
THE FINANCIAL RESPONSE TO THE COVID-19 PANDEMIC

As of August 1, 2020

Michael Barr, Howell Jackson, Margaret Tahyar¹

Abstract

We are living through extraordinary times as the United States has struggled to deal with the global COVID-19 pandemic, and as of the writing of this paper, we remain in the midst of the crisis. We still do not know what the full economic and financial consequences of the pandemic will be, but they are likely to persist for an extended period, as many people are unlikely to return to normal work or consumption patterns soon, and household and business defaults are likely to increase and negatively affect the financial sector. This paper, written to assist faculty in teaching about the pandemic, focuses on key actions taken by the financial regulators in response to the crisis so far, giving a detailed summary of the actions taken by the Federal Reserve, the Treasury Department, and Congress. We discuss the Federal Reserve's monetary policy actions, emergency lending facilities, and supervisory forbearance by the federal banking agencies. We also provide a summary of financial provisions of the CARES Act, including an analysis of the Paycheck Protection Program. We explore a number of central themes already emerging, including the blurry line between monetary policy and fiscal policy. We also highlight the fact that unlike the Financial Crisis of 2008, today's economic crisis is caused by the failure to take sufficient public health actions to contain a global pandemic, not poor policy and risk choices in the financial markets; the fact that the crisis is caused by a public health failure poses unique problems for economic and financial policymakers in crafting responses.

¹ The authors acknowledge the assistance of Amy Lorenc (Michigan Law '22) and Julia Deng (Michigan Law '21) in the development of this supplement to MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY (Foundation Press, 2d ed. 2018).

I. INTRODUCTION

A. AN UNPRECEDENTED HEALTH CRISIS BUT NOT YET A FINANCIAL CRISIS

We are living through extraordinary times as the United States has struggled to deal with the global COVID-19 pandemic. The public health crisis has laid bare problems with our governmental infrastructure and leadership, exacerbated existing conditions of social and racial inequality, and accelerated many economic and social trends. It would be a vast understatement to say that many parts of the federal and state governments have not functioned as well as citizens have a right to expect. Our government's, and in some ways, our citizens' response to the crisis has not compared well with that of many other countries. As this pandemic module is released, taking into account events up to July 28, 2020, we remain in the midst of the crisis. We still do not know what the economic consequences will be, whether and how any economic recovery or continued COVID-19 surges will play out, and when historic highs in unemployment will lessen. We do know that the societal dislocation is unprecedented and immense. The economic consequences of the pandemic are likely to persist for an extended period, as the virus is increasing in many states—and even in states with muted transmission, many people are unlikely to return to normal work or consumption patterns soon.

The pandemic is a public health and economic crisis, but not yet a financial crisis.² Unlike the Financial Crisis of 2008, the problems did not first arise because of poor policy and risk choices in the financial markets. The banking sector entered the pandemic in a position of resilience and strength. Federal Reserve Chairman Jay Powell stated that “[t]he current downturn is unique in that it is attributable to the virus and the steps taken to limit its fallout. This time, high inflation was not a problem. There was no economy-threatening bubble to pop and no unsustainable boom to bust. The virus is the cause, not the usual suspects—something worth keeping in mind as we respond.”³ But, an economic crisis caused by a health crisis can morph into a financial crisis. Congress and the financial regulators have thus been faced with unique challenges as they try to prevent the economic fallout from the pandemic from turning into another financial crisis.⁴

B. ACTIONS TAKEN BY CONGRESS AND THE FINANCIAL REGULATORS

It has been fortunate that many in positions of policy making power, both in Congress and at the financial regulatory agencies, have clear memories of the responses to the 2008 Financial Crisis.⁵ Despite the partisan times within which we live, Congress has passed three bills to lessen the economic harms to households and businesses and a fourth bill is widely expected. Many of the Congressional actions have been unprecedented, and bipartisan support for these types of measures would have been unthinkable before the pandemic. Federal financial regulators have been extremely active in developing responses. From January to July, 2020, their output has been

² Throughout this document, cross references are provided in the footnotes to sections of our *Financial Regulation: Law and Policy* textbook that contain useful background information. For more information on systemic risk, see BARR, JACKSON & TAHYAR, *supra* note 1, ch. 9.1 at 935-960.

³ Press Release, Bd. of Governors of the Fed. Res. Sys., Chair Jerome H. Powell on Current Economic Issues (May 13, 2020), <https://www.federalreserve.gov/newsevents/speech/powell20200513a.htm>.

⁴ See Howell E. Jackson & Steven L. Schwarcz, *Protecting Financial Stability: Lessons from the Coronavirus Pandemic* (Duke Law School Public Law & Legal Theory Series No. 2020-39, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644417.

⁵ For more information regarding the 2008 Financial Crisis, see BARR, JACKSON & TAHYAR, *supra* note 1.

prodigious: the Federal Reserve pulled out, on one Sunday afternoon, all of its Financial Crisis monetary policy toolkit, actions which often took weeks or months to develop during the time of the Financial Crisis. These monetary policy actions, plus the announcements of an alphabet soup of programs, both those that are a reprise from the Financial Crisis and those that are new, were aimed at instilling confidence in the financial system and calming market volatility. As we learned during the Financial Crisis, some Federal Reserve actions calm markets by their mere announcement. Not counting the Federal Reserve programs or facilities or the SBA's Paycheck Protection Program, the CFPB, CFTC, FDIC, Federal Reserve, FFIEC, FHFA (along with Fannie Mae and Freddie Mac), OCC and SEC have provided, while themselves working remotely under lockdown conditions, approximately 166 new regulations, guidance and other announcements related to adapting the legal framework to pandemic conditions.⁶

C. ANALYSIS OF KEY ACTIONS TAKEN INVOLVING THE FINANCIAL SECTOR

This paper focuses on key actions taken by financial regulators over the last several months. These include the Federal Reserve's monetary actions and the reprise of its Financial Crisis programs. We then cover the funds distributed by the CARES Act, including the Paycheck Protection Program, before exploring the Federal Reserve's creation of innovative new programs, such as the Main Street Lending Program, the program for municipalities, and the non-profit program. We then cover supervisory actions taken by regulators around stress testing and capital, and actions to provide mortgage and rental relief to consumers and its impact on the credit cycle. We assess transparency and Congressional oversight. We note the uncertainty of what might happen next. We finish by exploring certain central themes that are already emerging.⁷

II. INITIAL FEDERAL RESERVE MONETARY RESPONSE

The Federal Reserve responded aggressively to the economic shock of the COVID-19 crisis, quickly deploying virtually all of its Financial Crisis monetary policy tools and programs. In early March, the Federal Open Market Committee (FOMC) voted twice to lower the target range for the federal funds rate by a total of 1-1.5%, bringing the range to 0 to .25% for the first time since the Financial Crisis.⁸ In a long-range use of forward guidance, Chairman Powell has made clear

⁶ *Financial Regulatory Agency Actions in Response to COVID-19*, DAVIS POLK & WARDWELL LLP (July 31, 2020),

https://www.davispolk.com/files/financial_regulatory_agency_actions_in_response_to_covid-19.pdf.

This count approximates total agency actions. Where appropriate, it includes the grouping of similar actions and announcements together. State financial regulatory agencies, Governors, and Mayors have also been acting at an unprecedented rate. During the same period covered in the text, the New York Department of Financial Services, New York Governor Andrew Cuomo and New York City Mayor Bill de Blasio, for example, have implemented approximately 26 financial actions in response to the pandemic.

⁷ This paper could be used to facilitate discussion of these central themes in financial regulation courses during the 2020 academic year.

⁸ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Issues FOMC Statement (Mar. 3, 2020, 10:00 AM),

<https://www.federalreserve.gov/newsevents/pressreleases/monetary20200303a.htm>;

Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Issues FOMC Statement (Mar. 15, 2020, 5:00 PM),

<https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315a.htm>; Liz Frazier, *Fed Cuts Rates to Near Zero in an Effort to Combat Coronavirus Impact*, FORBES (Mar. 15, 2020),

<https://www.forbes.com/sites/lizfrazierpeck/2020/03/15/fed-cuts-rates-to-near-zero-in-an-effort-to-combat-coronavirus-impact/#703f56133517>.

that the Federal Reserve is not considering raising rates in the foreseeable future.⁹ In fact, most Federal Reserve Board members and Bank presidents project that rates will stay near zero through the end of 2022.¹⁰ Chairman Powell has indicated that the FOMC is unlikely to lower rates below zero,¹¹ unlike the European Central Bank,¹² and despite Twitter comments by President Trump.¹³

On the same day it announced its second rate cut, the Federal Reserve also lowered the rate it charges banks to borrow from its discount window¹⁴ from 1.75% to 0.25%, and eliminated banks' reserve requirement, allowing the funds banks must usually keep in accounts at a Federal Reserve Bank to be used instead to support more lending.¹⁵ Despite this measure, excess reserves remain extremely elevated. To further encourage lending, the Federal Reserve eased the conditions that applied to the intraday credit it provides to banks and encouraged banks to use their capital and liquidity buffers.¹⁶ The Federal Reserve also expanded its repurchase agreement operations and began purchasing massive amounts of Treasury securities and agency MBS, resumed Quantitative Easing, and ended the notion of shrinking the Federal Reserve's balance sheet.¹⁷ The Federal Reserve initially committed to purchasing \$500 billion in Treasury securities and \$200 in agency mortgage-backed securities (MBS), but one week later made the purchases open ended, promising to purchase "in the amounts needed to support smooth market functioning and effective transmission of monetary policy . . ."¹⁸ The Federal Reserve also re-instated dollar swap lines for foreign central banks, which are designed to ease overseas liquidity in the dollar.¹⁹

Each of these monetary policy tools had been widely used during the Financial Crisis. Based on concerns that the powerful tool of the discount window was underused during the Financial

⁹ See *Transcript of Chair Powell's Press Conference*, BD. OF GOVERNORS OF THE FED. RES. SYS. (June 10, 2020), <https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20200610.pdf>.

¹⁰ *Survey of Economic Projections*, BD. OF GOVERNORS OF THE FED. RES. SYS. (June 10, 2020, 2:00 PM), <https://www.federalreserve.gov/monetarypolicy/files/fomcprojtabl20200610.pdf>.

¹¹ See *Full Transcript: Fed Chair Jerome Powell's 60 Minutes Interview on Economic Recovery from the Coronavirus Pandemic*, CBS NEWS (May 17, 2020), <https://www.cbsnews.com/news/full-transcript-fed-chair-jerome-powell-60-minutes-interview-economic-recovery-from-coronavirus-pandemic/>.

¹² For the ongoing controversy on negative interest rates in the European Union, see, e.g., M. Arnold, *ECB Rebuffs Bank Complaints on Negative Interest Rates*, Financial Times, May 13, 2020, <https://www.ft.com/content/52de6e70-56bc-4da9-adf7-b228c8da79a0>.

¹³ See, e.g., S. Goldstein, *Trump tweets support for negative interest rates*, MarketWatch, Sept. 11, 2019, <https://www.marketwatch.com/story/trump-tweets-support-for-negative-interest-rates-2019-09-11>.

¹⁴ For more information on the discount window and the Federal Reserve's role as the lender of last resort, see BARR, JACKSON & TAHYAR, *supra* note 1, ch. 9.1 at 935-60.

¹⁵ Press Release, Bd. of Governors of the Fed. Res. Sys., *Federal Reserve Actions to Support the Flow of Credit to Households and Businesses* (Mar. 15, 2020, 5:00 PM), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315b.htm>.

¹⁶ *Id.*

¹⁷ Press Release, Bd. of Governors of the Fed. Res. Sys., *Federal Reserve Issues FOMC Statement* (Mar. 15, 2020, 5:00 PM), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315a.htm>.

¹⁸ Press Release, Bd. of Governors of the Fed. Res. Sys., *Federal Reserve Announces Extensive New Measures to Support the Economy* (Mar. 23, 2020, 8:00 AM), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm>.

¹⁹ See, e.g., Press Release, Bd. of Governors of the Fed. Res. Sys., *Coordinated Central Bank Action to Enhance the Provision of U.S. Dollar Liquidity* (Mar. 15, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315c.htm>.

Crisis because of the stigma attached to its use, the Federal Reserve made announcements designed to reduce that stigma and encourage its use. JPMorgan Chase, along with other large banks, announced that it would make use of the discount window.²⁰

III. FEDERAL RESERVE INVOCATION OF EMERGENCY LENDING

A. FEDERAL RESERVE USE OF EMERGENCY AUTHORITY UNDER SECTION 13(3)

Shortly after cutting interest rates, the Federal Reserve began invoking its emergency authority under Section 13(3) of the Federal Reserve Act²¹ for the first time since the Financial Crisis. Section 13(3), “discounts to individuals, partnerships and corporations,” provides that in “unusual and exigent” circumstances, the Federal Reserve may make loans to “any participant” in a broad-based facility or program.²² Any participant in such a program must be unable to “secure adequate credit accommodations” from the banking sector.²³ The program must be “for the purposes of providing liquidity to the financial system,” a term that the Federal Reserve has broadly interpreted, cannot be aimed at one company (to prevent bail-outs of particular financial firms as experienced during the Financial Crisis), and must be terminated in a “timely and orderly fashion.”²⁴ Only secured loans may be made under Section 13(3), and at the time that the loans are made, the Federal Reserve must have procedures in place designed to ensure that it has security sufficient in its judgment to protect the taxpayer from losses.²⁵

At least five of the Federal Reserve governors must vote for any use of the Federal Reserve’s emergency powers and, in a reform instituted by Dodd-Frank, the Treasury Secretary must concur. When Dodd Frank reforms were being added to Section 13(3), it had been contemplated that requiring the Treasury Secretary’s agreement to any Federal Reserve use of emergency authority would provide an important measure of political accountability because potential losses might be seen as more appropriate for fiscal policy, rather than monetary policy. Some had expressed concerns, and others the hope, that this political check might be used by a Treasury Secretary (and behind him a President) to block Federal Reserve interventions in the next Financial Crisis. As it turned out, these fears and hopes did not play out in the face of a global health crisis. The Treasury Secretary quickly consented to all such uses of the Federal Reserve’s emergency authority.

²⁰ See *Financial Services Forum Statement on the Discount Window*, FIN. SERVS. F. (Mar. 16, 2020), <https://www.fsforum.com/types/press/releases/financial-services-forum-statement-on-the-discount-window/> (announcing that “all members [of the Financial Services Forum] are accessing funding from the discount window to reassure financial institutions of all sizes that they should use the facility to meet client liquidity needs during this difficult period”).

²¹ For more information on the Federal Reserve’s emergency lending authority under Section 13(3), see BARR, JACKSON & TAHYAR, *supra* note 1, ch. 9.1 at 935-60.

²² 12 U.S.C. § 343(3)(A) (2010). Capital market reactions in mid-March also triggered a number of SEC-imposed circuit breakers for both individual securities and broader market indices, responding to extreme volatility and a rush to cash. An industry-led task force is currently studying whether this experience suggests the need to reform the design of circuit-breakers. See Alexander Osipovich & Dawn Lim, *Wall Street Explores Changes to Circuit Breakers After Coronavirus Crash*, WALL STREET J. (Apr. 15, 2020), <https://www.wsj.com/articles/wall-street-explores-changes-to-circuit-breakers-after-coronavirus-crash-11586952558>.

²³ *Id.*

²⁴ *Id.* § 343(3)(B)(i).

²⁵ *Id.*

B. REVIVAL OF THE FINANCIAL CRISIS ALPHABET SOUP OF PROGRAMS

The Federal Reserve began the use of its emergency lending authority by reviving four lending facilities that were used during the Financial Crisis to provide liquidity to nonbank financial entities and corporations: the Primary Dealer Credit Facility (PDCF), the Money Market Mutual Fund Liquidity Facility (MMLF), the Commercial Paper Funding Facility (CPFF) and the Term Asset Backed Securities Loan Facility (TALF).²⁶ The PDCF is intended to keep credit markets functioning by lending to primary dealers with investment grade debt securities as collateral. The MMLF provides an indirect backstop to money-market mutual funds (MMFs),²⁷ which have experienced high rates of investor redemptions during times of financial turbulence. MMLF lends to banks against collateral they purchase from MMFs. The CPFF allows the Federal Reserve to purchase commercial paper, providing support to eligible issuers, including financial and commercial companies. The Federal Reserve also restarted the crisis-era Term Asset Backed Securities Loan Facility (TALF), which lends to holders of asset-backed securities collateralized by loans, including student loans, auto loans, and credit card loans.²⁸ Unlike during the Financial Crisis, the Federal Reserve broadened the range of assets that are eligible collateral for TALF to include triple-A rated tranches of outstanding commercial MBS and newly issued collateralized loan obligations.²⁹

The Treasury pledged \$20 billion from its Exchange Stabilization Fund (ESF) to backstop both the MMLF and CPFF facilities, with \$10 billion allotted to each, and provided \$10 billion in first loss support to the TALF.³⁰ As of the date of this paper, the TALF has not actually been used, which may be an example of the Federal Reserve's announcement effect or which may be because banks are directly using the discount window instead of using TALF. The CPFF has had relatively low but stable usage since it became operational.³¹ The PDCF and the MMF facilities were heavily used in March and April, but then usage gradually fell off.³²

During the Financial Crisis, the Treasury Department had established a Temporary Guarantee Program for Money Market Funds, using its Exchange Stabilization Fund to guarantee MMFs on an unsecured basis. Congress prohibited the use of the ESF to guarantee MMFs in the Dodd-Frank Act. At Treasury's request, Congress reversed the prohibition on Treasury using the ESF to provide a guaranty to MMFs as part of the CARES Act. That new power has not yet been invoked as of the end of July, 2020.

²⁶ For a review of all of the Federal Reserve's programs during the Financial Crisis see, e.g., Margaret E. Tahyar (editor), *Republication: 2009 Financial Crisis Manual: A Guide to the Laws, Regulations and Contracts of the Financial Crisis, with Updated 2020 Introduction*, DAVIS POLK & WARDWELL LLP (Mar. 2020), https://www.davispolk.com/files/2020-03-16_republication_the_2009_davis_polk_financial_crisis_manual.pdf.

²⁷ For more information on money market mutual funds, see BARR, JACKSON & TAHYAR, *supra* note 1, ch. 12.3 at 1301-1324.

²⁸ Federal Reserve, *supra* note 18.

²⁹ Federal Reserve, *supra* note 18.

³⁰ Jeffrey Cheng, Dave Skidmore & David Wessel, *What's the Fed Doing in Response to the COVID-19 Crisis? What More Could It Do?*, BROOKINGS INST. (July 17, 2020), <https://www.brookings.edu/research/fed-response-to-covid19/>.

³¹ See Daleep Singh, *The Fed's Emergency Facilities: Usage, Impact, and Early Lessons*, FED. RES. BANK OF N.Y. (July 8, 2020), https://www.newyorkfed.org/medialibrary/media/newsevents/speeches/2020/sin200708/Singh_HVPP_exhibits_7.7.pdf.

³² *Id.*

Lev Menand has suggested that the Dodd Frank prohibition on a guaranty raises questions about whether, before the CARES Act, the Treasury had the legal authority to use the ESF to backstop MMFs in the days between the announcement of the MMF facility and the passage of the CARES Act.³³ One of the key learnings from the Financial Crisis is that the law gets stretched in a crisis; the use of indirect purchases as opposed to direct guarantees raises that question once again.³⁴ It is a fair question to ask whether the Treasury had the authority to announce such a backstop in light of the prohibition on a direct guarantee. In March and April, the Fed's MMLF was the most widely used of the Federal Reserve's programs.³⁵ This usage makes it apparent that there were real stresses and strains in the money market funds and that announcement affect alone did not create enough positive impact. The need for a federal backstop also raises questions about whether the post-Financial Crisis reforms of money market funds were sufficient.³⁶

IV. FISCAL RESPONSE—CONGRESSIONAL RELIEF LEGISLATION

A. THE CARES ACT

Congress responded to the COVID-19 pandemic by passing three relief bills in March, 2020, each more comprehensive than the last. The third bill, known as the CARES Act, was signed into law by President Trump on March 27 and provided more than \$2 trillion in financial assistance to individuals and businesses, making it by some measures (although not GDP³⁷) the largest aid bill in U.S. history.³⁸ The bill included \$250 billion to expand unemployment insurance eligibility and increase unemployment benefits by \$600 per week for four months.³⁹ The bill also included \$300 billion in direct payments to households, with most households under an income threshold eligible to receive one-time checks for \$1,200 per adult and \$500 per child.⁴⁰ The \$2 trillion total does not include the effect of leverage from the Federal Reserve programs. The \$454 billion in allocations to the Treasury to provide credit protection to the Federal Reserve programs can be

³³ Lev Menand, *Unappropriated Dollars: The Fed's Ad Hoc Lending Facilities and the Rules that Govern Them* (European Corp. Governance Inst., Law Working Paper No. 518/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602740.

³⁴ *Id.*

³⁵ See Singh, *supra* note 31.

³⁶ BlackRock, one of the largest asset managers, has acknowledged this point and has already published a paper suggesting reforms. Barbara Novick et al., *Lessons from COVID-19: U.S. Short-Term Money Markets*, BLACKROCK (July 2020), <https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-lessons-from-covid-19-us-short-term-money-markets-july-2020.pdf>. Please see Barr, Jackson, and Tahyar, FINANCIAL REGULATION, Chapter 12.3 and 12.4.

³⁷ Douglas Holtz-Eakin, *CARES Act in Historical Perspective*, AM. ACTION F. (Mar. 27, 2020), <https://www.americanactionforum.org/daily-dish/cares-act-in-historical-perspective/>.

³⁸ CARES Act, H.R. 748, 116th Cong. (2020); Jack Brewster, *Trump Signs \$2 Trillion Coronavirus Relief Bill into Law, Largest Aid Package in U.S. History*, FORBES (Mar. 27, 2020), <https://www.forbes.com/sites/jackbrewster/2020/03/27/trump-signs-2-trillion-stimulus-bill-into-law-largest-aid-package-in-us-history/#4abbfd124ea5>.

³⁹ AnnaMaria Andriotis et. al, *What's in the \$2 Trillion Senate Coronavirus Bill*, WALL STREET J. (Mar. 26, 2020), <https://www.wsj.com/articles/whats-in-the-2-trillion-senate-coronavirus-bill-11585185450>.

⁴⁰ *Id.*

leveraged, according to some estimates, up to approximately \$4 trillion or more because of the Federal Reserve lending power added on to the Treasury credit protection layer.⁴¹

B. THE PAYCHECK PROTECTION PROGRAM

The CARES Act created a \$349 billion loan program for small businesses known as the Paycheck Protection Program (PPP) that was designed to provide an incentive for small businesses to keep workers on their payroll.⁴² The definition of a small business was drawn from the Small Business Association's (SBA's) regulations and guidelines,⁴³ with modifications aimed at increasing eligibility.⁴⁴ The most commonly known requirement is that the business must have fewer than 500 employees, though exceptions are made for certain industries such as restaurants, hotels, and franchisees where the 500 employee requirement is counted on a per location basis.⁴⁵ Exceptions to the usual SBA eligibility requirements⁴⁶ were also made for religious organizations and non-profits.⁴⁷

A PPP loan is essentially a grant disguised as a loan: the loans can be forgiven if the recipient business maintains or restores most of its employee headcount and the proceeds are primarily used for payroll, rent, mortgage interest, or utilities.⁴⁸ While the PPP is implemented by the SBA, the SBA relies on private lenders to originate and service the loans, which are then fully guaranteed by the U.S. government.⁴⁹ Lenders take no credit risk and receive a fee for processing the loan application.⁵⁰ The PPP is supported by the Federal Reserve's PPP Liquidity Facility (PPPLF), which extends credit to financial institutions that make PPP loans.⁵¹

⁴¹ Jeanna Smialek, *How the Fed's Magic Money Machine Will Turn \$454 Billion Into \$4 Trillion*, WALL STREET J. (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/business/economy/fed-coronavirus-stimulus.html>; Nathan Stovall, *Coronavirus Bailout Already Towers Over TARP, With More to Come*, S&P GLOBAL (Apr. 8, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/coronavirus-bailout-already-towers-over-tarp-with-more-to-come-57964369>.

⁴² *Paycheck Protection Program*, U.S. SMALL BUS. ADMIN. (SBA), <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited July 20, 2020).

⁴³ See, e.g., 13 C.F.R. § 121 (2020).

⁴⁴ CARES Act § 1102, 15 U.S.C. § 636(a)(36)(D) (2020).

⁴⁵ *Id.*

⁴⁶ For a deeper dive into the SBA eligibility requirements, see Office of Financial Assistance, *SOP 50 10 5(K): Lender and Development Company Loan Programs*, U.S. SMALL BUS. ADMIN., ch. 2 at 40 (Apr. 1, 2019), <https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf>.

⁴⁷ 15 U.S.C. § 636(a)(36)(D) (2020); *Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL)*, U.S. SMALL BUS. ADMIN. (Apr. 3, 2020), <https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf>.

⁴⁸ CARES Act § 1106; Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 85 Fed. Reg. 38,304 (June 26, 2020) (hereinafter First IFR).

⁴⁹ 15 U.S.C. § 636(a)(1).

⁵⁰ *Id.* at § 636(a)(1), 636(a)(36)(P).

⁵¹ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Takes Additional Actions to Provide up to \$2.3 Trillion in Loans to Support the Economy (Apr. 9, 2020, 8:30 AM), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm>.

After the PPP became operational on April 3, 2020, the program struggled with huge demand and all \$349 billion of funding was claimed within just two weeks.⁵² In those 14 days, the SBA processed more than 14 years' worth of usual loans.⁵³ In response to calls for additional funding and program reforms, Congress expanded the PPP by \$310 billion, of which \$60 billion was set aside for lending by community banks and credit unions and community development financial institutions.⁵⁴

The SBA began processing applications for a second round of loans on April 27, which has been more successful in reaching smaller businesses: the average loan size dropped from \$206,000 in round one to \$73,000 in about the first two weeks of round two.⁵⁵ Similarly, the proportion of loans that were for \$150,000 or less grew from 74% in round one to 91% at the beginning of round two.⁵⁶ More than 90% of the loans for \$1 million or more were approved in April.⁵⁷ By the end of June, between 72 and 96 percent of small business payroll was covered by PPP loans across all 50 states.⁵⁸ In July, Congress extended the PPP program beyond its initial end date, allowing businesses until August 8, 2020 to claim the remaining \$132 billion in funding that remained unallocated at the end of June.⁵⁹

Early research on the impact of the PPP is mixed. On the one hand, a recent paper by Raj Chetty and others finds that the PPP had little material impact on employment at small business, potentially because PPP loans were not distributed to the industries most likely to experience job losses from the COVID-19 crisis.⁶⁰ On the other hand, research by economists at MIT, the Federal Reserve, and the ADP Research Institute finds that the PPP increased aggregate U.S.

⁵² Press Release, U.S. Small Bus. Admin., Statement from Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Success of the Paycheck Protection Program (Apr. 17, 2020), <https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/statement-secretary-steven-t-mnuchin-and-administrator-jovita-carranza-success-paycheck-protection>; Thomas Franck & Kate Rogers, *Small Business Rescue Loan Program Hits \$349 Billion Limit and is Now Out of Money*, CNBC (Apr. 16, 2020), <https://www.cnbc.com/2020/04/16/small-business-rescue-loan-program-hits-349-billion-limit-and-is-now-out-of-money.html>.

⁵³ *Id.*

⁵⁴ Paycheck Protection Program and Health Care Enhancement Act, H.R. 266, 116th Cong. (2020).

⁵⁵ Compare, *Paycheck Protection Program (PPP) Report: Approvals Through 12 PM EST 4/16/2020*, U.S. SMALL BUS. ADMIN. (Apr. 16, 2020), <https://www.sba.gov/sites/default/files/2020-06/PPP%20Deck%20copy-508.pdf> with *Paycheck Protection Program (PPP) Report: Second Round: Approvals from 4/27/2020 through 5/08/2020*, U.S. SMALL BUS. ADMIN. (May 8, 2020), https://www.sba.gov/sites/default/files/2020-06/PPP_Report_200508_0-508.pdf.

⁵⁶ *Id.* While large businesses could choose to take out smaller loans, loan size is a good proxy for the size of businesses getting loans because the maximum allowable loan size is a function of business payroll. CARES Act § 1102 (2020).

⁵⁷ See Yan Wu and Vivien Ngo, *Where Did the Biggest PPP Loans Go?*, WALL STREET J. (July 23, 2020, 12:00 PM), <https://www.wsj.com/graphics/where-did-the-biggest-ppp-loans-go/>.

⁵⁸ *Paycheck Protection Program (PPP) Report: Approvals Through 6/30/2020*, U.S. SMALL BUS. ADMIN. (June 30, 2020), <https://www.sba.gov/sites/default/files/2020-07/PPP%20Results%20-%20Sunday%20FINAL-508.pdf> (citing data from Bloomberg/Evercore and SBA).

⁵⁹ *Id.*; S. 4116, 116th Cong. (2020). On unallocated funding, see J. Grotto et al., *Where \$521 Billion in U.S. Small-Business Aid Went*, BLOOMBERG (July 6, 2020), <https://www.bloomberg.com/graphics/2020-ppp-loans-data-disclosure/>.

⁶⁰ Raj Chetty et al., *How Did COVID-19 and Stabilization Policies Affect Spending and Employment? A New Real-Time Economic Tracker Based on Private Sector Data*, OPPORTUNITY INSIGHTS (June 17, 2020), https://opportunityinsights.org/wp-content/uploads/2020/05/tracker_paper.pdf.

employment by roughly 2.3 million workers through the first week of June.⁶¹ The two papers use similar methodology but different data samples in their analyses.

Throughout its tenure, the PPP program has been marked by significant regulatory confusion and administrative disarray—a function of both the need for quick rulemaking in a crisis and a small agency that was ill-equipped to suddenly administer a half-trillion-dollar economic rescue program. The first interim final rule was published on April 2, the day before the program began.⁶² From April 2 to May 8, the SBA issued 10 regulations and 45 guidance FAQs.⁶³

The PPP program was situated within a long-existing regulatory framework created by the Small Business Act of 1953, generating almost immediate questions of the extent to which various existing requirements would apply to the PPP program. Certain business were denied loans based on decades-old ineligibility regulations, though some courts have found that some of these regulations are superseded by the CARES Act.⁶⁴ Reflecting the frenetic pace of issuance and the struggles of a small and overwhelmed staff, the regulations and guidance that have been issued have been frequently unclear. Given the urgency of getting funds to small businesses and the first-come-first served nature of the program, none of these pronouncements have been subject to traditional notice and comment processes. All regulations have been issued as emergency rules with frequent supplements by guidance or FAQs and no official comment period offered to the public.

The frenetic pace and constantly shifting regulatory goalposts both caused confusion for borrowers and created opportunities to game the system or engage in outright fraud. In the early days, many small businesses were unable to reach their banks or to understand the complex forms required for an application. The public and media were surprised when a major basketball team and certain large restaurant chains, relying on the 500 employees per location rule, were able to get funding.⁶⁵ Questions were quickly raised about whether such businesses could show economic necessity if they had access to other funds in the markets, and some gave the funds back.⁶⁶ Churches, including many individual Dioceses of the Catholic Church, received \$1.4 billion, and Planned Parenthood received \$80 million, both relying on the theory that they should be exempt

⁶¹ David Autor et al., *An Evaluation of the Paycheck Protection Program Using Administrative Payroll Microdata*, MIT WORKING PAPER (July 22, 2020), http://economics.mit.edu/files/20094?campaign_id=9&emc=edit_nn_20200722&instance_id=20513&nl=the-morning®i_id=95631744&segment_id=34035&te=1&user_id=ef4ac774eaf0ba0ead1ff2caa23203f0.

⁶² First IFR, *supra* note 48.

⁶³ *Paycheck Protection Program*, U.S. SMALL BUS. ADMIN. (SBA), <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited July 20, 2020).

⁶⁴ See, e.g., *Camelot Banquet Rooms v. U.S. Small Bus. Admin.*, 2020 WL 2088637 (E.D. Wis. 2020) (Order granting preliminary injunction to enjoin the SBA from using certain regulations in making eligibility determinations); *DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin.*, No. 20-cv-10899 (E.D. Mich. May 13, 2020).

⁶⁵ Jim Zarroli, *Even The Los Angeles Lakers Got A PPP Small Business Loan*, NPR (Apr. 27, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/27/846024717/even-the-la-lakers-got-a-ppp-small-business-loan>.

⁶⁶ Thomas Franck, *Companies Returned \$30 Billion in Small-Business Loans from Paycheck Protection Program*, CNBC (July 6, 2020, 11:00 AM), <https://www.cnbc.com/2020/07/06/companies-returned-30-billion-in-small-business-loans-from-ppp.html>. First IFR, *supra* note 48. Most portfolio companies of private equity firms were excluded due to the SBA's strict affiliation requirements. See Office of Financial Assistance, *supra* note 46.

from the affiliation rules because of their unique structures.⁶⁷ Predictable criticisms followed. The DOJ quickly opened investigations into fraud by borrowers and began arresting some who had lied on their applications.⁶⁸ The Department of Treasury announced that the SBA would audit any loan over \$2 million.⁶⁹

The wide and shifting regulatory goalposts also caused significant angst for the banks responsible for carrying out the program, which has led to downstream effects for borrowers. Despite having no credit underwriting, PPP loans require a considerable amount of paperwork and must meet Anti-Money Laundering and Know Your Customer requirements. While large banks have generally invested in automated systems for loan processing, small and regional banks processed loans manually and had capacity limitations, even when they pulled employees from across the bank to become temporary loan processors. As a result, many banks only accepted applications from existing business customers and many eligible borrowers found themselves effectively barred from applying for funds because they did not have existing relationships with SBA-approved lenders; the problem was worse for really small businesses who most needed the support, and for minority-owned small businesses of all sizes without strong banking relationships.⁷⁰

The SBA has also shown signs of stress under the pressure of millions of loans, with its computer system for accepting loans failing often early on in the program.⁷¹ Observers have also questioned whether the overwhelmed SBA would allow loan fraud to slip through the cracks. The Treasury Department announcement that all loans over \$2 million would be reviewed does little to quell this concern, as such loans number nearly thirty thousand.⁷² Limited reporting during the early phase raised questions of how much Congress and the public would be able to peer within the SBA's black box and evaluate its performance. Under pressure from members of Congress and the public, the SBA and Treasury's initial reluctance to provide transparency has begun to recede. On July 6, the Department of the Treasury announced that it would release details on all loans over \$150,000, which account for nearly 75 percent of the loan dollars approved.⁷³

⁶⁷ See Reese Dunklin & Michael Rezendes, *AP: Catholic Church Lobbied for Taxpayer Funds, Got \$1.4B*, ASSOCIATED PRESS (July 10, 2020), <https://apnews.com/dab8261c68c93f24c0bfc1876518b3f6>; Kate Smith, *Planned Parenthood Received \$80 Million in PPP Loans. Now, the SBA Wants It Back*, CBS NEWS (May 22, 2020, 2:13 PM), <https://www.cbsnews.com/news/planned-parenthood-paycheck-protection-program-loan-controversy>; Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Mar. 27, 2020) (Exempting religious organizations from the SBA's affiliation rules).

⁶⁸ See, e.g., Office of Pub. Affairs, *Texas Man Charged with COVID-Relief Fraud, False Statements and Money Laundering*, U.S. DEP'T OF JUST. (June 23, 2020), <https://www.justice.gov/opa/pr/texas-man-charged-covid-relief-fraud-false-statements-and-money-laundering>.

⁶⁹ Press Release, U.S. Dep't of the Treasury, Joint Statement by Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Review Procedure for Paycheck Protection Program Loans (Apr. 28, 2020), <https://home.treasury.gov/news/press-releases/sm991>.

⁷⁰ See, e.g., Michael S. Barr, *Paycheck Protection Program Failed to Reach the Smallest Businesses: How Congress Can Do Better*, CRAIN'S DETROIT BUSINESS (Apr. 22, 2020, 6:00 AM), <https://www.crainsdetroit.com/other-voices/paycheck-protection-program-failed-reach-smallest-businesses-how-congress-can-do>.

⁷¹ *Id.*

⁷² *Paycheck Protection Program (PPP) Report: Approvals Through 6/30/2020*, U.S. SMALL BUS. ADMIN. (June 30, 2020), <https://www.sba.gov/sites/default/files/2020-07/PPP%20Results%20-%20Sunday%20FINAL-508.pdf>.

⁷³ Jeff Drew, *SBA, Treasury Release Names of Some PPP Recipients*, J. OF ACCT. (July 6, 2020),

The administrative hurdles plaguing the SBA, banks, and borrowers alike are likely to continue as the loan application phase gives way to the loan forgiveness phase, and litigation will likely continue through 2020 and beyond. The complexity of the PPP, especially when compared to the much simpler one-step grant systems with easier applications that took place in many European countries, raises the question about how the United States could have created a better and less complex system for channeling funds to small businesses.

C. DIRECT LOANS BY TREASURY

The CARES Act designated \$500 billion for the U.S. Department of the Treasury, a small portion of which Treasury is using for direct loans to specific sectors: \$46 billion was to be lent to airlines, air carriers, ticket agents, and businesses critical to maintaining national security.⁷⁴ As of July 7, the Department of the Treasury had executed letters of intent with ten major airlines, and indicated that it was continuing loan discussions with others.⁷⁵ Borrowers are required to provide warrants, equity, or senior debt instruments as appropriate taxpayer compensation. Despite the aid afforded to the aviation industry, in light of the continuing dire collapse in air travel, a number of airlines have announced plans to furlough tens of thousands of workers.⁷⁶

V. INNOVATIVE FEDERAL RESERVE PROGRAMS

One of the novel twists in the global pandemic has been the Federal Reserve's decision to support lending to large corporations, medium-sized businesses denominated as "Main Street" businesses, as well as municipalities and a range of non-profits. The Federal Reserve's power to lend beyond the financial sector has long been a part of its emergency lending authorities, but the Federal Reserve had not used it.⁷⁷ The economic brutality of the pandemic, as well as direct encouragement from the CARES Act, appears to have changed that traditional reluctance.⁷⁸

Although some of these programs were announced as concepts before the passage of the CARES Act, none of them were truly fleshed out or made operational until well after its passage. On March 23, the Federal Reserve announced two facilities aimed toward supporting large corporate employers, the Primary Market Corporate Credit Facility (PMCCF) and the Secondary

<https://www.journalofaccountancy.com/news/2020/jul/sba-treasury-release-names-of-ppp-recipients.html>; the full list of names sorted by state is posted on the Treasury Department's site, available at <https://home.treasury.gov/policy-issues/cares-act/assistance-for-small-businesses/sba-paycheck-protection-program-loan-level-data> (last accessed July 28, 2020).

⁷⁴ Q&A: *Loans to Air Carriers and Eligible Businesses and National Security Businesses*, Treasury Department (updated April 10, 2020), <https://home.treasury.gov/system/files/136/CARES-Airline-Loan-Support-Q-and-A-national-security.pdf>.

⁷⁵ *The Third Report of the Congressional Oversight Commission*, CONGRESSIONAL OVERSIGHT COMMISSION at 35 (July 20, 2020), [https://www.toomey.senate.gov/files/documents/Oversight%20Commission%20-%203rd%20Report%20\(FINAL\)_7.20.20.pdf](https://www.toomey.senate.gov/files/documents/Oversight%20Commission%20-%203rd%20Report%20(FINAL)_7.20.20.pdf).

⁷⁶ See, e.g., Alison Sider, *American Airlines Plans to Furlough up to 25,000 Workers This Fall*, WALL STREET J. (July 15, 2020).

⁷⁷ See, e.g., Tahyar, *supra* note 26, ch. 1 at 18.

⁷⁸ The Federal Reserve announced before the passage of the CARES Act that it would create a facility for Main Street lending. In the CARES Act, Congress explicitly blessed a Main Street program, a separate mid-size business program that has not been made operational, and lending to states and municipalities. Lending to non-profits is not explicitly mentioned in the CARES Act and derives from the Federal Reserve's emergency lending powers.

Market Corporate Credit Facility (SMCCF).⁷⁹ The two facilities allow the Federal Reserve to purchase up to \$750 billion in newly issued or existing eligible corporate bonds.⁸⁰ These programs were initially limited to investment grade debt, but later expanded to those companies who had been newly downgraded. The SMCCF also allows for the purchase of U.S.-listed exchange-traded funds (ETFs), including bond funds, which allows for broader investments rather than buying individual corporate bonds, but the program may have less of an impact because ETFs tend to be more liquid in any event. As of July 1, 2020, these programs had been barely used, perhaps illustrating the positive impact of the Federal Reserve's announcement, or the lack of need. The Treasury will provide up to \$75 billion in first-loss credit protection for the facilities.⁸¹

The Federal Reserve's Main Street lending program is a highly innovative but complex effort to support mid-market lending and since it is so recently operational, its impact is still unclear.⁸² In essence, the Federal Reserve has partnered with both the Treasury, as the provider of first-loss credit protection, and private-sector commercial banks, as underwriters and allocators of credit, with the goal of providing funds to companies in the middle of the market, many of which are too small to tap the capital markets and too large to qualify for the PPP. Facing many design choices ranging from the philosophical to the operational, and mindful of the glitches in the rollout of the PPP, the Federal Reserve and the Treasury have taken their time in designing and setting up the program. They have also invited comments on the term sheets, issued several rounds of FAQs, hired outside advisors, and developed a computer portal for banks to use.⁸³

To qualify as an eligible borrower, a company must have either less than \$2 billion in 2019 annual revenues or fewer than 15,000 employees. In general, the company's leverage cannot exceed six times its 2019 EBITDA.⁸⁴ As a result, many growth companies are excluded,⁸⁵ as are many portfolio companies of private equity sponsors and owners of commercial real estate.⁸⁶ The loans range in size from \$250,000 up to \$300 million. Until one year after the loan is repaid, a borrower cannot distribute capital to its shareholders through dividends or stock buybacks, and will be subject to limits on employee compensation. Most banks are limiting the program to existing customers, although a few are accepting new customers.

⁷⁹ Press Release, *supra* note 18.

⁸⁰ Cheng, *supra* note 30.

⁸¹ *Id.*

⁸² As of July 16, the Main Street lending program for businesses had made one \$12 million loan to a single borrower. See Glenn Hubbard & Hal Scott, 'Main Street' Program Is Too Stingy to Banks and Borrowers, WALL STREET J. (July 20, 2020, 6:31 PM), <https://www.wsj.com/articles/main-street-program-is-too-stingy-to-banks-and-borrowers-11595284266>. The program's expected capacity is \$600 billion. Press Release, *supra* note 51.

⁸³ *Main Street Program: Davis Polk Visual Memo*, DAVIS POLK & WARDWELL LLP (June 12, 2020), https://www.davispolk.com/files/main_street_program_visual_memo.pdf.

⁸⁴ EBITDA refers to earnings before interest, taxes, depreciation and amortization. It is commonly used as a measure of a company's net income. The program would generally exclude any company that, after receiving a Main Street loan, would have outstanding debt of more than 6 times its 2019 EBITDA, depending on the type of loan and subject to some adjustments. See *Main Street Lending Program: Frequently Asked Questions*, FEDERAL RESERVE (July 15, 2020), <http://www.bostonfed.org/mslp-faqs>.

⁸⁵ Jeanna Smialek, *A Coffee Chain Reveals Flaws in the Fed's Plan to Save Main Street*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/business/economy/federal-reserve-treasury-main-street.html>.

⁸⁶ *Main Street Program: Davis Polk Visual Memo*, DAVIS POLK & WARDWELL LLP (June 12, 2020), https://www.davispolk.com/files/main_street_program_visual_memo.pdf. In an unusual move, the Federal Reserve borrowed many eligibility standards from SBA programs.

At the time this paper was finalized, use of the Main Street program was quite muted. Federal Reserve Chairman Jay Powell acknowledged that the program was “not getting a ton of interest from borrowers,” but the Federal Reserve expects demand to grow and it “[continues to] be open to playing with the formula and making adjustments going forward.”⁸⁷ The President of the Federal Reserve Bank of Boston, which is administering the program, has suggested that the program will become an important source of support if the economy remains weaker through the summer and fall than many companies had anticipated.⁸⁸

Additionally, the Federal Reserve created the Municipal Liquidity Facility (MLF) to offer loans directly to states, counties, and cities – a move the Federal Reserve had explicitly avoided during the Financial Crisis.⁸⁹ The Federal Reserve’s program for states and municipalities is also innovative. Like the Main Street program, it was specifically contemplated by the CARES Act. The Federal Reserve will purchase bonds issued by states, cities, and counties that meet certain requirements as to their credit ratings and population size. Funds from the program can only be used to manage the cash flow impact of the pandemic, such as the deferral of tax revenue due to the extension of tax filing deadlines.⁹⁰ In response to criticisms that it did not reach a wide enough scope of municipalities, and may have inadvertently excluded communities with high populations of minorities, the Federal Reserve reduced the population size requirements to 250,000 for cities and 500,000 for counties, and authorized governors to designate two cities or counties for participation if they cannot meet the population threshold.⁹¹ As of July 10, 2020 only the State of Illinois had used the facility, for a total of \$1.2 billion.⁹² The Treasury is providing \$35 billion in first-loss support to the MLF.⁹³

The Federal Reserve’s program for non-profits has been announced and initial details determined. For example, non-profits with high endowments and a large number of employees are excluded. The program is not explicitly contemplated in the CARES Act but is based on Federal Reserve 13(3) authorities. Details on all Federal Reserve facilities are noted in a chart referenced in the footnote.⁹⁴

⁸⁷ *Federal Reserve Chair Powell and Treasury Secretary Mnuchin on Coronavirus Response: Hearing Before the H. Fin. Serv. Comm.*, 116th Cong. (June 30, 2020), <https://www.c-span.org/video/?473448-1/fed-chair-powell-treasury-secretary-mnuchin-testify-coronavirus-response>.

⁸⁸ Jonnelle Marte, *Fed's Rosengren Says Demand for Main Street Loans Expected to Grow as U.S. Economy Grapples with Virus*, REUTERS (July 8, 2020, 2:27 PM), <https://www.reuters.com/article/us-usa-fed-rosengren/feds-rosengren-says-demand-for-main-street-loans-expected-to-grow-as-u-s-economy-grapples-with-virus-idUSKBN2492VN>.

⁸⁹ Press Release, *supra* note 51; Nick Timiraos & Heather Gillers, *Fed Includes Municipal Debt in Money-Market Lending Backstop*, WALL STREET J. (Mar. 20, 2020 1:37 PM), <https://www.wsj.com/articles/federal-reserve-to-increase-frequency-of-dollar-transactions-with-foreign-central-banks-11584712851>.

⁹⁰ *Key CARES Act Provisions and Fed Programs for Corporates*, DAVIS POLK & WARDWELL LLP (May 22, 2020), https://www.davispolk.com/files/davis_polk_key_cares_act_provisions_fed_programs_corporates.pdf; Municipal Liquidity Facility Term Sheet, “Eligible Use of Proceeds” (June 3, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200603a1.pdf>.

⁹¹ Cheng, *supra* note 30.

⁹² *MLF Transaction-specific Disclosures*, BD. OF GOVERNORS OF THE FED. RES. SYS. (July 10, 2020), <https://www.federalreserve.gov/publications/files/mlf-transaction-specific-disclosures-7-10-20.xlsx>.

⁹³ Press Release, *supra* note 51.

⁹⁴ *The Federal Reserve’s Actions to Address the Coronavirus Crisis*, DAVIS POLK & WARDWELL LLP (May 22, 2020), https://www.davispolk.com/files/the_federal_reserves_actions_address_coronavirus_crisis.pdf.

While take-up of many of the Federal Reserve's facilities already in operation has been low, this does not necessarily indicate that the facilities have been unsuccessful. To the contrary, one might argue, as President of the Federal Reserve Bank of New York John Williams recently noted, the relatively low take-up "is in fact a measure of success."⁹⁵ Williams opined that "the existence of the facilities, even in a backstop role, has helped boost confidence to the point where borrowers are able to access credit from the private market at affordable rates."⁹⁶ To the extent it succeeds in calming markets, the Federal Reserve's so-called "announcement effect" reflects on the institution's credibility among market participants. The announcement effect is at its strongest for liquidity programs, although it may not always be sufficient. This can be seen by the relatively high usage of the MMLF as compared to other Federal Reserve facilities. Whether the announcement effect is sufficient in the novel credit programs, such as the Main Street, the municipal, and the non-profit programs, remains to be seen.

Many of the actions taken by the Federal Reserve to reduce the economic and financial effects from an unprecedented pandemic have helped so far, but the responses raise concerns of their own. Some worry, for example, that the Federal Reserve's facilities are delaying the default of poorly run corporations that were already in weak financial positions before the pandemic began.⁹⁷ There are also concerns that by keeping bond rates low, the Federal Reserve is making it harder for investors to judge the true strength of corporations.⁹⁸ These actions could be inflating the stock market and creating a bubble that will eventually "pop."⁹⁹

It is an important question whether the Federal Reserve's foray into making loans to the real economy, both directly and indirectly, will strengthen or weaken its independence, require more Congressional oversight of its mandate, or otherwise cause concern about the role of a central bank in a democracy.¹⁰⁰ It has been argued that the Federal Reserve's purchases of corporate and municipal debt are more aligned with the role of a national investment authority rather than a central bank,¹⁰¹ and that recent Federal Reserve activities amount to investment management, which is unrelated to traditional central banking responsibilities such as managing the monetary supply or supervising banks.¹⁰² It has also been argued that the Federal Reserve could be more successful in helping small businesses if it relied more heavily on market participants that specialize in making loans to small business.¹⁰³ The nature of the Federal Reserve programs, which either rely on the banking sector to make credit decisions or rely on broad eligibility standards across a range of eligible companies may mute, for the moment, concerns that the Federal Reserve is directly making decisions about credit allocation, but these questions may come more to the fore as the Federal Reserve and Treasury programs effectively pick winners and

⁹⁵ John C. Williams, *Rising to the Challenge: Central Banking, Financial Markets, and the Pandemic*, FED. RES. BANK OF N.Y. (July 16, 2020), <https://www.newyorkfed.org/newsevents/speeches/2020/wil200716>.

⁹⁶ *Id.*

⁹⁷ Victoria Guida & Kellie Mejdrieh, *'The Balloon Might Pop': Fed's Corporate Intervention Spurs Anxiety*, POLITICO (July 16, 2020, 4:30 AM), <https://www.politico.com/news/2020/07/16/fed-corporate-intervention-worry-365047>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ PAUL TUCKER, *UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE* (Princeton Univ. Press 2018).

¹⁰¹ See Lev Menand, *supra* note 33.

¹⁰² David Zaring, *The Government's Economic Response to the Coronavirus Crisis* (draft as of July 2020).

¹⁰³ Kathryn Judge, *The Fed Can Do More for Small Businesses, But It Needs Help*, FORBES (July 13, 2020, 4:32 PM), <https://www.forbes.com/sites/kathrynjudge/2020/07/13/the-fed-can-do-more/#7d33305666fd>.

losers.¹⁰⁴ It is an open question whether the special purpose vehicle (SPV) structure provides enough governance for what are essentially policy decisions about the distribution of resources.

Another interesting question, as the Federal Reserve moves beyond its Financial Crisis toolkit, is the extent to which the Federal Reserve, in its partnership with the Treasury, is now subject to more political influence in the design and operation of those programs. The credit protection supplied by the Treasury is similar to the credit protection supplied by Treasury during the Financial Crisis and is aimed at insulating the Federal Reserve from losses. Since Treasury approval is now required for each use of Section 13(3), Treasury has more say and more power to influence what the Federal Reserve does.¹⁰⁵ This influence may bring more political accountability, and also make the Federal Reserve more willing to move beyond the Financial Crisis toolkit. It might also reduce the political independence of the Federal Reserve or subject it to criticism either for being more bound up in political decisions or because its impact on the real economy is seen as more direct.

VI. SUPERVISORY ACTIONS

It remains to be seen to what degree the economic crisis we are currently experiencing will flow through to the financial sector, and whether or not the financial sector is stable enough to withstand serious shock. As Federal Reserve Vice Chair for Supervision Randal Quarles has noted, “[U]nlike the global financial crisis, this shock originated from outside the financial system... Banks entered the current crisis in a much stronger position than they did the global financial crisis.”¹⁰⁶ Despite this, the severity of the pandemic has made the resiliency of the banking sector, including its level of capital and liquidity, and any required provisioning for anticipated credit losses, an area of focus and concern.

A. REGULATORY FORBEARANCE

Financial regulators had taken a number of steps before the crisis, including implementing a 2018 law that mandated changes in the capital and liquidity positions of banks; additional regulatory steps went beyond those required in the 2018 enactment. For the banking sector, these steps are seen as minor recalibration of the capital framework. Critics argue that these steps have weakened the capital of the banking sector and left both the banking sector and some parts of the non-banking financial sector more exposed to risk than they should be.

In April 2018, the Federal Reserve proposed to tailor leverage ratio requirements for global systemically important banks (G-SIBs) to tie the enhanced supplementary leverage ratio (eSLR) buffer requirement to the risk-based G-SIB capital surcharge of each firm, estimating that it would reduce the required amount of tier 1 capital for the holding companies of G-SIBs by approximately \$400 million, which is approximately 0.04 percent of total tier 1 capital as of the

¹⁰⁴ Morgan Ricks, John Crawford & Lev Menand, *Central Banking for All: A Public Option for Bank Account*, GREATER DEMOCRACY INITIATIVE (June 2018), <https://greatdemocracyinitiative.org/wp-content/uploads/2018/06/FedAccountsGDI.pdf>.

¹⁰⁵ Nick Timiraos & Kate Davidson, *Fed, Treasury Disagreements Slowed Start of Main Street Lending Program*, WALL STREET J. (July 12, 2020, 9:00 AM), <https://www.wsj.com/articles/fed-treasury-disagreements-slowed-start-of-main-street-lending-program-11594558800>.

¹⁰⁶ Randal K. Quarles, *Global in Life and Orderly in Death: Post-Crisis Reforms and the Too-Big-to-Fail Question*, BD. OF GOVERNORS OF THE FED. RES. SYS. (July 7, 2020), <https://www.federalreserve.gov/newsevents/speech/quarles20200707a.htm>.

third quarter 2017.¹⁰⁷ In March 2019, the Federal Reserve announced that it would limit the use of qualitative objections in stress testing, a suggestion that had originally been made by former Governor Tarullo.¹⁰⁸ It also voted not to invoke the countercyclical capital buffer (CCyB), a macroprudential tool that can be used to raise capital requirements when the economy is strong and loan volumes and asset prices are increasing.¹⁰⁹ Later that year, the Federal Reserve finalized rules establishing a framework to tailor regulations for domestic and foreign banks based on asset size, cross-jurisdictional activity, reliance on short-term wholesale funding, and other factors.¹¹⁰ Under the framework, the most stringent compliance requirements for the largest firms were maintained while requirements for smaller firms were reduced.¹¹¹ In March of this year, the Federal Reserve finalized its stress capital buffer (SCB) rule, which individualizes required capital levels for large firms by integrating stress test results with non-stress capital requirements.¹¹²

There have been differing perspectives and debates on these changes to capital and liquidity rules. For example, Vice Chair for Supervision Quarles noted that the SCB rule would lead to an increase in the common equity capital requirements for large banking firms of approximately \$11 billion, including an approximately \$46 billion increase for the U.S. G-SIBs.¹¹³ On the other hand, Governor Lael Brainard, who dissented from the SCB rule, made a drastically different estimate that the SCB rule would reduce current required common equity tier 1 capital by \$60 billion (5%) and required tier 1 capital by roughly \$100 billion (7%) for large banks, including an approximately \$40 billion decrease for the G-SIBs.¹¹⁴ Brainard noted that these reductions “reflect the rule's substantial reduction in the requirement to prefund distributions and, to a

¹⁰⁷ Press Release, Bd. of Governors of the Fed. Res. Sys., Rule Proposed to Tailor ‘Enhanced Supplementary Leverage Ratio’ Requirements (Apr. 11, 2018, 4:30 PM), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180411a.htm>.

¹⁰⁸ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Announces It Will Limit the Use of the “Qualitative Objection” in Its Comprehensive Capital Analysis and Review (CCAR) Exercise, Effective for the 2019 Cycle (Mar. 6, 2019, 4:00 PM), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190306b.htm>; Daniel K. Tarullo, Governor, Bd. of Governors of the Fed. Res. Sys., Departing Thoughts (Apr. 04, 2017), <https://www.federalreserve.gov/newsevents/speech/tarullo20170404a.htm>.

¹⁰⁹ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Votes to Affirm the Countercyclical Capital Buffer (CCyB) at the Current Level of 0 Percent (Mar. 6, 2019), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190306c.htm>.

¹¹⁰ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board finalizes rules that tailor its regulations for domestic and foreign banks to more closely match their risk profiles (Oct. 10, 2019, 3:45 PM), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191010a.htm>.

¹¹¹ *Id.*

¹¹² Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Approves Rule to Simplify Its Capital Rules for Large Banks, Preserving the Strong Capital Requirements Already in Place (Mar. 4, 2020, 4:30 PM), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200304a.htm#:~:text=The%20Federal%20Reserve%20Board%20on,its%20non%2Dstress%20capital%20requirements>.

¹¹³ Press Release, Bd. of Governors of the Fed. Res. System, Statement by Vice Chair for Supervision Quarles (Mar. 4, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/quarles-statement-20200304a.htm>.

¹¹⁴ Press Release, Bd. of Governors of the Fed. Res. Sys., Statement by Governor Brainard (Mar. 4, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20200304a.htm>.

lesser extent, the elimination of any stress leverage requirement (for tier 1) and the assumption of a flat balance sheet.”¹¹⁵

Similarly, a number of the Federal Reserve’s other decisions on capital and stress testing were subject to dissents by Governor Brainard,¹¹⁶ including in relation to the eSLR,¹¹⁷ the easing of capital rules for banks \$100-\$250 billion in asset size,¹¹⁸ the decision not to invoke the countercyclical capital buffer in 2019,¹¹⁹ the elimination of qualitative objections from stress tests,¹²⁰ the reduction in capital stemming from the Federal Reserve’s stress capital buffer rule,¹²¹ and permitting banks to pay dividends after the stress test results in summer 2020.¹²²

Since the COVID-19 crisis began, the Federal Reserve and other banking agencies have taken a number of additional steps to ease supervisory burdens. On March 24, the Federal Reserve announced that it would temporarily reduce its examination activities in order to minimize disruption in light of the coronavirus.¹²³ Shortly thereafter, the Federal Reserve, Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) issued a joint statement allowing banks to mitigate the capital impact of a new accounting standard on “current expected credit loss” (CECL) for up to two years and early adopt a new, less stringent methodology for measuring counterparty credit risk.¹²⁴ The Federal Reserve also eased capital requirements by announcing changes to its supplementary leverage ratio (SLR) rule and total

¹¹⁵ *Id.*

¹¹⁶ Governor Brainard also dissented from the Federal Reserve’s decision to alter the Volcker Rule’s provisions with respect to covered funds, arguing that the rule would expose the banking system to excessive risk, and should not in any event have been undertaken during the pandemic. *See* Press Release, Bd. of Governors of the Fed. Res. Sys., Statement of Governor Brainard (June 25, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20200625a.htm>. The banking sector views the changes to the Volcker Funds rule as a calibration that was in process before the pandemic.

¹¹⁷ Press Release, *supra* note 107.

¹¹⁸ Press Release, Bd. of Governors of the Fed. Res. Sys., Statement by Governor Lael Brainard (Oct. 10, 2019), <https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20191010.htm>.

¹¹⁹ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Votes to Affirm the Countercyclical Capital Buffer (CCyB) at the Current Level of 0 Percent (Mar. 6, 2019), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190306c.htm>.

¹²⁰ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Announces It Will Limit the Use of the “Qualitative Objection” in Its Comprehensive Capital Analysis and Review (CCAR) Exercise, Effective for the 2019 Cycle (Mar. 6, 2019, 4:00 PM), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190306b.htm>.

¹²¹ Press Release, Bd. of Governors of the Fed. Res. Sys., Statement by Governor Brainard (Mar. 4, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20200304a.htm>.

¹²² Press Release, Bd. of Governors of the Fed. Res. Sys., Statement by Governor Brainard (June 25, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20200625c.htm>.

¹²³ Press Release, Bd. of Governors of the Fed. Res. System, Federal Reserve Provides Additional Information to Financial Institutions on How Its Supervisory Approach is Adjusting in Light of the Coronavirus (Mar. 24, 2020, 5:30 PM), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200324a.htm>.

¹²⁴ Joint Press Release, Bd. of Governors of the Fed. Res. Sys., Fed. Deposit Ins. Corp. & Off. of the Comptroller of the Currency, Agencies Announce Two Actions to Support Lending to Households and Businesses (Mar. 27, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200327a.htm>.

loss absorbing capacity (TLAC) rule.¹²⁵ The community bank leverage ratio was reduced from 9% to 8%.¹²⁶

The changes made during the COVID-19 pandemic are intended to be temporary, and regulatory forbearance on capital and liquidity are designed to help financial institutions in the short term. Yet, some worry that these measures will reduce the resiliency of the banking system when its strength is most needed.¹²⁷ Given the pressure that the sharp inflow of deposits has placed on some banking institutions with respect to their leverage ratios, there will be pressure from the banking sector to make some of these changes permanent, especially given the increased liquidity of banks as of July 2020. In addition to these concerns about the financial sector, many non-financial companies increased their leverage leading into the pandemic, the non-bank financial sector such as money market funds and hedge funds were increasingly exposed to risk, and many households had little financial slack with which to weather a crisis during a time of growing income inequality, stagnant wages, and huge wealth inequality.

B. RESULTS OF STRESS TESTING

The Federal Reserve released results of its 2020 stress tests on June 25,¹²⁸ which were based upon scenarios developed before the impact of the pandemic. As a result, even the most severe scenario included in the stress tests was not severe enough. To account for this, the Federal Reserve included an additional sensitivity analysis in light of the COVID-19 crisis, the scenarios for which had not been previously announced.¹²⁹ The additional sensitivity analysis tested large banks under three hypothetical scenarios that could be caused by COVID-19: a V-shaped recession and recovery; a slower, U-shaped recession and recovery; and a W-shaped, double-dip recession.¹³⁰ The analysis did not include an L-shaped test where the economy remains in a

¹²⁵ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Announces Technical Change to Support the U.S. Economy and Allow Banks to Continue Lending to Creditworthy Households and Businesses (Mar. 23, 2020, 9:15 AM),

<https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200323a.htm>;

Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Announces Temporary Change to Its Supplementary Leverage Ratio Rule to Ease Strains in the Treasury Market Resulting from the Coronavirus and Increase Banking Organizations' Ability to Provide Credit to Households and Businesses (Apr. 1, 2020, 4:45 PM),

<https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200401a.htm>.

¹²⁶ Press Release, Bd. of Governors of the Fed. Res. Sys., Agencies Announce Changes to the Community Bank Leverage Ratio (Apr. 6, 2020, 9:00 AM),

<https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200406a.htm>.

¹²⁷ For instance, there is a view that the Federal Reserve could have made more targeted adjustments to its SLR rule, still minimizing the impact of pandemic-related deposit inflows on banks' supplementary leverage ratios, but keeping more bank capital in the financial system.

Jeremy Kress, *Don't Weaken the G-SIB Surcharge*, AM. BANKER (July 10, 2020, 10:14 AM),

<https://www.americanbanker.com/opinion/dont-weaken-the-g-sib-surcharge>.

¹²⁸ For more information on Federal Reserve stress testing, see BARR, JACKSON & TAHYAR, *supra* note 1, ch. 2.7 at 165-188.

¹²⁹ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Board Releases Results of Stress Tests for 2020 and Additional Sensitivity Analyses Conducted in Light of the Coronavirus Event (June 25, 2020, 4:30 PM),

<https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200625c.htm>.

¹³⁰ A recent working paper by Jeremy Stein and others finds that while U.S. banks were generally well capitalized going into the COVID-19 pandemic, banks may face large credit losses as the pandemic continues. Michael Blank et al., *How Should U.S. Bank Regulators Respond to the COVID-19 Crisis?* (Hutchins Center, Working Paper 63, 2020), <https://www.brookings.edu/research/how->

recession for a prolonged period of time due to a slow COVID-19 recovery, or other more severe scenarios.

While the Federal Reserve released results of its usual stress test on a bank-by-bank basis, it declined to do so for the sensitivity analysis. The results were only provided qualitatively and in the aggregate,¹³¹ with the Federal Reserve stating that most firms would remain well capitalized, but several firms would approach minimum capital levels under the most severe scenarios,¹³² and some would breach their minimum capital ratios.¹³³ Kathryn Judge argues that stress tests designed to reflect distinct periods of systemic distress can provide critical “just-in-time” information to policymakers and others, but acknowledges that regulators will rationally be hesitant to disclose negative information during an already fragile time for the financial system.¹³⁴ Judge suggests that safety nets should be designed to lessen the negative impact of bad news, such as vesting the Treasury Department with broad, time-limited guarantee authority.¹³⁵ During the Financial Crisis, the Federal Reserve’s stress tests were disclosed in real-time as to individual firms, with credible economic scenarios, which enhanced market stability;

[should-u-s-bank-regulators-respond-to-the-covid-19-crisis/](#). The authors employed a stress scenario model to assess the potential impact of COVID-19 on the aggregate common equity Tier 1 capital ratio (CET1 ratio) for the 21 U.S. banks subject to the Federal Reserve’s Comprehensive Capital Analysis and Review (CCAR). In the least adverse scenario considered by the authors, the aggregate CET1 ratio drops from 11.5% to 7.3% of risk-weighted assets. Under the most adverse scenario, the aggregate CET1 ratio drops from 11.5% to 5.5%. While the authors note that their analysis is subject to a wide range of caveats, they stress that the message that U.S. banks might experience significant capital depletion should be taken seriously. Former Federal Reserve Board Governor Daniel Tarullo remarked that by not releasing bank-by-bank results, the stress tests provide limited information and cause confusion. He also argued that the Federal Reserve should have required large banks to resubmit their capital plans this spring, and should not be waiting until later to do so. Daniel K. Tarullo, *Are We Seeing the Demise of Stress Testing?*, BROOKINGS INST. (June 25, 2020), <https://www.brookings.edu/blog/up-front/2020/06/25/stress-testing/>.

¹³¹ Bd. of Governors of the Fed. Res. Sys., *Assessment of Bank Capital during the Recent Coronavirus Event* (June 2020), <https://www.federalreserve.gov/publications/files/2020-sensitivity-analysis-20200625.pdf>.

¹³² Press Release, *supra* note 129.

¹³³ See *Transcript of Chair Powell’s Press Conference*, BD. OF GOVERNORS OF THE FED. RES. SYS. (July 29, 2020), <https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20200729.pdf> (stating that “[U]nder the regular way stress test, the banks passed. But right in the middle of the stress test came the pandemic. And so we quickly dropped in three other scenarios which were, you know, really bad scenarios. And many of the banks passed, but some didn’t.”). It is possible that up to roughly a quarter of the banks included in the sensitivity analysis would breach their minimum quarter ratios under the W-shaped scenario, based on a chart in the sensitivity analysis showing the distribution of banks in the 25th to 75th percentile passing the test, implying that some number of those in the 0 to 25th percentile did not, but a senior Federal Reserve official “cautioned against reading too much into this because the analysis . . . did not incorporate the effects of actions already taken by Congress, including stimulus checks and expanded unemployment insurance.” Victoria Guida & Aubree Eliza Weaver, *Stress Tests Turn Out Stressful*, POLITICO (June 26, 2020, 8:00 AM), <https://www.politico.com/newsletters/morning-money/2020/06/26/stress-tests-turn-out-stressful-788818>.

¹³⁴ Kathryn Judge, *Stress Testing During Times of War* (European Corp. Governance Inst., Law Working Paper No. 529/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=363331.

¹³⁵ *Id.*

at the same time, Treasury and the Federal Reserve made it clear that firms needing capital under the stress tests would be backstopped.¹³⁶

With the stress test results, the Federal Reserve also announced that it is requiring large banks to suspend share repurchases, cap dividends based on past income, and resubmit their capital plans later this year.¹³⁷ The Federal Reserve will conduct quarterly analysis to determine if further actions should be taken.¹³⁸ The results of, and the level of transparency to be provided in, the extra out-of-cycle stress tests to be conducted later in the year remain to be seen.

Much concern has been expressed regarding the Federal Reserve's decision to cap (rather than suspend) dividends.¹³⁹ Former Federal Reserve Governor Jeremy Stein and his coauthors, for example, have called on the Federal Reserve to suspend dividends, encourage banks to raise new common equity via secondary offerings, and require that banks suspend cash bonus payments to senior executives in order to conserve capital.¹⁴⁰ They argue that banks should be conserving and raising capital now, rather than waiting until things get worse because a central lesson of the Financial Crisis is that earlier capital conservation and capital-raising end up being more effective than later efforts. The banking sector, of course, feels differently, especially about the suspension of dividends and how it might impact share price. Since March, many banks have raised Tier 2 capital via subordinated debt. Given the fact that bank stocks have dropped almost 34% year to date as of July 31 and are trading in many cases barely above book value, banks would not want voluntarily to raise equity given current prices.¹⁴¹ The interaction between stopping dividends and share price is of major concern to the banking sector, but regulators will need to decide whether in the public interest they should require conservation and raising of equity given the potential for future losses from the global pandemic. It should be noted that dividends have largely been suspended already in the European Union.

In anticipation of credit losses to come, there was a sharp rise in the amount of provisions that banks took in the first quarter of 2020 and this trend continued in the second quarter.¹⁴² Given that increases in the allowance for loan losses provides a cushion against losses in addition to capital, this is a positive sign in terms of the resilience of the system, but whether it is sufficient remains to be seen. As noted above, some believe that more should be done to ensure the capital adequacy of the banking system throughout the remainder of the COVID-crisis.

¹³⁶ See Tim Clark, Matthew Kabaker, & Lee Sachs, *Bank Capital: Reviving the System*, in FIRST RESPONDERS: INSIDE THE U.S. STRATEGY FOR FIGHTING THE 2007-2009 GLOBAL FINANCIAL CRISIS 254-288 (Ben S. Bernanke, Timothy F. Geithner & Henry M. Paulson, Jr., with J. Nellie Liang, eds., Yale Univ. Press 2020).

¹³⁷ Press Release, *supra* note 129.

¹³⁸ *Id.*

¹³⁹ See, e.g., *Fed's Stress Test Actions Allowing Capital Payouts in the Middle of an Historic Economic Crisis Undermines Its Credibility and Makes Bank Failures and Bailouts More Likely*, BETTER MARKETS (June 25, 2020), <https://bettermarkets.com/newsroom/fed's-stress-test-actions-allowing-capital-payouts-middle-historic-economic-crisis>; *Blog: Wall Street Reaps Huge Profits from Fed as Main Street Still Waits for Help*, AMS. FOR FIN. REFORM (July 17, 2020), <https://ourfinancialsecurity.org/2020/07/blog-wall-street-reaps-huge-profits-from-fed-as-main-street-still-waits-for-help/>.

¹⁴⁰ Blank, *supra* note 130.

¹⁴¹ *KBW Bank Index*, BLOOMBERG (July 31, 2020), <https://www.bloomberg.com/quote/BKX:IND>.

¹⁴² Emily Flitter, Stacy Cowley and Gillian Friedman, *Banks Stockpile Billions as They Prepare for Things to Get Worse*, NY TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/business/big-banks-quarterly-results.html>. For more information on the interaction of loan loss reserves and bank capital more generally, see BARR, JACKSON & TAHYAR, *supra* note 1, at 265-340.

C. OTHER SUPERVISORY ACTIONS

The pace, breadth and sheer output of new regulations, guidance and other announcements by the financial regulatory agencies has been impressive. Among other changes, these actions have tailored regulatory requirements to reflect the country's adjustment to social distancing and remote-working; delayed and/or relaxed reporting requirements and rulemaking comment deadlines; modified capital and liquidity requirements to promote lending and facilitate implementation of Federal Reserve funding facilities and the CARES Act; and provided guidance to the financial sector on the agencies' approaches to supervision and public disclosure in light of the novel challenges presented by the crisis. For instance, the Federal Reserve, FDIC, and OCC took quick, aggressive action, first announcing an interim final rule on March 17 to facilitate the use of firms' capital and liquidity buffers to promote lending activity to households and businesses,¹⁴³ and subsequently took actions to neutralize the capital and liquidity impacts of certain Federal Reserve programs and facilities.¹⁴⁴ Multiple agencies provided guidance on how financial institutions can provide loan modifications.¹⁴⁵ The SEC provided guidance on how public companies should disclose the impacts of COVID-19 in their financial statements.¹⁴⁶ The SEC also issued rule changes to facilitate the continued operation of securities exchanges following the

¹⁴³ Joint Release, Off. of the Comptroller of the Currency, Bd. of Governors of the Fed. Res. Sys. & Fed. Deposit Ins. Corp., Federal Banking Agencies Provide Banks Additional Flexibility to Support Households and Businesses (Mar. 17, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-34.html>.

¹⁴⁴ Joint Release, Off. of the Comptroller of the Currency, Bd. of Governors of the Fed. Res. Sys. & Fed. Deposit Ins. Corp., Federal Bank Regulatory Agencies Issue Interim Final Rule for Money Market Liquidity Facility (Mar. 19, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-36.html>; Joint Release, Off. of the Comptroller of the Currency, Bd. of Governors of the Fed. Res. Sys. & Fed. Deposit Ins. Corp., Federal Bank Regulators Issue Interim Final Rule for Paycheck Protection Program Facility (Apr. 9, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-51.html> (interim final rules regarding the capital treatment of PPP activities); Joint Release, Off. of the Comptroller of the Currency, Bd. of Governors of the Fed. Res. Sys. & Fed. Deposit Ins. Corp., Federal Bank Regulatory Agencies Modify Liquidity Coverage Ratio for Banks Participating in Money Market Mutual Fund Liquidity Facility and Paycheck Protection Program Liquidity Facility (May 5, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-59.html> (interim final rule on modification to Liquidity Coverage Ratio to support MMLF and PPP activities).

¹⁴⁵ See, e.g., Joint Release, Off. of the Comptroller of the Currency, Bd. of Governors of the Fed. Res. Sys., Fed. Deposit Ins. Corp., Nat'l Credit Union Admin., Consumer Fin. Protection Bureau & Conf. of State Bank Supervisors, Agencies Provide Additional Information to Encourage Financial Institutions to Work with Borrowers Affected by COVID-19 (Mar. 22, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-39.html>.

¹⁴⁶ Public Statement, Sec. and Exch. Comm'n, Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020), <https://www.sec.gov/news/public-statement/clayton-mds-2020-01-30>; Public Statement, Sec. and Exch. Comm'n, Statement on Continued Dialogue with Audit Firm Representatives on Audit Quality in China and Other Emerging Markets; Coronavirus – Reporting Considerations and Potential Relief (Feb. 19, 2020), <https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19>; Public Statement, Sec. and Exch. Comm'n, Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of COVID-19 (Apr. 3, 2020), <https://www.sec.gov/news/public-statement/statement-teotia-financial-reporting-covid-19-2020-04-03>; Public Statement, Sec. and Exch. Comm'n, The Importance of Disclosure for Our Municipal Markets (May 4, 2020), <https://www.sec.gov/news/public-statement/statement-clayton-olsen-2020-05-04>.

temporary closure of trading floors;¹⁴⁷ provided relief to manual signature,¹⁴⁸ notarization¹⁴⁹ and paper filing requirements;¹⁵⁰ and relaxed in-person requirements for board meetings¹⁵¹ and annual meetings.¹⁵² The Federal Reserve relaxed reporting requirements for small financial institutions,¹⁵³ the CFPB postponed data collection requirements under the HMDA, Reg Z, TILA and other Bureau-related rules,¹⁵⁴ the FDIC provided extensions for Call Reports¹⁵⁵ and the SEC provided an extension to the filing deadline for Part III of Form 10-K.¹⁵⁶ Financial regulatory agencies also relaxed regulatory requirements by extending the swap margin rule compliance

¹⁴⁷ Press Release, Sec. and Exch. Comm'n, Cboe Options Exchange Temporarily Shifts to Fully Electronic Trading – SEC Enables Immediate Effectiveness of Proposed Rule Change to Facilitate Continued Operations in Light of Temporary Suspension of Cboe Physical Trading Floor (Mar. 14, 2020), <https://www.sec.gov/news/press-release/2020-64>; SEC. AND EXCH. COMM'N, SELF-REGULATORY ORGANIZATIONS; NEW YORK STOCK EXCHANGE LLC; NOTICE OF FILING AND IMMEDIATE EFFECTIVENESS OF PROPOSED RULE CHANGE TO AMEND RULES 7.35A, 7.35B, AND 7.35C FOR A TEMPORARY PERIOD, (Mar. 20, 2020), <https://www.sec.gov/rules/sro/nyse/2020/34-88444.pdf>.

¹⁴⁸ Announcement, Sec. and Exch. Comm'n, Staff Statement Regarding Rule 302(b) of Regulation S-T in Light of COVID-19 Concerns (June 22, 2020), <https://www.sec.gov/corpfin/announcement/staff-statement-regarding-rule-302b-regulation-s-t-light-covid-19-concerns>.

¹⁴⁹ Press Release, Sec. and Exch. Comm'n, SEC Provides Additional Temporary Regulatory Relief and Assistance to Market Participants Affected by COVID-19 (Mar. 26, 2020), <https://www.sec.gov/news/press-release/2020-74>.

¹⁵⁰ *Division of Trading and Markets Staff Statement Regarding Requirements for Certain Paper Submissions in Light of COVID-19 Concerns*, SEC. AND EXCH. COMM'N (Apr. 2, 2020), <https://www.sec.gov/tm/paper-submission-requirements-covid-19>; Announcement, Sec. and Exch. Comm'n, Division of Corporation Finance Statement Regarding Requirements for Form 144 Paper Filings in Light of COVID-19 Concerns (Apr. 10, 2020), <https://www.sec.gov/corpfin/announcement/form-144-paper-filings-email-option>; *Updated Division of Trading and Markets Staff Statement Regarding Requirements for Certain Paper Submissions in Light of COVID-19 Concerns*, SEC. AND EXCH. COMM'N (June 18, 2020), <https://www.sec.gov/tm/paper-submission-requirements-covid-19-updates-061820>.

¹⁵¹ Securities and Exchange Commission, *Staff Statement* (Modified March 4, 2020), <https://www.sec.gov/investment/staff-statement-im-covid-19>; Securities and Exchange Commission, *Press Release* (March 13, 2020), <https://www.sec.gov/news/press-release/2020-63>.

¹⁵² Announcement, Sec. and Exch. Comm'n, Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns (Apr. 7, 2020), <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>. The OCC has also issued guidance to banks and federal savings associations and an interim final rule regarding board and shareholder meetings. Off. of the Comptroller of the Currency, OCC Bulletin 2020-51, Corporate Governance: Annual Meetings and the COVID-19 Emergency (May 12, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-51.html>; Off. of the Comptroller of the Currency, OCC Bulletin 2020-55, Director, Shareholder, and Member Meetings: Interim Final Rule (May 26, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-55.html>.

¹⁵³ Press Release, Bd. of Governors of the Fed. Res. Sys., Federal Reserve Offers Regulatory Reporting Relief to Small Financial Institutions Affected by the Coronavirus (Mar. 26, 2020, 1:00 PM), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200326b.htm>.

¹⁵⁴ Press Release, Consumer Fin. Protection Bureau, CFPB Provides Flexibility During COVID-19 Pandemic (Mar. 26, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-provides-flexibility-during-covid-19-pandemic/>.

¹⁵⁵ *Financial Institution Letter: The FDIC Announces a 30-Day Grace Period for the Call Report for the First Quarter of 2020*, FED. DEPOSIT INS. CORP. (Mar. 26, 2020), <https://www.fdic.gov/news/news/financial/2020/fil20028.html>.

¹⁵⁶ *Compliance and Disclosure Interpretations*, SEC. AND EXCH. COMM'N (Apr. 6, 2020), <https://www.sec.gov/divisions/corpfin/guidance/exchangeactforms-interps.htm#104.18>.

deadline,¹⁵⁷ revising the short-term investment fund (STIF) rule¹⁵⁸ and proposing to reduce deposit insurance assessments.¹⁵⁹

Financial regulators have also focused many of their actions on providing relief to the financial sector that they contend would assist the countless number of consumers who have been affected by the economic effects of the crisis.¹⁶⁰ They have, among other actions, encouraged the offering of small-dollar loans,¹⁶¹ provided an extension to permit banks to continue to estimate certain rates and fees for remittance transfers,¹⁶² facilitated the provision of pandemic relief

¹⁵⁷ Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 Fed. Reg. 69,19878 (Apr. 9, 2020), <https://www.cftc.gov/sites/default/files/2020/04/2020-06625a.pdf>; *Voting Draft: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, COMMODITY AND FUTURES TRADING COMM'N (May 28, 2020), <https://www.cftc.gov/media/3916/votingdraft052820b/download>; Off. of the Comptroller of the Currency, OCC Bulletin 2020-67, Extension of the Swap Margin Rule Compliance Dates: Interim Final Rule (July 1, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-67.html>.

¹⁵⁸ *OCC Revises Short-Term Investment Fund Rule*, OFF. OF THE COMPTROLLER OF THE CURRENCY (Mar. 22, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-38.html>.

¹⁵⁹ *Financial Institution Letter: Proposed Rulemaking to Mitigate the Deposit Insurance Assessment Effects of Participation in the Paycheck Protection Program (PPP), the PPP Lending Facility, and the Money Market Mutual Fund Liquidity Facility*, FED. DEPOSIT INS. CORP. (May 12, 2020), <https://www.fdic.gov/news/news/financial/2020/fil20056.html>; Press Release, Fed. Deposit Ins. Corp., FDIC Issues Final Rule to Mitigate the Deposit Insurance Assessment Effect of Participation in the Paycheck Protection Program (PPP), the PPP Liquidity Facility, and the Money Market Mutual Fund Liquidity Facility (June 22, 2020), <https://www.fdic.gov/news/press-releases/2020/pr20071.html>.

¹⁶⁰ As alluded to in note 6, many actions have also been taken at the state and local level with respect to consumer relief.

¹⁶¹ Off. of the Comptroller of the Currency, News Release 2020-40, Federal Agencies Encourage Banks, Savings Associations and Credit Unions to Offer Responsible Small-Dollar Loans to Consumers and Small Businesses Affected by COVID-19 (Mar. 26, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-40.html>; Off. of the Comptroller of the Currency, OCC Bulletin 2020-54, Small-Dollar Lending: Interagency Lending Principles for Offering Responsible Small-Dollar Loans (May 20, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-54.html>.

¹⁶² Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Announces Guidance on Remittance Transfers During COVID-19 Pandemic (Apr. 10, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-guidance-remittance-transfers-during-covid-19-pandemic/>; Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Issues Final Remittance Rule (May 11, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-final-remittance-rule/>.

payments,¹⁶³ eased requirements for mortgage disclosures,¹⁶⁴ provided loan origination flexibilities,¹⁶⁵ and encouraged the reduction of banking fees.¹⁶⁶

In recent hearings, Republican members of Congress have commended that CFPB for the actions it has taken during the crisis.¹⁶⁷ At the same time, some commentators argue that the CFPB's policy changes both before and during the pandemic may harm consumers and weaken the financial system when it should be protecting customers. Consumer advocates worry, for example, that the CFPB policy changes have weakened consumer protections at precisely the time that households need the most protection from debt collectors, mortgage servicers, and other financial service providers. Complaints to the CFPB consumer complaint database have soared.¹⁶⁸ And some argue that the CFPB regulatory actions on mortgages, payday lending, and the like may leave consumers much more exposed to risk in the middle of the pandemic. One advocacy group has warned that the CFPB's actions regarding payday lending "will give loan shark-like payday lenders greater leeway to exploit the current crisis by continuing to trap people in debt and hamper their financial recovery."¹⁶⁹ In late June, a group of 104 organizations, including many nonprofits and consumer advocacy groups, submitted a letter to Congress calling for a temporary ban of the most aggressive forms of debt collection during the COVID-19 crisis.¹⁷⁰

VII. MORTGAGE FORBEARANCE AND LOAN DEFERMENTS

¹⁶³ Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Paves Way for Consumers to Receive Economic Impact Payments Quicker (Apr. 13, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-paves-way-consumers-receive-economic-impact-payments-quicker/>.

¹⁶⁴ Press Release, Consumer Fin. Protection Bureau, CFPB Paves Way for Consumers Facing Financial Emergencies to Obtain Access to Mortgage Credit More Quickly (Apr. 29, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-paves-way-consumers-facing-financial-emergencies-access-mortgage-credit-quickly/>.

¹⁶⁵ Federal Housing Finance Agency, *News Release* (May 5, 2020), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Loan-Processing-Flexibilities-for-Fannie-Mae-and-Freddie-Mac-Customers.aspx>; Federal Housing Finance Agency, *News Release* (July 9, 2020), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-Related-Loan-Processing-Flexibilities-for-Fannie-Mae-and-Freddie-Mac-Customers-Through-August.aspx>.

¹⁶⁶ Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Outlines Responsibilities of Financial Firms During Pandemic (May 13, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-outlines-responsibilities-financial-firms-during-pandemic/>.

¹⁶⁷ Press Release, Consumer Fin. Protection Bureau, Crapo Statement at CFPB Semi-Annual Report to Congress (July 29, 2020), <https://www.banking.senate.gov/imo/media/doc/Crapo%20Statement%207-29-201.pdf>.

¹⁶⁸ See Andrew Keshner, *Consumer Complaints to the CFPB Are Skyrocketing as the Coronavirus Outbreak Continues*, MARKETWATCH (July 19, 2020, 6:58 AM), <https://www.marketwatch.com/story/consumer-complaints-to-the-cfpb-are-skyrocketing-as-the-coronavirus-outbreak-continues-2020-07-17>; *Complaint Bulletin*, CONSUMER FIN. PROTECTION BUREAU (July 2020), https://files.consumerfinance.gov/f/documents/cfpb_july-complaint-bulletin_coronavirus-complaints_2020-07.pdf (last accessed July 28, 2020).

¹⁶⁹ *News Release: Rollback of Payday Protections Enables Predator Profiteering Amid Health Crisis*, AMS. FOR FIN. REFORM (July 7, 2020), <https://ourfinancialsecurity.org/2020/07/news-release-rollback-of-payday-protections-enables-predator-profiteering-amid-health-crisis/>.

¹⁷⁰ *Joint Letter: Letter to Congress from 104 Groups in Support of COVID-19 Debt Collection Protections*, AMS. FOR FIN. REFORM (June 23, 2020), <https://ourfinancialsecurity.org/2020/06/joint-letter-letter-to-congress-from-104-groups-in-support-of-covid-19-debt-collection-protections/>.

One of the criticisms in the response to the Financial Crisis is that policymakers did not provide enough relief to homeowners and renters.¹⁷¹ Despite the extensive support provided to homeowners, many agree that more should have been done.¹⁷² During the current crisis, the CARES Act required that banks provide homeowners with mortgages insured by the federal government (now most homeowners) up to a six month deferment in payments upon request, similar to deferments provided in the Financial Crisis for the unemployed.¹⁷³ Homeowners are only required to attest to a financial hardship in order to qualify for the mortgage forbearance – no additional documentation is required, unlike during the Financial Crisis.¹⁷⁴ In addition, a number of banks voluntarily provided deferments on consumer credit and other loans, as was the case a decade ago.¹⁷⁵ The CARES Act provides protections from eviction for most tenants in federally subsidized or federally backed housing.¹⁷⁶ Individual states such as New York,¹⁷⁷ California,¹⁷⁸ and Michigan,¹⁷⁹ have provided relief to renters, most commonly in the form of temporary eviction bans.

¹⁷¹ Alan Blinder, *After the Music Stopped: The Financial Crisis, the Response, and the Work Ahead* (2013). A separate policy question—not addressed in this supplement—is whether the U.S. bankruptcy system is equipped to handle the volume of cases that the pandemic is expected to generate. See David Skeel, *Bankruptcy and the Coronavirus* (Apr. 2020) (Brookings Economic Studies Working Paper); David Skeel, *Bankruptcy and the Coronavirus: Part II* (July 2020) (Brookings Economic Studies Working Paper). See also Benjamin Charles Iverson et al., *Estimating the Need for Additional Bankruptcy Judges in Light of the COVID-19 Pandemic* (Harvard Business Law Review, Vol. 11, forthcoming 2020),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3624529. Some scholars have also recommended that the Federal Reserve extend its Section 10B discount window authority to provide debtor-in-possession financing. See Peter Conti-Brown & David Skeel, *Using the Federal Reserve's Discount Window for Debtor-in-Possession Financing During the Covid-19 Bankruptcy Crisis*, BROOKINGS INST. (July 2020), <https://www.brookings.edu/research/using-the-federal-reserves-discount-window-for-debtor-in-possession-financing-during-the-covid-19-bankruptcy-crisis/>.

¹⁷² Michael S. Barr, Neel T. Kashkari, Andreas Lehnert & Phillip Swagel, *Crisis-Era Housing Programs*, in FIRST RESPONDERS: INSIDE THE U.S. STRATEGY FOR FIGHTING THE 2007-2009 GLOBAL FINANCIAL CRISIS 320 (Ben S. Bernanke, Timothy F. Geithner & Henry M. Paulson, Jr., with J. Nellie Liang, eds., Yale Univ. Press 2020).

¹⁷³ CARES Act, H.R. 748, 116th Cong. § 4022 (2020).

¹⁷⁴ *Id.*

¹⁷⁵ For example, Ally Bank gave homeowners the option to defer their Ally home loan payment for up to 120 days. *A Message for Our Ally Community About Coronavirus (COVID-19)*, ALLY Fin. Inc., <https://www.ally.com/coronavirus-response> (last updated July 14, 2020). Many other banks are offering deferments on a case-by-case basis.

¹⁷⁶ See *Protections for Renters*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/> (last modified July 2, 2020); H.R. 748 § 4024.

¹⁷⁷ See Memorandum from Lawrence K. Marks to All Judicial and Non-Judicial Personnel of the Unified Court System (Mar. 15, 2020), <https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf>.

¹⁷⁸ See *Governor Newsom Takes Executive Action to Establish a Statewide Moratorium on Evictions*, OFF. OF GOVERNOR GAVIN NEWSOM (Mar. 27, 2020), <https://www.gov.ca.gov/2020/03/27/governor-newsom-takes-executive-action-to-establish-a-statewide-moratorium-on-evictions/>.

¹⁷⁹ See Mich. Exec. Order 2020-19 (COVID-19) (Mar. 20, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522509--,00.html#:~:text=The%20novel%20coronavirus%20.

The need to provide relief for homeowners and renters is urgent. Recent news articles suggest that up to a quarter of renters in New York City are unable to pay their full rent,¹⁸⁰ and ensuring housing security for all individuals is necessary during a public health crisis. While Congress and states have already taken action, there is debate regarding the effectiveness of mortgage forbearance and eviction moratoriums. A temporary halt of rent payments may result in ripple effects that hurt local economies due to a reduction in income to landlords, property taxes collected, and money spent on things like maintenance and hiring property staff.¹⁸¹

There is also the pressing question of what happens when mortgage forbearance and eviction bans end. With respect to mortgages, many homeowners will be eligible for a payment deferral which makes missed mortgage payments due at the sale or refinancing of the home, or at the end of the loan.¹⁸² Others who have a sustained reduction in income may be eligible for a loan modification.¹⁸³ But these solutions are not as easily applied to renters. Many fear that a surge of evictions will follow the end of eviction moratoriums, leaving tens of thousands at risk of losing their homes while we are still fighting a public health crisis.¹⁸⁴ A recent study has shown that “eviction filings have almost returned to their prepandemic levels in places where local bans have expired or where they were never enacted.”¹⁸⁵ Some have argued for providing cash to individuals would be a more effective policy tool that offers longer-term housing security and avoids the problem of ripple effects.¹⁸⁶

As the pandemic has continued, some states, notably California, are considering legislation that would allow mortgage borrowers to request forbearances from their loan servicers.¹⁸⁷ The OCC, however, under Acting Comptroller Brian Brooks, recently issued a bulletin stating that “federal law preempts state and local laws that impermissibly conflict with banks’ exercise of federally authorized powers.”¹⁸⁸ The OCC specifically stated that federal law preempts “state

¹⁸⁰ See Matthew Haag, *A Moratorium on Evictions Ends, Leaving Thousands of Tenants Fearful*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/nyc-evictions-moratorium-coronavirus.html>.

¹⁸¹ Jenny Schuetz, *Halting Evictions During the Coronavirus Crisis Isn’t As Good As It Sounds*, BROOKINGS INST. (Mar. 25, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/25/halting-evictions-during-the-coronavirus-crisis-isnt-as-good-as-it-sounds/>.

¹⁸² *What to Do After You Receive Forbearance*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/after-you-receive-relief/> (last accessed July 18, 2020).

¹⁸³ *Id.*

¹⁸⁴ See, e.g., Haag, *supra* note 180.

¹⁸⁵ Rebecca Cowin et al., *Measuring Evictions During the COVID-19 Crisis*, FED. RES. BANK OF CLEVELAND (July 17, 2020), <https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20200717-measuring-evictions-during-the-covid-19-crisis.aspx>.

¹⁸⁶ See, e.g., Schuetz, *supra* note 181.

¹⁸⁷ See, e.g., AB-2501, 2019-2020 Reg. Sess. (Cal. 2020), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2501.

¹⁸⁸ See Off. of the Comptroller of the Currency, OCC Bulletin 2020-62, COVID-19 Relief Programs: Preemption (June 17, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-62.html>. Prior to Acting Comptroller Brooks’ tenure, the OCC stated that it has exclusive visitorial authority over banks, which generally precludes state and local officials from conducting examinations, requiring the production of banks’ books or records, or exercising other visitorial authority with respect to banks. See Off. of the Comptroller of the Currency, OCC Bulletin 2020-43, COVID-19 Financial Support Programs: Visitorial Authority (Apr. 24, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-43.html>.

actions that limit banks' ability to foreclose on a defaulted loan and take possession of collateral, beyond what is provided for in the CARES Act."¹⁸⁹

VIII. TRANSPARENCY AND CONGRESSIONAL OVERSIGHT

One of the key lessons from the Financial Crisis was a consensus on the need for transparency over the Federal Reserve's emergency lending programs. As a result, new requirements were put in place for Federal Reserve reporting to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives, providing the details of who received loans and the terms of these loans.¹⁹⁰ The Federal Reserve has been making this information available to Congress on a monthly basis. In addition, under the Dodd-Frank reforms, the names of banks who make use of the discount window and the amount of usage will be made publicly available after two years.¹⁹¹ After initial resistance by Secretary Mnuchin, the Treasury Department agreed in June to provide data on PPP loans above \$150,000.¹⁹² This transparency may provide a vein of data upon which to later assess the efficacy and fairness of programs created in the heat of the rushed moment.

Another lesson from the Financial Crisis is the need for strong congressional oversight of emergency programs. The most obvious point is to protect taxpayer money from fraud, and DOJ has made several high-profile arrests in connection with PPP fraud.¹⁹³ There are other deeper reasons as well. The distribution of cash and grants to citizens and the operation of Federal Reserve and Treasury lending programs may favor particular firms, and also takes place within the existing economic and social context. It may help or exacerbate existing inequalities. There are also fair questions about which businesses ought to be helped.

The CARES Act sets in place oversight in the following ways. The Act established the Pandemic Response Accountability Committee that will be made up of the Inspector Generals (IGs) from nine federal agencies, including the Departments of Defense, Education, Justice, and the Treasury.¹⁹⁴ The Committee is responsible for promoting transparency and conducting oversight of all funds provided by the CARES Act.¹⁹⁵ The Act also established a new Office of the Special Inspector General within the Department of the Treasury and a Congressional Oversight Commission.¹⁹⁶ The Office of the Special Inspector General, whose head is appointed by the President, is responsible for overseeing the \$500 billion fund designated by the Act for the Treasury to use for direct lending.¹⁹⁷ The Congressional Oversight Commission is responsible for overseeing the implementation of the Act by the Treasury and the Federal Reserve.¹⁹⁸ The Commission is similar in structure to the TARP Congressional Oversight Panel, consisting of four members and a Chairperson. Members are appointed by congressional leadership in both houses

¹⁸⁹ *Id.*

¹⁹⁰ 12 U.S.C. § 343(3)(C) (2010).

¹⁹¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1103, 124 Stat. 1376, 2118 (2010).

¹⁹² Press Release, U.S. Small Bus. Admin., SBA and Treasury Announce Enhanced Transparency Regarding the Paycheck Protection Program (June 19, 2020), <https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sba-and-treasury-announce-enhanced-transparency-regarding-paycheck-protection-program>.

¹⁹³ See, e.g., Office of Pub. Affairs, *supra* note 68.

¹⁹⁴ H.R. 748, 116th Cong. § 15010 (2019).

¹⁹⁵ *Id.*

¹⁹⁶ CARES Act, H.R. 748, 116th Cong. § 4018, 4020 (2020).

¹⁹⁷ H.R. 748 § 4018.

¹⁹⁸ H.R. 748 § 4020.

and the Chairperson is to be chosen jointly by the House Speaker and Senate Majority Leader. The Commission is required to submit regular reports to Congress.¹⁹⁹

The effectiveness of these oversight provisions remains to be seen. The White House released a statement on March 27th describing a number of constitutional concerns related to the oversight required by the CARES Act,²⁰⁰ and in early April President Trump removed the first Chairman of the Pandemic Response Accountability Committee without offering an explanation.²⁰¹ As of late-July, House Speaker Nancy Pelosi and Senate Majority Leader Mitch McConnell had yet to name a Chairperson to the Congressional Oversight Commission.²⁰²

IX. WHAT HAPPENS NEXT?

As of late July 2020, financial markets have largely rebounded, with the stock market even turning positive for the year,²⁰³ despite the persistence of high unemployment, and the failure of the United States to stem the health crisis caused by the pandemic. Governor Lael Brainard has referred to a “thick fog of uncertainty” over the U.S. economy and Chairman and CEO of JPMorgan Jamie Dimon has stated that “this is not a normal recession.”²⁰⁴ With cases currently on the rise in many states, and initial relief measures set to end in July, it is widely expected the Congress will pass a fourth fiscal stimulus sometime. In June, more than 150 scholars—including former chairs of the Federal Reserve Ben Bernanke and Janet Yellen, as well as four former chairs of the Council of Economic Advisors and two Nobel laureates—released a statement imploring Congress to immediately pass another relief bill “commensurate with the nearly \$16 trillion nominal output gap our economy faces over the next decade.”²⁰⁵ As this paper was being finalized, Congress was negotiating over the fourth fiscal stimulus bill. Undoubtedly, further actions by the financial regulators will also continue to unfold during the fall.

¹⁹⁹ *Id.*

²⁰⁰ White House Press Release, Statement by the President (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/>.

²⁰¹ Ben Kesling, Andrew Restuccia & Dustin Volz, *Trump Removes Watchdog Who Heads Panel Overseeing Pandemic Stimulus Spending*, WALL STREET J. (Apr. 7, 2020), <https://www.wsj.com/articles/trump-removes-acting-defense-department-inspector-general-11586277895>.

²⁰² *Nearly 100 Days Later, Key Position For COVID-19 Congressional Oversight Commission Remains Unfilled: Dozens of Groups Call on Pelosi, McConnell to Appoint Chair*, PUB. CITIZEN (July 1, 2020), <https://www.citizen.org/news/nearly-100-days-later-key-position-for-covid-19-congressional-oversight-commission-remains-unfilled/>.

²⁰³ See Matt Phillips, *Despite Recession, Stock Markets Turn Positive for the Year*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/business/recession-stock-market-coronavirus.html>.

²⁰⁴ Lael Brainard, Governor, Bd. of Governors of the Fed. Res. Sys., *Navigating Monetary Policy Through the Fog of COVID* (July 14, 2020), <https://www.federalreserve.gov/newsevents/speech/brainard20200714a.htm>; see Ben Eisen & David Benoit, ‘This is Not a Normal Recession’: Banks Ready for Wave of Coronavirus Defaults, WALL STREET J. (July 14, 2020, 4:08 PM), <https://www.wsj.com/articles/this-is-not-a-normal-recession-banks-ready-for-wave-of-coronavirus-defaults-11594746008>.

²⁰⁵ *More than 150 Economists Tell Congress: More Relief Needed to Avoid ‘Prolonged Suffering’ and ‘Stunted Economic Growth’*, WASHINGTON CTR. FOR EQUITABLE GROWTH (June 16, 2020), <https://equitablegrowth.org/press/more-than-150-economists-tell-congress-more-relief-needed-to-avoid-prolonged-suffering-and-stunted-economic-growth/>.

X. CENTRAL THEMES

We remain in the midst of the pandemic and so it is too early to render any final judgment on whether and how the actions taken by the financial regulators have worked. Nonetheless, certain central themes have emerged that could be explored.

First, as in the Financial Crisis, the Federal Reserve seems to have set up its first wave of crisis response programs seeking to adhere to some undefined line between monetary policy and fiscal policy. One can see that, for example, in the partnership between the Federal Reserve and Treasury for a number of facilities under which Treasury is effectively taking the first loss position, permitting the Federal Reserve to lend with a lower risk of loss to a broader range of firms. The second wave of Federal Reserve programs, including the Main Street Lending program and the announced but not yet implemented program for non-profits, have thrust the Federal Reserve into the unknown territory of lending, albeit indirectly, to companies and others in the real economy. These programs raise questions about the role of a central bank in a modern democracy, bringing to the fore themes posed by Paul Tucker in *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State*.²⁰⁶ But despite the Federal Reserve's willingness to tread closer to the blurred line between monetary policy and fiscal policy than ever before, there may be limits to what the Federal Reserve considers it can do. As Federal Reserve Chair Jerome Powell succinctly noted during a recent speech, "the Fed has lending powers, not spending powers."²⁰⁷ Chair Powell went on to suggest that additional fiscal support could be "costly, but worth it," and noted that the tradeoff is "one for our elected representatives, who wield powers of taxation and spending."

Second, Congress and the White House have taken the policy decision to rely on the Federal Reserve, and the banking sector, to transmit credit to an economy whose main risk today is not inadequate access to low-cost credit, but a fundamental lack of demand because of the global pandemic and associated shut-downs. In addition to the Federal Reserve programs, especially the Main Street Lending program and the non-profit program, one can see this in the PPP, which is fundamentally a grant, disguised as a loan and funneled through the banking system. Query whether direct spending would be more effective.

Third, a global pandemic was not on financial regulators' list of top threats to the financial system, despite the fact that a global pandemic was very much in the minds of top epidemiologists.²⁰⁸ This suggests the need for humility about the ability of the Financial Stability Oversight Council, the Office of Financial Research, or the Federal Reserve to forecast systemic financial risk, and the wisdom of building significant capital and liquidity buffers into the banking sector during normal economic times to buttress it against systemic risk.

Fourth, the political and societal push for transparency and oversight in the government programs is intense. The post Financial Crisis reforms rightly imposed more transparency on the Federal Reserve programs, and similar reforms were eventually incorporated into the PPP. Much of this transparency and oversight reflects good public policy even if one questions the immediate

²⁰⁶ TUCKER, *supra* note 100.

²⁰⁷ Jerome H. Powell, Chair, Bd. of Governors of the Fed. Res. Sys., Current Economic Issues (May 13, 2020), <https://www.federalreserve.gov/newsevents/speech/powell20200513a.htm>.

²⁰⁸ Nonetheless, it is interesting to note that after MERS, the prudential banking regulators had required the banking sector to create a pandemic business continuity plan and one of the first pronouncements by the banking agencies was to remind banks of that fact. See Press Release, Bd. of Governors of the Fed. Res. Sys., SR 20-4 / CA 20-3: Supervisory Practices Regarding Financial Institutions Affected by Coronavirus (Mar. 13, 2020), <https://www.federalreserve.gov/supervisionreg/srletters/SR2004.htm>.

feedback loop of press and social media about which companies or non-profits are deemed deserving and which are not. We have already seen how transparency can led to course correction as well as to politicization.

Last, but certainly not least, households' and businesses' lack of economic and social financial slack²⁰⁹ is a source of systemic risk, exposing our society to heightened risks from external shocks. Steps are being taken to directly help homeowners, consumers and renters. If the crisis persists, we will see an even greater need in this area.

²⁰⁹ MICHAEL S. BARR, NO SLACK (Brookings Inst. Press 2012).

USEFUL RESOURCES

Main Street Program: Davis Polk Visual Memo, DAVIS POLK & WARDWELL LLP (June 12, 2020), https://www.davispolk.com/files/main_street_program_visual_memo.pdf

Key CARES Act Provisions and Fed Programs for Corporates, DAVIS POLK & WARDWELL LLP (May 22, 2020), https://www.davispolk.com/files/davis_polk_key_cares_act_provisions_fed_programs_corporates.pdf

The Federal Reserve's Actions to Address the Coronavirus Crisis, DAVIS POLK & WARDWELL LLP (May 22, 2020), https://www.davispolk.com/files/the_federal_reserves_actions_address_coronavirus_crisis.pdf

Margaret Tahyar (editor), *Republication: 2009 Financial Crisis Manual: A Guide to the Laws, Regulations and Contracts of the Financial Crisis, with Updated 2020 Introduction*, DAVIS POLK & WARDWELL LLP (Mar. 16, 2020), https://www.davispolk.com/files/2020-03-16_republication_the_2009_davis_polk_financial_crisis_manual.pdf

Program on Financial Stability, *COVID-19 Financial Response Tracker Visualization*, YALE SCH. OF MGMT., <https://som.yale.edu/faculty-research-centers/centers-initiatives/program-on-financial-stability/covid-19-tracker> (last visited July 20, 2020).

CARES Act, H.R. 748, 116th Cong. § 4018, 4020 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748eas.pdf>

AnnaMaria Andriotis et. al, *What's in the \$2 Trillion Senate Coronavirus Bill*, WALL STREET J. (Mar. 26, 2020), <https://www.wsj.com/articles/whats-in-the-2-trillion-senate-coronavirus-bill-11585185450>.

Paycheck Protection Program, U.S. SMALL BUS. ADMIN. (SBA), <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited July 20, 2020).

Reports to Congress Pursuant to Section 13(3) of the Federal Reserve Act in Response to COVID-19, BD. OF GOVERNORS OF THE FED. RES. SYS., <https://www.federalreserve.gov/publications/reports-to-congress-in-response-to-covid-19.htm> (last updated July 10, 2020).

Daleep Singh, *The Fed's Emergency Facilities: Usage, Impact, and Early Lessons*, FED. RES. BANK OF N.Y. (July 8, 2020), <https://www.newyorkfed.org/newsevents/speeches/2020/sin200708> and accompanying figures https://www.newyorkfed.org/medialibrary/media/newsevents/speeches/2020/sin200708/Singh_H_VPP_exhibits_7.7.pdf.

Michael Barr, *Paycheck Protection Program Failed to Reach the Smallest Businesses: How Congress Can Do Better*, CRAIN'S DETROIT BUSINESS (Apr. 22, 2020, 6:00 AM),

<https://www.crainsdetroit.com/other-voices/paycheck-protection-program-failed-reach-smallest-businesses-how-congress-can-do>.

Peter Conti-Brown, *Explaining the New Fed-Treasury Emergency Fund*, BROOKINGS INST. (Apr. 3, 2020), <https://www.brookings.edu/research/explaining-the-new-fed-treasury-emergency-fund/>.

Sage Belz & David Wessel, *What Is the Exchange Stabilization Fund? And How Is It Being Used in the Coronavirus (COVID-19) Crisis?*, BROOKINGS INST. (Mar. 24, 2020), <https://www.brookings.edu/blog/up-front/2020/03/24/what-is-the-exchange-stabilization-fund-and-how-is-it-being-used-in-the-coronavirus-covid-19-crisis/>.

Michael Blank et al., *How Should U.S. Bank Regulators Respond to the COVID-19 Crisis?* (Hutchins Center, Working Paper 63, 2020), <https://www.brookings.edu/research/how-should-u-s-bank-regulators-respond-to-the-covid-19-crisis/>.

Jeffrey Cheng, Dave Skidmore & David Wessel, *What's the Fed Doing in Response to the COVID-19 Crisis? What More Could It Do?*, BROOKINGS INST. (July 17, 2020), <https://www.brookings.edu/research/fed-response-to-covid19/>.

Howell E. Jackson & Steven L. Schwarcz, *Protecting Financial Stability: Lessons from the Coronavirus Pandemic* (Duke Law School Public Law & Legal Theory Series No. 2020-39, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644417.

Lev Menand, *Unappropriated Dollars: The Fed's Ad Hoc Lending Facilities and the Rules that Govern Them* (European Corp. Governance Inst., Law Working Paper No. 518/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602740.

MARC LABONTE, CONG. RESEARCH SERV., R44185, FEDERAL RESERVE: EMERGENCY LENDING (Mar. 27, 2020), <https://fas.org/sgp/crs/misc/R44185.pdf>.

Daniel K. Tarullo, *Are We Seeing the Demise of Stress Testing?*, BROOKINGS INST. (June 25, 2020), <https://www.brookings.edu/blog/up-front/2020/06/25/stress-testing/>.