "bank's board should ensure the interests of the bank are not subordinate to the interests of the parent holding company. . . ." ¹⁰³ In addition, the Federal Reserve requires a majority of a bank's board of directors to review and approve certain transactions with the bank's affiliates. ¹⁰⁴

Policymakers presume that bank directors will go to great lengths to protect the bank from its holding company. The OCC states that "[i]f the bank's board is concerned that the holding

were observable, however, BHC shareholders would have limited incentive to police these payments given the shareholders' preference for maximizing the BHCs' value. *See supra* notes 96–99 and accompanying text.

102. OFF. OF THE COMPTROLLER OF THE CURRENCY, THE DIRECTOR'S BOOK: ROLE OF DIRECTORS FOR NATIONAL BANKS AND FEDERAL SAVINGS ASSOCIATIONS 34–35 (2020), <https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-directors-book.pdf> [<https://perma.cc/BHB3-HRF3>].

103. *Id.* at 34.

104. 12 C.F.R. § 223.41(d)(5) (2021) (providing that a bank's purchase of assets from an affiliate in connection with an internal corporate reorganization is exempt from section 23A's quantitative limits only if, among other things, a majority of the bank's directors reviews and approves the transaction before consummation).

company is engaging in practices that may harm the bank . . . the bank's board should notify the holding company and obtain modifications."¹⁰⁵ If the holding company fails to address the bank directors' concerns, the OCC instructs the bank directors to "dissent on the record and consider actions to protect the bank's interests."¹⁰⁶ The OCC advises that, if necessary, the bank's board "should hire an independent legal counsel" or "raise its concerns with its regulators."¹⁰⁷ Policymakers, in sum, presume that bank directors will zealously safeguard the interests of the bank from its holding company.

The expectation that a bank's directors will shield the bank from exploitation, however, ignores a potential conflict of interest. When a bank's directors also sit on the board of the bank's holding company, the directors have an incentive to *allow* the holding company and its nonbank subsidiaries to take advantage of the bank and thereby benefit from federal safety net subsidies. Since BHC directors are accountable to shareholders for maximizing the value of the financial conglomerate—not just the bank subsidiary—they may want the bank to engage in preferential loans, asset transfers, or other intracompany transactions that benefit its affiliates.¹⁰⁸ In addition, BHC directors are enriched financially when a bank extends federal safety net subsidies to its affiliates, since board members are often significant shareholders of the BHC.¹⁰⁹ When a bank director serves simultaneously on the board of the parent holding company, therefore, the director is ill-suited to protect the bank from exploitation by its affiliates.¹¹⁰

105. OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 102, at 35.

106. *Id.*

107. *Id.*

108. See Macey & O'Hara, *supra* note 34, at 93 (noting that BHC directors "are pulled in opposite directions").

109. See, e.g., JPMORGAN CHASE & CO, *supra* note 26, at 82 (disclosing directors' security ownership).

110. Former Comptroller of the Currency John Skelton Williams made a similar observation more than a century ago. In his final report to Congress as Comptroller, Williams vehemently opposed efforts to allow national banks to affiliate with securities firms, saying, "[I]t would be difficult, if not impossible, for the same set of officers to conduct safely, soundly, and successfully the conservative business of the national bank and at the same time direct and manage the speculative ventures and promotions of the ancillary institutions." 1 OFF. OF THE COMPTROLLER OF THE CURRENCY, DOC. NO. 2,889, ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY 56 (1920), https://fraser.stlouisfed.org/files/docs/publications/comp/1920s/compcurr_1920_Vol1.pdf [<https://perma.cc/2PJR-4EMQ>].

This conflict of interest is far more widespread than is commonly understood. BHCs do not routinely disclose the identities of their bank subsidiaries' directors.¹¹¹ However, some bank board membership information is available in various state and international corporate registries, securities filings, and enforcement actions. Drawing on these resources, I compiled a near-complete dataset of the directors of the lead bank subsidiaries of BHCs with more than \$100 billion in assets and more than 1 percent of their assets in nonbanks.¹¹² This dataset reveals that the vast majority of big-bank directors simultaneously serve as directors of their parent holding companies, as depicted in Figure 1.¹¹³ The membership of each bank's board of directors is listed in the Appendix.

Figure 1 shows the significant overlap between most large BHCs' boards and the boards of their bank subsidiaries. Nearly half of the banks in the sample do not have a single director who does not also serve on the board of its BHC. Of the four biggest banks by asset size—JPMorgan Chase Bank, Bank of America, Citibank, and Wells Fargo Bank—only Citibank has a director who does not also sit on its BHC's board. In total, 119 out of 153

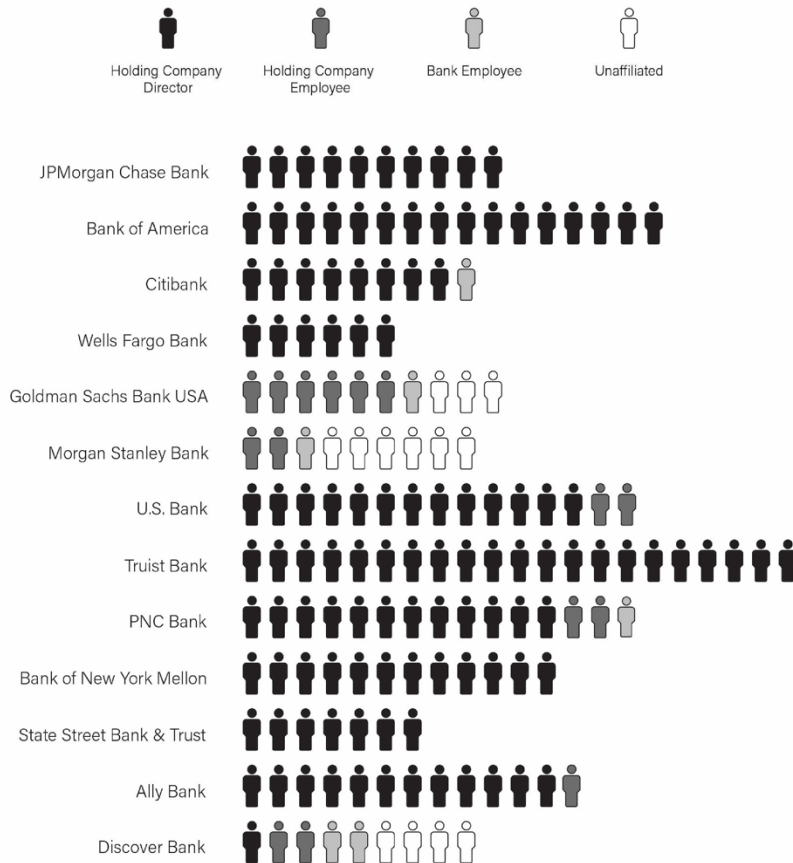
111. In response to the author's requests, many BHCs declined to disclose the membership of their bank subsidiaries. *See, e.g.*, E-mail from Emily Yang, Dir. of Inv. Rels., Discover Fin. Servs., to Author (June 30, 2021) (on file with author) ("We do not publicly disclose the identity of the Bank directors."); E-mail from Janet L. Deringer, Assistant Corp. Sec'y, PNC Fin. Servs. Grp., Inc., to Author (June 29, 2021) (on file with author) ("The Office of the Corporate Secretary does not provide non-public, confidential information including PNC Bank Directors [sic] names."). In addition, the federal banking agencies declined requests under the Freedom of Information Act (FOIA) to disclose the identities of individuals who serve as directors of the largest U.S. commercial banks. *See, e.g.*, Letter from Alisa Colgrove, Gov't. Info. Specialist, Fed. Deposit Ins. Corp., to Author (July 21, 2021) (on file with author) ("During the normal course of business, the FDIC does not create a consolidated list of bank board of directors."); Letter from Michele Taylor Fennell, Deputy Assoc. Sec'y of the Bd., Bd. of Governors of the Fed. Rsrv. Sys., to Author (June 11, 2021) (on file with author) ("[T]o the extent the Board maintains the board of director membership information you seek, it is contained within supervision files and accordingly would be subject to withholding pursuant to exemption 8 of the FOIA."); Letter from Frank D. Vance, Jr., Manager, Discloser Servs. & Freedom of Info. Act Officer, Off. of the Comptroller of the Currency, to Author (June 29, 2021) ("National banks are not required to file a list of individuals who served as a director during a specific year or time period. Therefore, we do not have the lists you seet [sic].").

112. *See infra* Appendix. American Express Company is the only BHC that meets the criteria for inclusion in the sample for which data were unavailable. *Id.*

113. In Figure 1, holding company employees include both current and former holding company employees. Likewise, bank employees include both current and former bank employees.

bank directors in the sample—or 78 percent—simultaneously serve on the board of the bank's holding company.

Figure 1: Bank Director Affiliations¹¹⁴



While it is common in many other industries for a parent company director to serve on a subsidiary's board,¹¹⁵ dual-directorships raise unique problems in banking. In contrast to other sectors of the economy, the federal safety net creates incentives

114. See *infra* Appendix.

115. See *U.S. v. Bestfoods*, 524 U.S. 51, 69 (1998) (“[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary [I]t is normal for a parent and subsidiary to have identical directors”) (internal citations and punctuation quotations omitted).

for a dual BHC-bank director to exploit the subsidiary.¹¹⁶ While dual BHC-bank directors have a legal obligation to prevent the financial conglomerate from taking advantage of the depository institution,¹¹⁷ in reality, enforcement against large bank directors is exceedingly rare.¹¹⁸ Thus, dual BHC-bank directors' incentives may favor taking advantage of the bank.

Consider an example. At the onset of the COVID-19 pandemic in March 2020, several BHCs sought and received permission from the Federal Reserve to transfer assets from their MMMF and broker-dealer affiliates to their bank subsidiaries.¹¹⁹ These transactions were reminiscent of the 2008 financial crisis, when banks supported their MMMF and broker-dealer affiliates with widespread asset purchases.¹²⁰ The Bank of New York Mellon was reportedly one of the banks that bolstered its nonbank affiliates again in 2020, buying \$1.2 billion of assets from affiliated MMMFs to prevent them from collapsing.¹²¹ Of the twelve individuals who oversaw these asset purchases as directors of The Bank of New York Mellon, all twelve simultaneously served on the board of the bank's holding company.¹²²

116. See *supra* notes 108–109 and accompanying text.

117. See *supra* notes 102–107 and accompanying text.

118. See Heidi Mandanis Schooner, *Big Bank Boards: The Case for Heightened Administrative Enforcement*, 68 ALA. L. REV. 1011, 1026 (2017) (discussing underenforcement against big-bank directors); Da Lin & Lev Menand, *The Banker Removal Power*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3806879 [<https://perma.cc/AF8H-VX4F>] (documenting limited enforcement against bank directors).

119. Template Letter on Money-Market Funds from Ann E. Misback, Sec'y, Bd. of Governors of the Fed. Rsrv. Sys. (Mar. 17, 2020), <https://www.federalreserve.gov/supervisionreg/legalinterpretations/fedreserseactint20200317.pdf> [<https://perma.cc/UMZ5-AZ3S>]; Template Letter on Broker-Dealers from Ann E. Misback, Sec'y, Bd. of Governors of the Fed. Rsrv. Sys. (Mar. 18, 2020), <https://www.federalreserve.gov/supervisionreg/legalinterpretations/fedreserseactint20200318.pdf> [<https://perma.cc/KT54-EGFU>].

120. Omarova, *supra* note 19, at 1740–46 (describing bank purchases of MMMF and broker-dealer assets during 2008).

121. Richard Henderson & Robert Armstrong, *BNY Mellon Steps in to Support Money Market Fund After Outflows*, FIN. TIMES (Mar. 20, 2020), <https://www.ft.com/content/8222c5a2-6ad3-11ea-800d-da70cf6e4d3> [<https://perma.cc/SAW9-BE2D>].

122. Compare BNY MELLON, NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 2021 8 (2021), https://www.bnymellon.com/content/dam/bnymellon/documents/pdf/investor-relations/2021_Proxy_Statement_126808_1.pdf.coredownload.pdf [<https://perma.cc/DS55-EKRT>] (listing directors of The Bank of New York Mellon Corporation), with Company Extract on The Bank of New York Mellon from the Australian Sec. & Invs. Comm'n to Author (July 1, 2021) (on file with author) (listing directors of The Bank of New York Mellon).

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Thus, the same directors who were supposed to protect the bank and prevent the spread of the federal safety net also had incentives to use the bank to stabilize its affiliates. Like many bank directors, therefore, Bank of New York Mellon's board members may have suffered from conflicts of interest.

Similar to bank directors, bank executives may also be ill-suited to protect a depository institution from exploitation by its affiliates. It is common for a bank's board to appoint the BHC's CEO to serve as the CEO of the bank. For example, at three of the four largest U.S. BHCs—JPMorgan, Bank of America, and Wells Fargo—the holding company's CEO also serves as the CEO of the bank.¹²³ Like dual BHC-bank directors, a dual BHC-bank CEO may perceive her primary objective as maximizing the value of the financial conglomerate—not just the bank subsidiary.¹²⁴ In addition, since dual BHC-bank directors generally receive pay packages tied to BHC performance metrics, a dual CEO may benefit financially by allowing the holding company to exploit its depository institution subsidiary.¹²⁵ Further, in cases where a bank executive is not already employed by the holding company, the executive may permit the BHC to take advantage of the bank in the hope of obtaining a promotion to the holding company.¹²⁶ In light of these conflicts of interest, therefore, a

123. See *JPMorgan Chase & Co.: James Dimon*, WALL ST. J. MKTS., <https://www.wsj.com/market-data/quotes/JPM/company-people/executive-profile/80975> [<https://perma.cc/9A6V-923B>]; *Bank of America Corp.: Brian T. Moynihan*, WALL ST. J. MKTS., <https://www.wsj.com/market-data/quotes/BAC/company-people/executive-profile/54240377> [<https://perma.cc/YS2R-22BG>]; *Wells Fargo & Co.: Charles William Scharf*, WALL ST. J. MKTS., <https://www.wsj.com/market-data/quotes/WFC/C/company-people/executive-profile/41727322> [<https://perma.cc/4PZ6-3BA7>].

124. See, e.g., Adi Ignatius, *Managers Don't Have All the Answers*, HARV. BUS. REV., July-Aug. 2018, at 124 <https://hbr.org/2018/07/managers-dont-have-all-the-answers> [<https://perma.cc/6233-AHLQ>] (quoting JPMorgan CEO Jamie Dimon) (“My primary responsibility is to shareholder value over a long period of time . . .”).

125. See, e.g., David Benoit, *JPMorgan CEO Jamie Dimon's Compensation Rises to \$31.5 Million*, WALL ST. J., <https://www.wsj.com/articles/jpmorgan-ceo-james-dimons-compensation-rises-to-31-5-million-11579817176> [<https://perma.cc/858S-TVHF>] (Jan. 23, 2020, 5:55 PM) (noting that Jamie Dimon's annual pay package included \$25 million in JPMorgan stock).

126. In 2021, for example, Goldman Sachs promoted the CEO of its bank subsidiary, Carey Halio, to become the holding company's head of investor relations. Elizabeth Dilts Marshall, *Goldman Promotes a Flurry of Female Partners to Executive Roles*, REUTERS (Apr. 1, 2021, 11:59 AM), <https://www.reuters.com/article/us-goldman-sachs-moves/goldman-promotes-a-flurry-of-female-partners-to-executive-roles-idUSKBN2BO6DZ> [<https://perma.cc/4B7L-B3AX>].

bank's executives are unlikely to prevent the BHC from exploiting its bank subsidiary.

In sum, policies that rely on bank directors or executives to shield a depository institution from its nonbank affiliates ignore critical conflicts of interest. Overlaps between bank and BHC boards likely bias directors' incentives toward expanding federal safety net subsidies. Dual BHC-bank CEOs may have similar motives. In the current system, therefore, neither bank directors nor their appointed officers should be counted on to shield depository institutions from exploitation by their holding companies.

C. Regulators?

Regulators could, in theory, compensate for bank directors' and officers' conflicts of interest by proactively policing predatory relationships between BHCs and their depository institutions. In practice, however, regulators consistently allow financial conglomerates to take advantage of their bank subsidiaries.¹²⁷ This Section first offers hypotheses as to why regulators permit BHCs to exploit their depository institutions. It then examines three specific ways in which regulators have allowed—and even encouraged—BHCs to take advantage of their banks: by eroding affiliate transaction limits; undermining Dodd-Frank's swaps push-out provision; and eliminating inter-affiliate margin requirements.

1. Why Regulators Permit BHCs to Exploit Their Banks

Despite their statutory mandates to protect depository institutions,¹²⁸ the federal banking agencies often enable financial conglomerates to exploit their bank subsidiaries. To be sure, policing relationships between banks and their affiliates poses serious challenges for the agencies, who face informational

127. It is perplexing that regulators permit BHCs to exploit their bank subsidiaries because federal law requires BHCs to serve as a "source of strength" to their depository institution subsidiaries. 12 U.S.C. § 1831o-1. By authorizing BHCs to take advantage of their bank subsidiaries, however, regulators treat depository institutions as sources of strength for their parent companies.

128. *See, e.g.*, 12 U.S.C. § 1(a) (charging the OCC with "assuring the safety and soundness of . . . the institutions . . . subject to its jurisdiction").

disadvantages relative to the institutions they supervise.¹²⁹ Compounding these limitations, however, the agencies have affirmatively relaxed regulatory safeguards shielding banks from their holding companies.¹³⁰ There are several possible reasons why regulators might permit BHCs to exploit their banks.

First, regulatory capture could explain why the banking agencies allow holding companies to prey on their depository subsidiaries. Professor Wilmarth has documented how conglomeration in the late 1990s and early 2000s increased financial institutions' influence on regulatory policy.¹³¹ As Wilmarth wrote, "The remarkable expansion of the financial industry's size, profits and compensation over the past three decades produced a parallel growth in the industry's political clout."¹³² This clout, Wilmarth asserted, "discourages regulators from imposing tougher restraints on financial institutions."¹³³ Subject to pressure from the financial sector, therefore, regulators may relax constraints on banks' relationships with their affiliates to enable the expansion of federal subsidies.

In addition to regulatory capture, the banking agencies might permit BHCs to take advantage of the federal safety net to further the agencies' interests in financial stability. Bank regulators have strong incentives to maintain the stability of large BHCs and, by extension, the broader financial system.¹³⁴ In some cases, regulators might advance this interest by allowing a BHC to exploit its bank subsidiary. For example, the banking agencies could permit a financial conglomerate to move risky assets into its federally insured bank with the goal of stabilizing the holding company.¹³⁵ Alternatively, regulators could roll back protections for depository institutions on the ground that strict firewalls weaken the consolidated company.¹³⁶ While regulatory

129. See *supra* notes 88–89 and accompanying text.

130. See *infra* Section II.C.2 (explaining how regulators have weakened rules that protect depository institutions from their holding companies).

131. Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1398–428 (2013).

132. *Id.* at 1407.

133. *Id.* at 1294.

134. See, e.g., Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO STATE L.J. 1087, 1121–22 (2015) (discussing the Federal Reserve's implicit financial stability mandate).

135. See, e.g., Omarova, *supra* note 19, at 1762–63.

136. For example, Federal Reserve Chairman Ben Bernanke opposed the Dodd-Frank Act provision requiring federally insured banks to move derivatives exposures to separately capitalized affiliates because, in his view, "it's not evident

agencies understandably want to promote the stability of the broader financial system, permitting holding companies to exploit their bank subsidiaries creates a moral hazard problem. If financial conglomerates expect that regulators will allow them to exploit their bank subsidiaries in times of crisis, they will take excessive risks during “normal” times.¹³⁷

Even the FDIC—which, as the administrator of the federal deposit insurance system, should have particularly strong motivation to protect depository institutions—has not prevented financial conglomerates from taking advantage of their banks. As Professor Omarova has written, “certain power dynamics among the three [banking] agencies” limit the FDIC’s influence relative to the Federal Reserve and OCC.¹³⁸ These power dynamics may stem from the fact that the Federal Reserve and OCC are the primary regulators for the largest financial conglomerates and their bank subsidiaries, while the FDIC mostly oversees smaller banks.¹³⁹ Accordingly, the FDIC is sometimes excluded from the other agencies’ decisions about banks’ relationships with their holding companies.¹⁴⁰ Even when the FDIC participates in interagency decision-making, it may be overly deferential to its sister agencies.¹⁴¹ Thus, although the FDIC could be a potentially powerful check on BHCs taking advantage of their bank subsidiaries, in practice, it oftentimes fails to prevent exploitation.

There are many possible explanations, therefore, why the federal banking agencies permit financial conglomerates to prey

why that makes the company as a whole safer.” See Rob Blackwell, *How Yellen Threw a Key Fed Staffer Under the Bus*, AM. BANKER (Feb. 26, 2015, 6:00 PM), <https://www.americanbanker.com/opinion/how-yellen-threw-a-key-fed-staffer-under-the-bus> [<https://perma.cc/JK9T-8U5N>]. For more on the Dodd-Frank swaps push-out provision, see *infra* Section II.C.2.b.

137. Cf. Harris Weinstein, *Moral Hazard Deposit Insurance and Banking Regulation*, 77 CORNELL L. REV. 1099, 1101–02 (1992) (discussing moral hazard in banking).

138. Omarova, *supra* note 19, at 1767.

139. See MICHAEL S. BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY 174 (2d ed. 2018).

140. For example, the Federal Reserve and the OCC—but not the FDIC—granted banks a two-year extension to comply with Dodd-Frank’s swaps push-out provision. See Prohibition Against Federal Assistance to Swaps Entities, 78 Fed. Reg. 34,545, 34,546–47 (June 10, 2013) (codified at 12 C.F.R. pt. 237); Transition Period Under Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 78 Fed. Reg. 1,306, 1,307 (Jan. 8, 2013).

141. See, e.g., Omarova, *supra* note 19, at 1767 (noting the FDIC’s concurrence with the Federal Reserve’s exemptions to section 23A affiliate transaction limitations).

on their depository institution subsidiaries. Whether due to some or all of these reasons, policymakers routinely weaken protections for depository institutions, as the next Subsection demonstrates.

2. How Regulators Permit BHCs to Exploit Their Banks

The federal banking agencies enable—and even encourage—BHCs to take advantage of their depository institution subsidiaries by rolling back safeguards designed to shield banks from their affiliates. This Subsection examines three of the most significant ways in which regulators have weakened protections for depository institutions: by eroding affiliate transaction limits, undermining Dodd-Frank's swaps push-out provision, and eliminating inter-affiliate margin requirements.

a. Eroding Affiliate Transaction Limits

First, the federal banking agencies have relaxed restrictions on depository institutions' transactions with their affiliates. As discussed above, sections 23A and 23B of the Federal Reserve Act have traditionally protected banks by limiting certain intra-company transactions and requiring all relationships with affiliates to be conducted on market terms.¹⁴² Ever since the Gramm-Leach-Bliley Act authorized financial conglomeration, however, the federal banking agencies have eroded these safeguards through regulatory exemptions and inaction.

Within the first decade after Gramm-Leach-Bliley, the Federal Reserve made frequent use of its authority to exempt affiliate transactions from sections 23A and 23B. Immediately after the September 11, 2001, terrorist attacks, the Federal Reserve suspended section 23A's quantitative limits "so that major banks could make large transfers of funds to their securities affiliates."¹⁴³ Several years later, when the U.S. housing bubble burst and credit markets froze, the Federal Reserve again issued widespread exemptions allowing financial conglomerates to transfer assets into their bank subsidiaries.¹⁴⁴ In at least one case, the Federal Reserve even waived section 23B's "market terms"

142. See *supra* notes 18–20, 85–89 and accompanying text.

143. WILMARTH, *supra* note 33, at 184.

144. Omarova, *supra* note 19, at 1729–63.

requirement, expressly allowing insured depository institutions to spread federal subsidies to their nonbank affiliates.¹⁴⁵ Although these exemptions did not result in reported losses to insured depository institutions, banks could have suffered sizeable losses from their affiliate transactions had the Federal Reserve not simultaneously supported the financial system with massive liquidity injections.¹⁴⁶

After the 2008 financial crisis, Congress tried to strengthen the Federal Reserve Act's limits on affiliate transactions. For example, the Dodd-Frank Act broadened the scope of "covered transactions" subject to section 23A to include derivatives, repurchase agreements, and securities lending arrangements.¹⁴⁷ In addition, Congress curtailed the Federal Reserve's unilateral authority to grant exemptions from sections 23A and 23B. Under Dodd-Frank, the FDIC may veto any section 23A or 23B exemption it deems to present an unreasonable risk to the deposit insurance fund.¹⁴⁸ With these amendments, Congress "significantly expanded the scope" of sections 23A and 23B and sought to "tighten [their] application."¹⁴⁹

Even after these legislative reforms, however, the federal banking agencies continued to erode limits on affiliate transactions through inaction and permissive exemptions. More than ten years after the effective date of Dodd-Frank's amendments, the Federal Reserve still has not proposed corresponding revisions to the agency's rule implementing sections 23A and 23B.¹⁵⁰ The absence of an implementing regulation leaves considerable uncertainty as to how the banking agencies apply affiliate transaction limits to derivatives, repurchase agreements, and

145. *See* Transactions Between Member Banks and Their Affiliates: Exemption for Certain Purchases of Asset-Backed Commercial Paper by a Member Bank from an Affiliate, 74 Fed. Reg. 6,226, 6,227 (Feb. 6, 2009) (codified at 12 C.F.R. § 223.56) (authorizing banks to purchase commercial paper from MMMF affiliates at amortized cost, rather than on market terms).

146. *See supra* note 71 and accompanying text (discussing the Federal Reserve's support of financial markets during 2008 crisis).

147. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 608, 124 Stat. 1376, 1608–11 (2010) (codified at 12 U.S.C. §§ 371c, 371c-1).

148. In addition, Dodd-Frank authorizes the OCC and FDIC—rather than the Federal Reserve—to grant section 23A exemptions to banks within their jurisdiction. *See id.*

149. Omarova, *supra* note 19, at 1763.

150. *See* 12 C.F.R. pt. 223 (2021).

securities lending arrangements.¹⁵¹ And despite Congress's intended limitation on regulatory exemptions, the banking agencies issued widespread exemptions allowing banks to purchase assets from their MMMF and broker-dealer affiliates as soon as the COVID-19 pandemic emerged in early 2020.¹⁵² Thus, notwithstanding Congress's directives, the regulatory agencies have not tightened limits on affiliate transactions and instead continue to allow depository institutions to spread the federal safety net to their nonbank affiliates.

b. Undermining Dodd-Frank's Swaps Push-Out Provision

In addition to eroding affiliate transaction limits, regulators' efforts to undermine Dodd-Frank's swaps push-out provision demonstrate how the banking agencies prioritize the financial condition of BHCs over their depository-institution subsidiaries. After derivatives exacerbated the 2008 financial crisis, Congress ordered insured depository institutions to transfer, or "push out," certain swap contracts to separately capitalized nonbank affiliates.¹⁵³ Dodd-Frank's swaps push-out provision—also known as the "Lincoln Amendment"—sought to "minimize 'the possibility that banks would use cheaper funding provided by deposits insured by the FDIC, to subsidize their trading activities.'"¹⁵⁴ The bank regulatory agencies, however, opposed the swaps push-out provision so vehemently that

151. See DEBEVOISE & PLIMPTON, FEDERAL RESERVE BOARD ISSUES WIDE-RANGING FAQ GUIDANCE ON KEY REGULATIONS 7 (2021), <https://www.debevoise.com/-/media/files/insights/publications/2021/04/20210414-federal-reserve-board-issues-wide.pdf> [<https://perma.cc/D74Z-SL34>] ("Regulation W has not yet been revised to reflect a quantification methodology for credit exposures arising from derivatives or securities lending and borrowing transactions . . .").

152. See *supra* note 118 and accompanying text; Letter from Ann E. Misback, Sec'y, Bd. of Governors of the Fed. Rsr. Sys., to Joseph M. Otting, Comptroller, Off. of the Comptroller of the Currency (Mar. 25, 2020), <https://www.federalreserve.gov/supervisionreg/legalinterpretations/fedreserseactint20200325.pdf> [<https://perma.cc/J886-KTYG>] (granting PNC Bank an exemption from section 23A to purchase assets from a securities affiliate).

153. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 716, 124 Stat. 1376, 1648–51 (2010) (codified at 15 U.S.C. § 8305). Dodd-Frank exempted swaps used for hedging and swaps related to certain bank-permissible activities. *Id.* § 716(d).

154. Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1197–98 (2017) (internal citation omitted).

Congress ultimately backtracked and repealed the Lincoln Amendment.

Despite the Lincoln Amendment's goal of safeguarding depository institutions, bank regulators criticized the rule because, in their view, the swaps push-out would weaken financial conglomerates. Federal Reserve Chairman Ben Bernanke, for example, protested the requirement that banks move derivatives into a separate affiliate, insisting that "it's not evident why that makes the company as a whole safer."¹⁵⁵ In addition, some bank regulators expressed concern that moving swaps from insured depository institutions into nonbank affiliates could impede prudential supervision.¹⁵⁶ Reflecting their concerns, the Federal Reserve and OCC extended the swaps push-out compliance date for two years beyond the statutory deadline.¹⁵⁷ This delay provided time for the agencies and the financial sector to continue lobbying Congress to reconsider the Lincoln Amendment.¹⁵⁸ Eventually, Congress relented and, in 2014, repealed substantially all of the swaps push-out provision.¹⁵⁹

The repeal of the Lincoln Amendment was a boon to BHCs. As Professor Wilmarth wrote, "The repeal of the Lincoln Amendment permits large financial holding companies to conduct virtually all of their derivative activities within their subsidiary banks, which enjoy the largest federal safety net subsidies and the lowest cost of funding within their holding company structures."¹⁶⁰ Meanwhile, allowing depository institutions to retain exposures to credit default swaps, commodities swaps, and equity swaps means that risks associated with those instruments will continue to be absorbed by the banks and, if necessary, by

155. Victoria McGrane, *Swap Talk: Why Are People Fighting Over Dodd-Frank and Derivatives?*, WALL ST. J. (Dec. 10, 2014, 4:38 PM), <https://www.wsj.com/articles/BL-WB-51386> [<https://perma.cc/9UEA-L43W>] (quoting Federal Reserve Chairman Ben Bernanke).

156. Dan Ryan, *Key Points from Congress's Roll-Back of the Swaps Push-Out*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 11, 2015), <https://corpgov.law.harvard.edu/2015/01/11/key-points-from-congresss-roll-back-of-the-swaps-push-out> [<https://perma.cc/RZ4V-RJCQ>].

157. *Id.*

158. See Dave Clarke et al., *How Wall St. Got Its Way*, POLITICO (Dec. 11, 2014, 10:40 PM), <https://www.politico.com/story/2014/12/wall-street-spending-bill-congress-113525> [<https://perma.cc/MEQ5-EHNJ>].

159. See Jonathan Weisman, *Furor Over Move to Aid Big Banks in Funding Bill*, N.Y. TIMES (Dec. 11, 2014), <https://www.nytimes.com/2014/12/12/business/furor-over-move-to-aid-big-banks-in-funding-bill.html> [<https://perma.cc/63GX-KBA9>].

160. WILMARTH, *supra* note 33, at 308.

the federal deposit insurance fund. Thus, by undermining the Lincoln Amendment's swap push-out provision, regulators thwarted Congress's goal of safeguarding depository institutions and, once again, prioritized BHCs over their bank subsidiaries.

c. Eliminating Inter-Affiliate Margin Requirements

Finally, the federal banking agencies have encouraged BHCs to exploit their depository institutions by eliminating inter-affiliate margin requirements. Financial conglomerates have traditionally run their derivatives businesses out of nonbank legal entities and then used swaps to transfer those exposures into their U.S. depository institutions, taking advantage of the federal safety net.¹⁶¹ Swaps proved problematic during the 2008 financial crisis when counterparties defaulted and saddled their trading partners with losses.¹⁶² In response, Dodd-Frank established new swap margin requirements. Under the new margin rules, a market participant must post collateral to guarantee its performance on a swaps contract, thereby protecting its trading partner in the event that it defaults.¹⁶³ Like the swaps push-out rule, however, the regulators effectively neutered Dodd-Frank's swaps margin requirements by exempting depository institutions from collecting initial margin from their affiliates.

Initially after the 2008 crisis, regulators used Dodd-Frank's swaps margin requirements to protect the banking system. Dodd-Frank directed the banking agencies to establish margin requirements for all swaps that are not centrally cleared.¹⁶⁴ In addition to instituting margin requirements for swaps between unaffiliated counterparties, the agencies mandated that depository institutions collect initial margin when entering into swaps with their affiliates.¹⁶⁵ As the agencies stated in their final rule,

161. Graham Steele, *The \$40 Billion Gift that Wall Street Doesn't Deserve*, AM. BANKER: BANKTHINK (July 16, 2019, 9:00 AM), <https://www.american-banker.com/opinion/the-40-billion-gift-that-wall-street-doesnt-deserve> [https://perma.cc/8MFC-EN3R].

162. See Letter from Graham Steele, *supra* note 81, at 1–3.

163. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 731, 124 Stat. 1376, 1704-05 (2010) (codified at 7 U.S.C. § 6s(e)); *id.* § 764, 124 Stat. 1376, 1787–88 (codified at 15 U.S.C. § 78o-8(e)).

164. See *id.*

165. See Margin and Capital Requirements for Covered Swap Entities, 80 Fed. Reg. 74,840, 74,889 (Nov. 30, 2015) (codified at scattered sections of 12 C.F.R.).

requiring affiliates to post initial margin “should help protect the safety and soundness of [depository institutions] in the event of an affiliated counterparty default.”¹⁶⁶ By 2019, depository institutions had collected more than \$44 billion in initial margin from their affiliates to cover intercompany swaps.¹⁶⁷

The financial sector, however, attacked inter-affiliate margin requirements, and the agencies eventually capitulated. As the *Wall Street Journal* reported, “JPMorgan Chase & Co., Goldman Sachs Group Inc. and other big banks have made easing the requirements a priority for years.”¹⁶⁸ In response to industry pressure, the Federal Reserve, OCC, and FDIC proposed in 2019 to eliminate the requirement that depository institutions collect initial margin from their affiliates, reasoning that inter-affiliate margin requirements place U.S. institutions at a competitive disadvantage relative to financial companies in other jurisdictions that lack comparable rules.¹⁶⁹ The agencies effectively repealed their inter-affiliate swap margin requirements in a 2020 final rule.¹⁷⁰

Eliminating inter-affiliate margin requirements allows—indeed, encourages—financial conglomerates to transfer risk into their depository institution subsidiaries. As FDIC Board Member Martin Gruenberg said, removing inter-affiliate margin requirements creates “a meaningful economic incentive” for a financial conglomerate to transfer risks associated with

166. *Id.*

167. Martin J. Gruenberg, Member, Bd. of Dirs. of the Fed. Deposit Ins. Corp., Remarks on Final Rule: Margin and Capital Requirements for Covered Swap Entities 2 (June 25, 2020), <https://www.fdic.gov/news/speeches/2020/spjun2520c.pdf> [<https://perma.cc/5Q69-ABA7>].

168. Lalita Clozel & Andrew Ackerman, *Big Banks Push to Free Up \$40 Billion from Postcrisis Restrictions*, WALL ST. J. (May 7, 2019, 8:31 AM), <https://www.wsj.com/articles/big-banks-push-to-free-up-40-billion-from-postcrisis-restrictions-11557232280> [<https://perma.cc/L9N2-3YQ6>].

169. See Margin and Capital Requirements for Covered Swap Entities, 84 Fed. Reg. 59,970, 59,976 (proposed Nov. 7, 2019) (to be codified at scattered sections of 12 C.F.R.).

170. See Margin and Capital Requirements for Covered Swap Entities, 85 Fed. Reg. 39,754 (July 1, 2020) (codified at scattered sections of 12 C.F.R.). In the final rule, the agencies require a bank to collect initial margin from an affiliate if the bank’s aggregate amount of inter-affiliate margin exposure exceeds 15 percent of its tier 1 capital. *Id.* at 39,762. As Federal Reserve Governor Lael Brainard explained, however, “this threshold has little practical impact, as no U.S. bank comes close to it.” Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Statement by Governor Brainard (June 25, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20200625b.htm> [<https://perma.cc/78DT-3LZV>].

derivative activities to its bank subsidiary instead of unaffiliated market participants because the conglomerate “would not be required to post initial margin to the insured depository institution but would be required to post initial margin to third parties.”¹⁷¹ In addition, eliminating the inter-affiliate margin requirement permits “insured depository institutions to return the \$44 billion in collateral that currently serves as a buffer for the Deposit Insurance Fund” and shields “taxpayers from potential losses that could arise from derivative contracts with affiliates.”¹⁷² As a result, now that regulators have rolled back inter-affiliate margin requirements, banks will be more exposed to their nonbank affiliates.

* * *

In the current system, no stakeholder is likely to prevent financial conglomerates from exploiting their banks. Shareholders benefit when BHCs take advantage of federal subsidies; bank directors and officers are compromised by conflicts of interest; and regulators do not offset these shortcomings with aggressive oversight. The absence of an effective watchdog jeopardizes banks' safety and soundness, distorts competition, and encourages excessive risk-taking.¹⁷³ A new approach is thus necessary to better protect banks from their nonbank affiliates.

III. PROTECTING BANKS THROUGH BETTER GOVERNANCE

Traditionally, proposals to better insulate banks from their holding companies have emphasized structural reforms. Professor Wilmarth, for example, favors reinstating the Glass-Steagall Act and thereby severing affiliations between depository institutions and companies engaged in nonbanking activities.¹⁷⁴ Other scholars, including Professor Steven Schwarcz, recommend “ring-fencing” approaches that would create stricter firewalls to isolate banks from their affiliates.¹⁷⁵ These structural reforms

171. Gruenberg, *supra* note 167, at 3–4.

172. *Id.*

173. See *supra* notes 15–17 and accompanying text.

174. See WILMARTH, *supra* note 33, at 335–56; accord Ganesh Sitaraman, *The Case for Glass-Steagall Act, the Depression-Era Law We Need Today*, GUARDIAN (June 16, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/jun/16/case-glass-steagall-act-ganesh-sitaraman> [https://perma.cc/5E9W-X2NU].

175. Steven L. Schwarcz, *Ring-Fencing*, 87 S. CAL. L. REV. 69, 101–05 (2013) (favorably discussing the U.K. government's proposal to ring-fence banks by legally

merit serious consideration. Implementing these proposals, however, would likely require Congress to pass legislation that has heretofore proven difficult to enact.¹⁷⁶

This Part suggests an alternative approach to safeguarding banks through stronger corporate governance. Specifically, it recommends that policymakers should require large banks to appoint directors who are unaffiliated with their holding companies or affiliates. As explained below, mitigating bank directors' conflicts of interests in this way could achieve many of the objectives of the Glass-Steagall Act and other ring-fencing proposals using existing legal authorities.

To be clear, the proposal described here is not a substitute for the sweeping structural reform that Glass-Steagall proponents envision. Alleviating bank directors' conflicts of interest is an incremental, relatively easy-to-implement strategy for safeguarding depository institutions within the prevailing structure of the U.S. financial system. The corporate governance reforms described below can help prevent the imprudent expansion of the federal safety net for as long as Congress continues to permit financial conglomeration.

A. *A Proposal for Unaffiliated Bank Boards*

To prevent financial conglomerates from taking advantage of their bank subsidiaries, policymakers should require banks to appoint at least some directors who are unaffiliated with their holding companies. This mandate would mitigate conflicts of interest that currently plague bank governance and, in doing so, would empower banks to resist exploitation by their affiliates.

separating risky assets from retail banking operations). Professor Wilmarth initially preferred a ring-fencing approach, which he referred to as “narrow banking” or an “internal Glass-Steagall.” Arthur E. Wilmarth, Jr., *Narrow Banking: An Overdue Reform that Could Solve the Too-Big-to-Fail Problem and Align US and UK Financial Regulation of Financial Conglomerates (Part II)*, 31 BANKING & FIN. SERVS. POL'Y REP. 1 (2012) (proposing to prohibit banks owned by large, complex financial conglomerates from transacting with their affiliates). More recently, however, Professor Wilmarth has rejected the narrow banking approach in favor of a more complete structural separation. See WILMARTH, *supra* note 33, at 478 n.104 (“[I] no longer have confidence in the internal Glass-Steagall approach . . . I have therefore concluded that only a strict external Glass-Steagall approach, comparable to the original 1933 act, will be successful in establishing a clear separation between the banking system and the capital markets.”).

176. See Kress, *supra* note 4, at 200–02 (discussing political barriers to structural reforms).

As this Section describes, this approach is consistent with both international and domestic precedent and would be relatively straightforward for regulators to implement using existing legal authorities.

First, a brief description of the proposal. The federal banking agencies—the Federal Reserve, OCC, and FDIC—should adopt a requirement that a BHC with more than \$100 billion in assets must appoint at least some unaffiliated directors to the board of its depository institution subsidiary.¹⁷⁷ A director would be considered “unaffiliated” if he or she (1) is not and has never been an officer, employee, or director of the holding company or any of its nonbank affiliates, and (2) is not a member of the immediate family of an officer, employee, or director of the holding company or any of its nonbank affiliates. Unaffiliated directors could be employed by the bank—but not by its holding company or nonbank affiliates—or could be independent of the financial conglomerate entirely.¹⁷⁸

The agencies should establish a sliding scale to determine how many of a bank’s directors must be unaffiliated. BHCs with a majority of their assets in nonbank legal entities could be required to appoint unaffiliated directors to every seat on their bank subsidiary boards. Because of their heavy focus on nonbank activities, these conglomerates pose the biggest risk of exploiting the federal safety net, and their bank subsidiaries would therefore benefit the most from unaffiliated directors. BHCs with significant nonbank operations—for example, between 10 and 50 percent of their assets in nonbank legal entities—could be required to maintain a majority of unaffiliated directors on their bank subsidiary boards. By contrast, BHCs in which nonbank activities constitute a smaller focus—for example, between 1 and 10 percent of assets—could appoint unaffiliated directors to at least one-third of their bank board seats. In the interests of

177. The proposal is limited to BHCs with more than \$100 billion in assets since the largest financial conglomerates tend to be the most involved in nonbank activities. LINDA GOLDBERG & APRIL MEEHL, COMPLEXITY IN LARGE U.S. BANKS 7–9 (2019), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr880.pdf [<https://perma.cc/6C2J-9QVJ>] (finding correlation between a BHC’s size and complexity).

178. Policymakers could consider instituting a requirement that at least some of a bank’s “unaffiliated” directors must not be employed by the bank. As discussed above, a director who is currently employed by the bank may be ill-suited to exercise independent judgment if he or she hopes to be promoted to a position at the holding company or one of its affiliates. *See supra* note 126 and accompanying text.

efficiency, policymakers could exempt large BHCs with de minimis nonbank operations from the requirement to appoint unaffiliated bank directors, as bank-focused conglomerates likely pose the least risk of exploitation.¹⁷⁹ All covered BHCs should have to appoint unaffiliated directors to the most important positions on their bank boards—lead director and chair of the audit and risk committees—because these roles bear special responsibility for overseeing the bank’s risk.¹⁸⁰

Requiring large banks to appoint unaffiliated directors would have several salutary effects. First, this reform would mitigate conflicts inherent in dual BHC-bank directorships. When an individual serves both a bank and its BHC simultaneously, he or she may have incentives to allow the holding company to exploit the federal safety net.¹⁸¹ By contrast, when a director serves only the bank—and has no formal ties to the holding company or its nonbank affiliates—he or she experiences no such conflict. Unaffiliated bank directors are therefore more likely to identify potential exploitation of the depository institution and resist predatory practices by the holding company.¹⁸²

Similarly, requiring large banks to appoint unaffiliated directors would rationalize the United States’ regulatory framework for financial conglomerates. Recall that policymakers presume that a bank’s board zealously protects the depository

179. Of the twenty-three U.S. BHCs with more than \$100 billion in assets, fourteen have more than 1 percent of their assets in nonbank legal entities. See NAT’L INFO. CTR., LARGE HOLDING COMPANIES (Mar. 31, 2021), <https://www.ffiec.gov/npw/Institution/TopHoldings> [<https://perma.cc/XA5X-TL9X>] (choose an institution name; then select “Bank Holding Company Performance Report”; then click “PDF” under 3/31/2021); see also *supra* notes 112–113 and accompanying text; *infra* Appendix.

180. See Kress, *supra* note 34, at 927. The banking agencies could also require a covered BHC to appoint an unaffiliated director to chair its bank subsidiary’s nominating committee to provide independent oversight of the selection of the bank’s other directors. Cf. Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1297–98 (2017) (discussing the nominating committee’s role in appointing directors who are independent of a controlling shareholder).

181. See *supra* notes 108–109 and accompanying text.

182. For similar reasons, Professor Paolo Saguato has proposed that derivatives clearinghouses should appoint directors who are unaffiliated with their parent companies to mitigate conflicts of interest in clearinghouse governance. See Paolo Saguato, *Financial Regulation, Corporate Governance, and the Hidden Costs of Clearinghouses*, 82 OHIO STATE L.J. (forthcoming) (manuscript at 70–73), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269060 [<https://perma.cc/L6NT-KAPQ>].

institution from its nonbank affiliates.¹⁸³ For example, regulators entrust a bank's directors to review and approve certain transactions with its affiliates, and they expect a bank's board to dissent on the record—and even hire legal counsel—if its BHC takes advantage of the depository institution.¹⁸⁴ These safeguards, however, are effectively meaningless when a bank's board overlaps with its BHC's board. In that case, the bank's board is unlikely to push back against the holding company's board—since their members are one and the same. Requiring a bank to appoint unaffiliated directors, by contrast, would help the existing regulatory framework function as intended.

In addition, unaffiliated bank directors could serve as valuable points of contact for bank supervisors. As Professor Lev Menand has documented, the proliferation of financial conglomerates since the 1990s has corresponded with a concomitant decline in discretionary bank supervision.¹⁸⁵ Requiring unaffiliated bank directors could help to reverse the decades-long relaxation of bank oversight. Bank directors who are independent of their holding companies could function as unbiased points of contact for supervisors focused on safeguarding depositors and preventing the inappropriate expansion of the federal safety net. For example, supervisors could interview a bank's unaffiliated directors as part of its annual examination and maintain consistent dialogue with the unaffiliated directors about any shortcomings. In return, unaffiliated directors might be more likely than dual BHC-bank directors to proactively seek out supervisors when the holding company jeopardizes the bank's safety and soundness.

Some foreign countries already mandate that banks maintain directors who are unaffiliated with their holding companies. The United Kingdom, for example, requires that no more than one-third of the members of a large bank's board of directors may be employees or directors of any of the bank's nonbank affiliates.¹⁸⁶ Similarly, France prohibits a systemically important

183. See *supra* notes 102–107 and accompanying text.

184. See *supra* notes 102–107 and accompanying text.

185. Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1551–74 (2018); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 1016–20 (2021).

186. PRUDENTIAL REGUL. AUTH., PRA RULEBOOK: CRR FIRMS AND NON-AUTHORIZED PERSONS: RING-FENCED BODIES INSTRUMENT § 4.4, at 10 (2016), <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy->

bank from sharing any directors with an affiliate that engages in proprietary trading or similarly risky financial activities.¹⁸⁷ Thus, other developed countries acknowledge the vital role that independent boards can play in safeguarding depository institutions from exploitation by their financial conglomerates.

Moreover, U.S. regulators have already mandated unaffiliated directors for certain insured depository institutions. In 2021, the FDIC adopted a rule establishing conditions for newly licensed industrial loan companies (ILCs)—a special type of depository institution that may be owned by a commercial parent company.¹⁸⁸ In the rule, the FDIC announced that it will require a new ILC to limit its parent company's board representation to less than 50 percent of the ILC's directors.¹⁸⁹ The FDIC explained that it adopted this safeguard "[i]n order to limit the extent of each [parent company's] influence over a subsidiary industrial bank."¹⁹⁰ This same logic, of course, could be applied to BHCs and their subsidiary banks. If such a rule is necessary to protect an ILC from exploitation by its parent company, a similar rule would be equally appropriate to prevent BHCs from taking advantage of their bank subsidiaries.

A requirement that large, diversified BHCs appoint unaffiliated bank directors would not be difficult for such firms to implement. Indeed, a few banks already have unaffiliated directors. A majority of Morgan Stanley Bank's board members, for example, are otherwise unaffiliated with the bank and its holding company.¹⁹¹ Likewise, most of Discover Bank's board

statement/2016/ps2016app1 [https://perma.cc/2WP4-LAFB]. When recommending this requirement, the United Kingdom's Independent Commission on Banking noted that "independent [subsidiary] boards are a standard requirement and have played an important role in protecting vital services" in the utility sector. INDEP. COMM'N ON BANKING, FINAL REPORT: RECOMMENDATIONS 74–75 (2011). For example, "evidence suggests that board independence was crucial to the survival of Wessex Water despite the collapse of its parent, Enron." *Id.* For further discussion of the U.K. rule, see Thom Wetzer, *In Two Minds: The Governance of Ring-Fenced Banks*, 19 J. CORP. L. STUDS. 197, 220–21 (2019).

187. Matthias Lehmann, *Volcker Rule, Ring-Fencing or Separation of Bank Activities – Comparison of Structural Reform Acts Around the World*, 17 J. BANKING REGUL. 176, 181 (2016).

188. Parent Companies of Industrial Banks and Industrial Loan Companies, 86 Fed. Reg. 10,703 (Feb. 23, 2021) (to be codified at 12 C.F.R. pt. 354).

189. *Id.* at 10,719. The FDIC initially proposed to limit the parent company's board representation to less than 25 percent of the ILC's directors. *Id.* at 10,708. However, the agency increased the threshold in response to commenters' requests. *Id.* at 10,719.

190. *Id.* at 10,719.

191. See *supra* Figure 1; see also *infra* Appendix.

members are either employees of the bank or unaffiliated with the company.¹⁹² In both cases, these banks have populated their boards with retired financial services executives, consultants, and other industry experts.¹⁹³ If policymakers were to mandate unaffiliated directors, other banks would likely appoint similar board members. An unaffiliated director requirement would probably not exhaust the pool of potential candidates, however, since the proposal outlined here would apply to only fourteen banks at present.¹⁹⁴

An unaffiliated director mandate would also be straightforward for regulators to enact using existing legal authorities. The federal banking agencies have wide latitude to establish rules governing depository institutions' safety and soundness.¹⁹⁵ The agencies could, for example, institute a requirement that large banks appoint unaffiliated members as part of their existing standards for bank boards of directors.¹⁹⁶ In contrast to proposals that aim to fix bank corporate governance problems by changing directors' fiduciary duties, an unaffiliated director mandate could be accomplished through rulemaking and would

192. See *supra* Figure 1; see also *infra* Appendix.

193. See, e.g., Niloofar Howe, RSA CONF., <https://www.rsaconference.com/experts/niloo-howe> [<https://perma.cc/DFJ9-MGWR>] (stating that Niloofar Howe is a former chief strategy officer at a cybersecurity company and current Morgan Stanley Bank board member); Laura Newman Olle, ENCORE CAP., <https://encorecapital.gcs-web.com/board-member/laura-newman-olle> [<https://perma.cc/DYG6-N944>] (documenting that Laura Newman Olle is a former Capital One chief risk officer and current Morgan Stanley Bank board member); *Abercrombie & Fitch Co. Announces Election of Ken Robinson to Its Board of Directors*, ABERCROMBIE & FITCH (Feb. 5, 2021), <https://corporate.bercrombie.com/investors/newsevents/press-releases> [<https://perma.cc/9EBG-YZ5S>] (stating that Ken Robinson is a former senior vice president of a Fortune 100 energy company and current Morgan Stanley Bank board member); Frank Grossman, LINKEDIN, <https://www.linkedin.com/in/frankgrossman> [<https://perma.cc/7TRZ-5D59>] (describing Frank Grossman's current positions as president of an investment advisory firm and Discover Bank board member); Frank Reilley, UNIV. OF NOTRE DAME, <https://mendoza.nd.edu/mendoza-directory/profile/frank-reilly/#Biography> [<https://perma.cc/WEK7-2A5V>] (select "Download CV") (stating that Frank Reilley is a finance professor and Discover Bank board member).

194. See *supra* note 179 and accompanying text.

195. See, e.g., 12 U.S.C. § 1831p-1 (directing the federal banking agencies to establish standards for safety and soundness).

196. See 12 C.F.R. pt. 30 app. D(III) (2021) (establishing heightened standards for the boards of directors of large national banks); BD. OF GOVERNORS OF THE FED. RESRV. SYS., SR 21-3/CA 21-1, SUPERVISORY GUIDANCE ON BOARD OF DIRECTORS' EFFECTIVENESS (2021), <https://www.federalreserve.gov/supervisionreg/srletters/SR2103.pdf> [<https://perma.cc/GJ63-2TUH>].

not require amendments to state law.¹⁹⁷ In addition, permitting banks to appoint unaffiliated directors of their choosing would be less disruptive to traditional corporate governance norms than proposals requiring banks to name government or creditor representatives to their boards.¹⁹⁸

While the agencies should require large banks to appoint unaffiliated directors, regulators probably do not need to mandate that such banks hire unaffiliated officers. With unconflicted directors in place, a bank's board could be trusted to select suitable management to run the bank on a day-to-day basis. In some cases, such as when a BHC's assets and revenues are concentrated in its bank subsidiary, it may be appropriate for the bank's board to install the conglomerate's senior executives as the bank's leadership. In other cases, such as when the bank is a relatively small part of the broader holding company, a bank's board may prefer to select officers who are unaffiliated with the bank's holding company to prevent exploitation. Regardless, the selection of executive officers can reasonably be left to the board's discretion, as long as unconflicted directors oversee the bank's relationships with its affiliates.¹⁹⁹

In sum, policymakers should strengthen bank governance to better protect depository institutions from exploitation by their affiliates. Requiring a large bank to appoint at least some

197. See, e.g., Schwarcz, *supra* note 34, at 29 (proposing that state legislatures enact a "public governance duty" for directors of systemically important banks); Armour & Gordon, *supra* note 34, at 74–76 (discussing state-level implementation of heightened liability rules for bank directors). An unaffiliated director mandate would not change bank directors' fiduciary duties. Courts generally recognize that directors of wholly owned subsidiaries owe fiduciary duties to the subsidiary, in addition to the parent company. See J. Haskell Murray, "Latchkey Corporations": *Fiduciary Duties in Wholly Owned, Financially Troubled Subsidiaries*, 36 DEL. J. CORP. L. 577, 598 (2011) ("[T]he current state of the law appears fairly well settled that directors of wholly owned subsidiaries owe fiduciary duties not only to its shareholder/parent, but also to the subsidiary as a whole."); Stefan J. Padfield, *In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries*, 10 FORDHAM J. CORP. & FIN. L. 79, 113 (2004) (quoting *First American Corp. v. Al-Nahyan*, 17 F. Supp. 2d 10, 26 (D.D.C. 1998)) ("[T]he directors of a wholly-owned subsidiary owe the [subsidiary] fiduciary duties . . ."). The unaffiliated director mandate would help ensure that bank directors impartially fulfill their fiduciary duties to the bank.

198. See, e.g., Omarova, *supra* note 34, at 1032 (advocating "a fundamental structural reconfiguration of bank governance by giving the federal government a seat on the board of each systemically important banking organization").

199. The federal banking agencies could consider mandating that the bank subsidiary of a covered BHC employ a chief risk officer and chief accounting officer who are unaffiliated with the bank's holding company to deter exploitation.

directors who are unaffiliated with the bank's holding company would alleviate conflicts of interest that facilitate the inappropriate expansion of the federal safety net. By mitigating these conflicts, an unaffiliated director mandate would ensure that someone is finally looking out for the banks.

B. Overcoming Implementation Challenges

To be sure, implementing an unaffiliated director mandate will require careful crafting to ensure the rule functions as intended. For example, policymakers will need to pay close attention to how unaffiliated directors are appointed, removed, and compensated. This Section examines several implementation challenges that warrant careful consideration but should not deter regulators from adopting an unaffiliated director mandate.

1. Appointment and Removal

First, policymakers must carefully consider how a bank appoints and removes its unaffiliated directors. Each of the largest U.S. banks is wholly owned by its holding company.²⁰⁰ As the sole shareholder, the BHC may select and remove the bank's directors at its discretion. This ownership structure therefore creates the risk that a bank's unaffiliated directors will remain responsive to the BHC's preference to expand the federal safety net.²⁰¹ Knowing that they could be removed by the BHC at any time, the unaffiliated bank directors will not want to "bite the hand that feeds them," even if they are nominally independent of the BHC.

To address this concern, policymakers should require a bank or its holding company to provide notice to the bank's primary federal regulator before appointing or removing an unaffiliated director. The agency could disapprove an appointment or removal if supervisors believe the proposal represents an

200. See, e.g., JPMORGAN CHASE BANK, NAT'L ASS'N, CONSOLIDATED FINANCIAL STATEMENTS (2021), <https://sec.report/nsm/Jpmorgan-Chase-Bank-National-Association/Portal/NI-000019866/NI-000019866.pdf>

[<https://perma.cc/5QYE-W5LR>] (noting that JPMorgan Chase Bank is a "wholly-owned subsidiary of JPMorgan Chase & Co.").

201. As Professor Thom Wetzer put it, "Because . . . corporate law generates accountability to the parent company, [ring-fenced bodies] directors remain accountable to parent company directors from whom they are supposed to be independent." Wetzer, *supra* note 186, at 197.

attempt by the BHC to exert inappropriate influence over the bank's board. At a minimum, when a bank proposes to remove an unaffiliated director, the regulator "may decide to scrutinise the relations between the [bank] and its parent company more rigorously."²⁰² In turn, knowing that the parent company may incur regulatory costs for removing an unaffiliated director, those directors "may deem the threat by the parent company to use [its removal] power to be less credible than it would normally be."²⁰³ For these reasons, the United Kingdom requires a bank to obtain prior approval from the Prudential Regulatory Authority before appointing certain directors.²⁰⁴

The United States, in fact, already has a prior notice framework for bank personnel changes that could easily be adapted for this purpose. The Federal Deposit Insurance Act requires a bank to provide notice to its primary federal regulator at least thirty days before replacing any member of its board or hiring a new senior executive officer if the bank is undercapitalized or considered to be in "troubled" supervisory condition.²⁰⁵ The responsible agency may disapprove a proposed personnel change if the agency finds that "the competence, experience, character, or integrity of the individual . . . indicates that it would not be in the best interests of the depositors of the [bank] or in the best interests of the public to permit the individual to be employed by, or associated with" the bank.²⁰⁶ To adapt this framework for unaffiliated directors, the agencies could disapprove a notice if the relevant agency finds that the appointment or removal of an unaffiliated director could create or exacerbate conflicts of interest or compromise the bank's independence. In this way, the agencies could help ensure that a BHC does not exert inappropriate influence over its bank's board through the appointment and removal of unaffiliated directors.

202. *Id.* at 227.

203. *Id.*

204. *See id.* The United Kingdom's prior approval requirement applies to a bank's chairman, lead independent director, and the chairs of the audit, nomination, compensation, and risk committees. *Id.* at 221 n.171.

205. The relevant agency may also require prior notice any time the agency "determines . . . that such prior notice is appropriate." 12 U.S.C. § 1831i(a).

206. *Id.* § 1831i(e).

2. Compensation

In addition to monitoring how unaffiliated bank directors are appointed and removed, policymakers must also pay attention to how such directors are paid. Financial conglomerates traditionally compensate senior officials, at least in part, with holding company stock or other equity-linked instruments.²⁰⁷ If a bank pays its unaffiliated directors with holding company stock, however, these equity awards could bias the board members' judgment. To the extent that a bank director owns a stake in the holding company, the director would have a financial incentive to allow the holding company to take advantage of the depository institution. The structure of bank directors' compensation, therefore, could undermine the efficacy of an unaffiliated director mandate.

In response to this challenge, the banking agencies should establish standards for unaffiliated director compensation. Regulators could adopt several potential approaches to ensure that bank director compensation does not create conflicts of interest. For example, the agencies could require that banks pay their unaffiliated directors entirely in cash. Alternatively, the agencies could insist that banks compensate unaffiliated directors using the bank's debt, which would better align the directors' interests with the depository institutions' creditors.²⁰⁸ The banking agencies could incorporate standards for bank director compensation into their unfinished rulemaking to implement section 956 of the Dodd-Frank Act, which directs the agencies to establish regulations or guidelines "that prohibit any types of incentive-based payment arrangement" that "encourage[] inappropriate risks."²⁰⁹ The standards for bank director compensation need not be overly prescriptive—they simply need to ensure that the way in which banks pay their unaffiliated board members does not undermine their independence from the holding company.

207. See, e.g., Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 262–66 (2010).

208. Frederick Tung, *Pay for Banker Performance: Structuring Executive Compensation for Risk Regulation*, 105 NW. U. L. REV. 1205, 1227–29 (2011) (discussing publicly traded subordinated debt as a form of bank executive compensation). Financial institution creditors are generally believed to be more risk averse than shareholders. See *id.* at 1207.

209. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 956(b), 124 Stat. 1376, 1905 (2010) (codified at 12 U.S.C. § 5641(b)).

3. Political Economy

Finally, proponents of an unaffiliated director mandate must confront political economy challenges. Why would the banking agencies—who have, to date, failed to adequately protect depository institutions from exploitation²¹⁰—enact this reform?²¹¹ And even if one set of regulators were to implement an unaffiliated director mandate, would other regulators roll it back in the future?

Although political-economy challenges pervade financial regulation,²¹² an unaffiliated director mandate is likely the type of initiative that can be implemented and withstand future deregulatory efforts. Leadership of the federal banking agencies, of course, is not static over time. For example, it is widely expected that President Joe Biden’s nominees will be more aggressive on financial regulation than President Donald Trump’s appointees.²¹³ Reform-minded regulators are likely to find corporate governance initiatives easier to implement than substantive rules, such as capital and liquidity requirements, since governance reforms do not impose direct costs on financial institutions and may therefore be less objectionable to the industry.²¹⁴ Further, enactment of an unaffiliated director mandate could entrench the rule for the long-term. Future deregulatory efforts will likely focus on substantive rules that directly affect financial conglomerates’ profitability, rather than governance standards.²¹⁵ Even if the banking agencies were to weaken an

210. See *supra* Section II.C.

211. Professors Eric Posner and Adrian Vermeule have described an “inside/outside fallacy” in which scholars “offer deeply pessimistic accounts of the motivations of relevant actors in the legal system” then “issue an optimistic proposal that the same actors should supply public-spirited solutions.” Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1743 (2013).

212. Wilmarth, *supra* note 131, at 1363–437 (describing the financial sector’s influence over regulatory policy).

213. See, e.g., Brendan Pedersen & Neil Haggerty, *Biden Team Lays Groundwork to Reverse Trump-Era Banking Policies*, AM. BANKER (Jan. 21, 2021, 9:00 PM), <https://www.americanbanker.com/news/biden-team-lays-groundwork-to-reverse-trump-era-banking-policies> [<https://perma.cc/58GJ-ZWHT>].

214. For a discussion of why banks generally oppose stricter capital rules, see Erik F. Gerding, *The Dialectics of Bank Capital: Regulation and Regulatory Capital Arbitrage*, 55 WASHBURN L.J. 357, 362–64 (2016).

215. For example, the Federal Reserve’s efforts to roll back portions of the Dodd-Frank Act under the Trump Administration focused on substantive rules like capital and liquidity, rather than Dodd-Frank’s corporate governance provisions, such as the requirement that each large BHC maintain a risk committee on its

unaffiliated director mandate in the future, financial conglomerates may decline to change their independent bank governance structures once they are in place.²¹⁶ Despite political economy challenges, therefore, if reform-minded regulators were to implement an unaffiliated director mandate, it would likely be a lasting reform.

CONCLUSION

Ever since the Gramm-Leach-Bliley Act authorized commercial banks to affiliate with nonbanks in 1999, financial conglomerates have had a powerful incentive to exploit their depository institution subsidiaries and take advantage of federal safety net subsidies. At present, however, no stakeholders in the U.S. financial sector have both the motivation and ability to reliably shield depository institutions from their parent holding companies. In particular, this Article has exposed an underappreciated conflict of interest that contributes to the inappropriate expansion of the federal safety net. While U.S. law expects a bank's directors to zealously safeguard the depository institution from their nonbank affiliates, widespread overlaps between the boards of large, diversified BHCs and their subsidiary banks undermine bank directors' ability to resist exploitation.

To prevent financial conglomerates from taking advantage of the federal safety net, policymakers could implement structural reforms, such as Professor Wilmarth's proposal for a new Glass-Steagall Act.²¹⁷ In the absence of large-scale structural change, however, policymakers should look to an easy-to-implement corporate governance solution. Specifically, this Article has proposed that policymakers should require large banks to appoint directors who are unaffiliated with their holding companies or affiliates. An unaffiliated director mandate, if enacted, would mitigate conflicts of interest within financial conglomerates and thereby achieve some of the objectives of a new Glass-Steagall Act using existing legal authorities. Thus, as long as depository institutions are permitted to affiliate with other

board of directors. See Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, 84 Fed. Reg. 59,230, 59,233–48 (Nov. 1, 2019) (codified in scattered sections of 12 C.F.R.).

216. See Clark G. Gilbert, *Unbundling the Structure of Inertia: Resource Versus Routine Rigidity*, 48 ACAD. MGMT. J. 741, 741 (2005) (discussing “organizational inertia,” or the tendency of a mature organization not to change).

217. See WILMARTH, *supra* note 33, at 335–56.

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financial companies, this governance reform is essential to ensure that someone is finally looking out for the banks.

APPENDIX: BANK DIRECTORS

This Appendix lists the directors of the thirteen banks in the Article's sample, as well as each director's holding-company affiliation. The sample includes the lead bank subsidiaries of BHCs with more than \$100 billion in assets and more than 1 percent of their assets in nonbanks.²¹⁸

The Author compiled bank-board membership information from various state and international corporate registries, securities filings, and enforcement actions. The Author identified the bank directors' holding-company affiliations from securities filings and other publicly available information. Data are current as of August 2021.

Bank directors' holding-company affiliations are color-coded for ease of reference. The following Key explains the color-coding system. An individual with multiple roles in a BHC is classified by the individual's highest position in the organization.²¹⁹

Key	
Signal	Affiliation
<i>Italics</i>	<i>Bank director also serves as a director of the bank's BHC.</i>
Dark Gray	Bank director is an employee of the bank's BHC or a nonbank affiliate.
Light Gray	Bank director is an employee of the bank.
White	Bank director is otherwise unaffiliated with the bank and the BHC.

218. American Express Company is the only BHC that meets the criteria for inclusion in the sample for which data were unavailable.

219. For example, an individual who serves as both a BHC director and a BHC employee is categorized as a BHC director.

JPMorgan Chase & Co.
 Total Assets: \$3.69 trillion²²⁰
 Nonbank Assets: 22.15%²²¹

JPMorgan Chase Bank N.A. - Board of Directors ²²²	
Name	Role
<i>Linda Bammann</i>	<i>Holding company director</i>
<i>Stephen Burke</i>	<i>Holding company director</i>
<i>Todd Combs</i>	<i>Holding company director</i>
<i>James Crown</i>	<i>Holding company director</i>
<i>James Dimon</i>	<i>Holding company director and CEO</i>
<i>Timothy Flynn</i>	<i>Holding company director</i>
<i>Melody Hobson</i>	<i>Holding company director</i>
<i>Michael Neal</i>	<i>Holding company director</i>
<i>Phebe Novakovic</i>	<i>Holding company director</i>
<i>Virginia Rometty</i>	<i>Holding company director</i>

220. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1039502&dt=20210331> [<https://perma.cc/H64L-3YJ9>] (reporting JPMorgan Chase & Co.'s financial condition).

221. *Id.* at 22.

222. JPMORGAN CHASE & CO., *supra* note 26, at 26.

Bank of America CorporationTotal Assets: \$2.97 trillion²²³Nonbank Assets: 21.90%²²⁴

Bank of America N.A. - Board of Directors ²²⁵	
Name	Role
<i>Sharon Allen</i>	<i>Holding company director</i>
<i>Susan Bies</i>	<i>Holding company director</i>
<i>Frank Bramble Sr.</i>	<i>Holding company director</i>
<i>Pierre de Weck</i>	<i>Holding company director</i>
<i>Arnold Donald</i>	<i>Holding company director</i>
<i>Linda Hudson</i>	<i>Holding company director</i>
<i>Monica Lozano</i>	<i>Holding company director</i>
<i>Thomas May</i>	<i>Holding company director</i>
<i>Brian Moynihan</i>	<i>Holding company director and CEO</i>
<i>Lionel Nowell III</i>	<i>Holding company director</i>
<i>Denise Ramos</i>	<i>Holding company director</i>
<i>Clayton Rose</i>	<i>Holding company director</i>
<i>Michael White</i>	<i>Holding company director</i>
<i>Thomas Woods</i>	<i>Holding company director</i>
<i>David Yost</i>	<i>Holding company director</i>
<i>Maria Zuber</i>	<i>Holding company director</i>

223. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1073757&dt=20210331> [https://perma.cc/T8XP-3PKB] (reporting Bank of America Corporation's financial condition).

224. *Id.* at 22.

225. Company Extract on Bank of America, National Association from the Australian Sec. & Invs. Comm'n to Author (July 1, 2021) (on file with Author).

Citigroup Inc.Total Assets: \$2.31 trillion²²⁶Nonbank Assets: 31.36%²²⁷

Citibank N.A. - Board of Directors ²²⁸	
Name	Role
<i>Grace Dailey</i>	<i>Holding company director</i>
<i>Barbara Desoer</i>	<i>Holding company director</i>
<i>Jane Fraser</i>	<i>Holding company director and CEO, Citigroup</i>
<i>Sunil Garg</i>	CEO, Citibank, N.A. ²²⁹
<i>Duncan Hennes</i>	<i>Holding company director</i>
<i>Peter Henry</i>	<i>Holding company director</i>
<i>S. Leslie Ireland</i>	<i>Holding company director</i>
<i>Diana Taylor</i>	<i>Holding company director</i>
<i>James Turley</i>	<i>Holding company director</i>

226. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 13, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1951350&dt=20210331> [https://perma.cc/88LF-F5RB] (reporting Citigroup Inc.'s financial condition).

227. *Id.* at 22.

228. *Citibank, N.A. Board of Directors*, CITI, https://www.citigroup.com/citi/about/citibank_na_boardofdirectors.html [https://perma.cc/TM9K-QED3].

229. *Id.*

Wells Fargo & Company
 Total Assets: \$1.96 trillion²³⁰
 Nonbank Assets: 10.88%²³¹

Wells Fargo Bank N.A. - Board of Directors ²³²	
Name	Role
<i>Mark Chaney</i>	<i>Holding company director</i>
<i>Theodore Craver Jr.</i>	<i>Holding company director</i>
<i>Maria Morris</i>	<i>Holding company director</i>
<i>Richard Payne</i>	<i>Holding company director</i>
<i>Juan Pujadas</i>	<i>Holding company director</i>
<i>Charles Scharf</i>	<i>Holding company director and CEO</i>

230. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1120754&dt=20210331> [<https://perma.cc/2JDZ-V2Q8>] (reporting Wells Fargo & Company's financial condition).

231. *Id.* at 22.

232. Nuveen Mich. Quality Mun. Income Fund, Beneficial Ownership Report (Form SC 13D/A) (Feb. 8, 2021), <https://sec.report/Document/0001193125-21-035787/d67329dsc13da.htm> [<https://perma.cc/3NWX-A2GB>].

The Goldman Sachs Group, Inc.Total Assets: \$1.30 trillion²³³Nonbank Assets: 84.54%²³⁴

Goldman Sachs Bank USA - Board of Directors ²³⁵	
Name	Role
Vikram Atal	Unaffiliated ²³⁶
Kathryn Corley	Unaffiliated ²³⁷
Carey Halio	Holding company deputy treasurer and head of investor relations; CEO, Goldman Sachs Bank USA ²³⁸
Ann Kaplan	Retired holding company partner ²³⁹
Larry Klane	Unaffiliated ²⁴⁰
Deborah Leone	Retired holding company partner ²⁴¹
Dermot McDonogh	Chief operating officer, Goldman Sachs International ²⁴²
Simon Morris	Retired holding company partner ²⁴³
Jeffrey Schroeder	Holding company chief administrative officer ²⁴⁴
Esta Stecher	Chairman, Goldman Sachs Bank USA ²⁴⁵

233. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=2380443&dt=20210331> [<https://perma.cc/BXJ4-MN2S>] (reporting Goldman Sachs Group, Inc.'s financial condition).

234. *Id.* at 22.

235. GOLDMAN SACHS BANK USA, ANNUAL REPORT, THE COMMONWEALTH OF MASSACHUSETTS, SECRETARY OF THE COMMONWEALTH, CORPORATIONS DIVISION (2020).

236. Vikram Atal, LINKEDIN, <https://www.linkedin.com/in/vikram-atal-22a00816> [<https://perma.cc/WW4N-J65P>].

237. Kelly McNamara Corley, LINKEDIN, <https://www.linkedin.com/in/kelly-mcnamara-corley-b2928ab> [<https://perma.cc/JP5V-QWSW>].

238. Marshall, *supra* note 126.

239. *Ann F. Kaplan '77*, COLUM. BUS. SCH., <https://www8.gsb.columbia.edu/about-us/board/ann-f-kaplan-'77> [<https://perma.cc/S48Z-KW42>].

240. Larry Klane, LINKEDIN, <https://www.linkedin.com/in/larry-klane-b071634> [<https://perma.cc/5KCK-PMX4>].

241. Deborah Leone, LINKEDIN, <https://www.linkedin.com/in/debleone> [<https://perma.cc/4CBJ-64RZ>].

242. Dermot McDonogh, LINKEDIN, <https://www.linkedin.com/in/dermot-mcdonogh-6911015b/?originalSubdomain=uk> [<https://perma.cc/9FEL-HCRL>].

243. *Rothesay Life Announces Non-Executive Board Changes*, ROTHESAY (Mar. 28, 2019), <https://www.rothesay.com/news/newsroom/rothesay-life-announces-non-executive-board-changes> [<https://perma.cc/M9Y8-XM3P>].

244. *Jeff W. Schroeder*, CRUNCHBASE, <https://www.crunchbase.com/person/jeff-w-schroeder> [<https://perma.cc/HX7A-89XD>].

245. Kristin Broughton, *Goldman Sachs Names Carey Halio Head of Its Banking Unit*, AM. BANKER (Sept. 17, 2018, 1:45 PM),

Morgan StanleyTotal Assets: \$1.16 trillion²⁴⁶Nonbank Assets: 83.87%²⁴⁷

Morgan Stanley Bank N.A. - Board of Directors ²⁴⁸	
Name	Role
Jeffrey Gelfand	Former director, Morgan Stanley Smith Barney ²⁴⁹
Eric Heaton	President, Morgan Stanley Bank N.A. ²⁵⁰
Niloofar Razi Howe	Unaffiliated ²⁵¹
Richard Johnson	Unaffiliated ²⁵²
Shelley O'Connor	Holding company vice chairman and head of external affairs ²⁵³
Laura Olle	Unaffiliated ²⁵⁴
Kenneth Robinson	Unaffiliated ²⁵⁵
Thomas Sargeant	Unaffiliated ²⁵⁶
Paige Wisdom	Unaffiliated ²⁵⁷

<https://www.americanbanker.com/news/goldman-sachs-names-carey-halio-head-of-its-banking-unit> [<https://perma.cc/Z92V-RRZD>].

246. BD. OF GOVERNORS OF THE FED. RSRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=2162966&dt=20210331> [<https://perma.cc/SL4W-6YLA>].

247. *Id.* at 22.

248. Written Agreement Between Morgan Stanley Bank, N.A., and U.S. Department of the Treasury, Office of the Comptroller of the Currency, Docket No. 2020-058 (Oct. 8, 2020), <https://www.occ.gov/static/enforcement-actions/ea2020-058.pdf> [<https://perma.cc/CF7L-JFSE>].

249. Jeff Gelfand, LINKEDIN, <https://www.linkedin.com/in/jeff-gelfand-20a0179> [<https://perma.cc/TY2F-VN7J>].

250. *Morgan Stanley Bank, N.A. Receives "Outstanding" Rating for Community Reinvestment Accomplishments for Sixth Consecutive Time*, MORGAN STANLEY (May 19, 2020), <https://www.morganstanley.com/press-releases/morgan-stanley-bank-n-a-receives-outstanding-rating-for-commu> [<https://perma.cc/3PW7-EYKF>].

251. *Niloofar Howe*, *supra* note 193.

252. CHESAPEAKE BAY MAR. MUSEUM, *New Members, Officers Join CBMM's Board of Governors*, CHESTERTOWN SPY (Mar. 19, 2021), <https://chestertownspy.org/2021/03/19/new-members-officers-join-cbmms-board-of-governors> [<https://perma.cc/4VLY-85LM>].

253. *Shelley S. O'Connor*, SIFMA, <https://www.sifma.org/people/shelly-s-oconnor> [<https://perma.cc/3T68-C3MU>].

254. *Laura Newman Olle*, *supra* note 193.

255. Press Release, Abercrombie & Fitch Co., Abercrombie & Fitch Co. Announces Election of Ken Robinson to its Board of Directors (Feb. 5, 2021), <https://corporate.abercrombie.com/investors/newsevents/press-releases> [<https://perma.cc/3E6D-R4QA>].

256. Thomas J Sargeant, BLOOMBERG, <https://www.bloomberg.com/profile/person/9890024> [<https://perma.cc/WL5G-SE4Q>].

257. Paige Wisdom, LINKEDIN, <https://www.linkedin.com/in/paige-wisdom> [<https://perma.cc/E25N-U4RY>].

U.S. BancorpTotal Assets: \$553 billion²⁵⁸Nonbank Assets: 1.78%²⁵⁹

U.S. Bank N.A. - Board of Directors ²⁶⁰	
Name	Role
<i>Warner Baxter</i>	<i>Holding company director</i>
<i>Dorothy Bridges</i>	<i>Holding company director</i>
<i>Elizabeth Buse</i>	<i>Holding company director</i>
<i>Andrew Cecere</i>	<i>Holding company director and CEO</i>
James Chosy	Holding company general counsel²⁶¹
<i>Kimberly Ellison-Taylor</i>	<i>Holding company director</i>
<i>Kimberly Harris</i>	<i>Holding company director</i>
<i>Ronald Hernandez</i>	<i>Holding company director</i>
<i>Olivia Kirtley</i>	<i>Holding company director</i>
<i>Karen Lynch</i>	<i>Holding company director</i>
<i>Richard McKenney</i>	<i>Holding company director</i>
<i>Yusuf Mehdi</i>	<i>Holding company director</i>
Jodi Richard	Holding company chief risk officer²⁶²
<i>John Wiehoff</i>	<i>Holding company director</i>
<i>Scott Wine</i>	<i>Holding company director</i>

258. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1119794&dt=20210331> [<https://perma.cc/BZX9-GR2U>] (reporting U.S. Bancorp's financial condition).

259. *Id.* at 22.

260. U.S. Bank, Nat'l Ass'n, Notice of Change of Directors (Form 29) (June 4, 2021).

261. *James L. Chosy*, U.S. BANCORP, <https://ir.usbank.com/management/james-chosy> [<https://perma.cc/M6NL-B8K8>].

262. *Jodi L. Richard*, U.S. BANCORP, <https://ir.usbank.com/management/jodi-richard> [<https://perma.cc/G9R9-KECB>].

Truist Financial CorporationTotal Assets: \$518 billion²⁶³Nonbank Assets: 2.68%²⁶⁴

Truist Bank - Board of Directors ²⁶⁵	
Name	Role
<i>Jennifer Banner</i>	<i>Holding company director</i>
<i>David Boyer Jr.</i>	<i>Holding company director</i>
<i>Agnes Bundy Scanlan</i>	<i>Holding company director</i>
<i>Anna Cablik</i>	<i>Holding company director</i>
<i>Dallas Clement</i>	<i>Holding company director</i>
<i>Paul Donahue</i>	<i>Holding company director</i>
<i>Paul Garcia</i>	<i>Holding company director</i>
<i>Patrick Graney III</i>	<i>Holding company director</i>
<i>Linnie Haynesworth</i>	<i>Holding company director</i>
<i>Kelly King</i>	<i>Holding company director and CEO</i>
<i>Easter Maynard</i>	<i>Holding company director</i>
<i>Donna Morea</i>	<i>Holding company director</i>
<i>Charles Patton</i>	<i>Holding company director</i>
<i>Nido Qubein</i>	<i>Holding company director</i>
<i>David Ratcliffe</i>	<i>Holding company director</i>
<i>William Rogers Jr.</i>	<i>Holding company director and chief operating officer</i>
<i>Frank Scruggs Jr.</i>	<i>Holding company director</i>
<i>Christine Sears</i>	<i>Holding company director</i>
<i>Thomas Skains</i>	<i>Holding company director</i>
<i>Bruce Tanner</i>	<i>Holding company director</i>
<i>Thomas Thompson</i>	<i>Holding company director</i>
<i>Steven Voorhees</i>	<i>Holding company director</i>

263. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1074156&dt=20210331> [https://perma.cc/T2PC-3APB] (reporting Truist Financial Corporation's financial condition).

264. *Id.* at 22.

265. TRUIST BANK, ANNUAL REPORT: THE COMMONWEALTH OF MASSACHUSETTS, SECRETARY OF THE COMMONWEALTH, CORPORATIONS DIVISION (2020) (on file with author).

The PNC Financial Services Group, Inc.Total Assets: \$475 billion²⁶⁶Nonbank Assets: 1.32%²⁶⁷

PNC Bank N.A. - Board of Directors ²⁶⁸	
Name	Role
<i>Joseph Alvarado</i>	<i>Holding company director</i>
<i>Charles Bunch</i>	<i>Holding company director</i>
<i>Debra Cafaro</i>	<i>Holding company director</i>
<i>Marjorie Rodgers Cheshire</i>	<i>Holding company director</i>
<i>William Demchak</i>	<i>Holding company director and CEO</i>
<i>Andrew Feldstein</i>	<i>Holding company director</i>
<i>Richard Harshman</i>	<i>Holding company director</i>
<i>Daniel Hesse</i>	<i>Holding company director</i>
<i>Michael Lyons</i>	Head of Corporate & Institutional Banking ²⁶⁹
<i>Linda Medler</i>	<i>Holding company director</i>
<i>E. William Parsley III</i>	Holding company chief operating officer ²⁷⁰
<i>Martin Pfinsgraff</i>	<i>Holding company director</i>
<i>Robert Reilly</i>	Holding company chief financial officer ²⁷¹
<i>Toni Townes-Whitley</i>	<i>Holding company director</i>
<i>Michael Ward</i>	<i>Holding company director</i>

266. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1069778&dt=20210331> [https://perma.cc/RA5S-XHTK] (reporting PNC Financial Services Group, Inc.'s financial condition).

267. *Id.* at 22.

268. PNC BANK, NAT'L ASS'N, APPLICATION FOR AUTHORITY TO TRANSACT BUSINESS OR CONDUCT AFFAIRS IN ARIZONA (FORM C018) (Aug. 31, 2020) (on file with author).

269. THE PNC FIN. SERVS. GRP., 2021 PROXY STATEMENT 38 (2021), <https://thepncfinancialservicesgroupinc.gcs-web.com/static-files/b339e70e-663c-488e-a38b-36ba40989fe9> [https://perma.cc/7RKP-ZEHW].

270. *Id.*

271. *Id.*

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The Bank of New York Mellon CorporationTotal Assets: \$465 billion²⁷²Nonbank Assets: 15.07%²⁷³

Bank of New York Mellon - Board of Directors ²⁷⁴	
Name	Role
<i>Linda Cook</i>	<i>Holding company director</i>
<i>Joseph Echevarria Jr.</i>	<i>Holding company director</i>
<i>Thomas Gibbons</i>	<i>Holding company director and CEO</i>
<i>Marguerite Gilliland</i>	<i>Holding company director</i>
<i>Jeffrey Goldstein</i>	<i>Holding company director</i>
<i>Kumara Gowrappan</i>	<i>Holding company director</i>
<i>Ralph Izzo</i>	<i>Holding company director</i>
<i>Edmund Kelly</i>	<i>Holding company director</i>
<i>Elizabeth Robinson</i>	<i>Holding company director</i>
<i>Samuel Scott III</i>	<i>Holding company director</i>
<i>Frederick Terrell</i>	<i>Holding company director</i>
<i>Alfred Zollar</i>	<i>Holding company director</i>

272. BD. OF GOVERNORS OF THE FED. RSRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=3587146&dt=20210331> [https://perma.cc/EQT7-MAB3] (reporting Bank of New York Mellon Corporation's financial condition).

273. *Id.* at 22.

274. Company extract on The Bank of New York Mellon from the Australian Sec. & Invs. Comm'n to author, *supra* note 121.

State Street CorporationTotal Assets: \$317 billion²⁷⁵Nonbank Assets: 4.21%²⁷⁶

State Street Bank & Trust Company - Board of Directors ²⁷⁷	
Name	Role
<i>Amelia Fawcett</i>	<i>Holding company director</i>
<i>William Freda</i>	<i>Holding company director</i>
<i>William Meaney</i>	<i>Holding company director</i>
<i>Ronald O'Hanley</i>	<i>Holding company director and CEO</i>
<i>Sean O'Sullivan</i>	<i>Holding company director</i>
<i>Richard Sergel</i>	<i>Holding company director</i>
<i>Gregory Summe</i>	<i>Holding company director</i>

275. BD. OF GOVERNORS OF THE FED. RSRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1111435&dt=20210331> [https://perma.cc/C3MQ-93F8] (reporting State Street Corporation's financial condition).

276. *Id.* at 22.

277. *Board of Directors*, STATE ST., <https://investors.statestreet.com/corporate-governance/board-of-directors/default.aspx> [https://perma.cc/H5V4-DN9F].

Ally Financial Inc.
 Total Assets: \$182 billion²⁷⁸
 Nonbank Assets: 5.96%²⁷⁹

Ally Bank - Board of Directors ²⁸⁰	
Name	Role
<i>Kenneth Bacon</i>	<i>Holding company director</i>
<i>Katryn Blake</i>	<i>Holding company director</i>
<i>Maureen Breakiron-Evans</i>	<i>Holding company director</i>
Bradley Brown	Holding company treasurer²⁸¹
<i>Jeffrey Brown</i>	<i>Holding company director and CEO</i>
<i>William Cary</i>	<i>Holding company director</i>
<i>Mayree Clark</i>	<i>Holding company director</i>
<i>Kim Fennebresque</i>	<i>Holding company director</i>
<i>Franklin Hobbs</i>	<i>Holding company director</i>
<i>Marjorie Magner</i>	<i>Holding company director</i>
<i>Brian Sharples</i>	<i>Holding company director</i>
<i>John Stack</i>	<i>Holding company director</i>
<i>Michael Steib</i>	<i>Holding company director</i>

278. BD. OF GOVERNORS OF THE FED. RSRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=1562859&dt=20210331> [<https://perma.cc/55S9-6QGH>] (reporting Ally Financial Inc.'s financial condition).

279. *Id.* at 22.

280. ALLY BANK, ANNUAL REPORT: FOR USE BY FOREIGN PROFIT CORPORATION (2021) (on file with author) (reporting to the Michigan Department of Licensing and Regulatory Affairs).

281. *Bradley (Brad) J. Brown*, ALLY, <https://media.ally.com/leadership-bradley-brown> [<https://perma.cc/J84R-LYEW>].

Discover Financial ServicesTotal Assets: \$114 billion²⁸²Nonbank Assets: 2.31%²⁸³

Discover Bank - Board of Directors ²⁸⁴	
Name	Role
Margaret Bellock	Unaffiliated ²⁸⁵
Frank Grossman	Unaffiliated ²⁸⁶
<i>Roger Hochschild</i>	<i>Holding company director and CEO</i>
Carlos Minetti	President of Consumer Banking ²⁸⁷
William O'Hara	Retired holding company executive ²⁸⁸
Frank Reilly	Unaffiliated ²⁸⁹
James Roszkowski	President, Discover Bank ²⁹⁰
Beverly Sibblies	Unaffiliated ²⁹¹
Joseph Yob	Retired holding company executive ²⁹²

282. BD. OF GOVERNORS OF THE FED. RESRV. SYS., BANK HOLDING COMPANY PERFORMANCE REPORT MARCH 31, 2021, at 5 (2021), <https://www.ffiec.gov/npw/FinancialReport/ReturnFinancialReportPDF?rpt=BHCPR&id=3846375&dt=20210331> [https://perma.cc/VB35-EZ98] (reporting Discover Financial Services' financial condition).

283. *Id.* at 22.

284. DISCOVER BANK, ANNUAL REPORT: COMMONWEALTH OF KENTUCKY (2021) (on file with author) (reporting to the Commonwealth of Kentucky).

285. *Margaret J. Bellock*, OPENSECRETS, <https://www.opensecrets.org/search?order=desc&q=Margaret+j+bellock&sort=D&type=donors> [https://perma.cc/57A3-WT9G] (listing Ms. Bellock as "retired" since 2008).

286. Frank Grossman, *supra* note 193.

287. *Leadership that Drives Innovation: Executive Committee*, DISCOVER, <https://www.discover.com/company/our-company/meet-the-team/executive-committee> [https://perma.cc/7YEP-6LSR].

288. *Curriculum Vitae of William P. O'Hara*, RED MCCOMBS SCH. OF BUS., <https://www.mcombs.utexas.edu/Departments/Accounting/~media/0A30086830734F0FBB5CFC5BC2563C2A.ashx> [https://perma.cc/8N2Z-Y9TZ].

289. *Frank Reilly*, *supra* note 193.

290. Jim Roszkowski, LINKEDIN, <https://www.linkedin.com/in/jjroszkowski> [https://perma.cc/YP9M-MBMV].

291. *Beverly A. Sibblies, Children's Home + Aid*, CRAIN'S CHI. BUS. <https://www.chicagobusiness.com/section/people-on-the-move/2911155> [https://perma.cc/4G2P-VUTJ].

292. *President's Advisory Counsel*, COLO. MOUNTAIN COLL., <https://coloradomtn.edu/about-us/president/presidents-advisory-council> [https://perma.cc/P55M-HYLN].