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Foreword: The Financial Services Industry: A New World (Dis)Order? Symposium

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The Financial Services Industry: A New World (Dis)Order?

FOREWORD

KELLYE Y. TESTY*

In publishing this symposium on the financial services industry, the Editors of the *Indiana Law Journal* have provided their readers a multidimensional resource. Foremost, each article in this symposium identifies and deftly explores a pressing issue within the banking and finance industry. In doing so, however, this symposium as a whole carries a more subtle message: it recognizes two strands of tension with which regulators are, consciously or unconsciously, grappling. The first is the strain created by the desire for domestic institutions to become internationally competitive without forsaking domestic safety and soundness; the second is the often-encountered conflict between normative social goals and the perceived costs of adhering to a market philosophy. Each of the four articles in this symposium is set in the arena of these policy tensions.

First, Professor Rubin addresses an area that strikes at the heart of the relationship between social policy and the regulation of financial institutions: lifeline banking.¹ As Professor Rubin notes, the call for lifeline banking, that is, providing banking services to low-income individuals, is itself an adept political move.² The implicit proposition in the term lifeline—that one's life is at stake from the lack of a checking account as it would be from the lack of heat in the wintertime—is incredible. Whatever its political power, however, the present conceptualization of lifeline banking may not succeed in meeting its redistributive objective. Using economic analysis, Professor Rubin demonstrates that current lifeline banking proposals would waste resources and fail to provide advantages to the intended beneficiaries.³

Taking as his premise that the goals of lifeline banking are valid social policy, however, Professor Rubin goes on to suggest an alternative approach to providing low-income individuals with payment services at a cost below the prevailing market rate.⁴ Professor Rubin recommends that the financial services industry be deregulated to allow retail chains (such as supermarkets)

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1. Rubin, *The Lifeline Banking Controversy: Putting Deregulation to Work for the Low-Income Consumer*, 67 *IND. L.J.* 213 (1992).

2. *Id.* at 214.

3. *Id.* at 223-30.

4. *Id.* at 230.

to offer federally insured deposit accounts. To compensate those entities offering these services, he further suggests that the institutions be permitted wide latitude in the use of depositors' funds, including the right to use the deposits for internal corporate purposes.⁵ Thus, Professor Rubin's proposal arguably accomplishes a valuable social goal by adhering to free market principles rather than by deviating from them as present lifeline banking proposals would require.

Professor Lichtenstein's article turns our attention to the pressing need to bolster domestic financial institutions' international competitiveness without further straining domestic health. By arguing for intellectual coherence in regulations that seek to separate banking and commerce, Professor Lichtenstein seeks to increase the ability of United States banks to compete with their foreign counterparts.⁶ As this symposium goes to press, Congress continues to struggle with legislation to revise restrictions dating back to the 1930s on entanglements between banking entities and industrial corporations. Indeed, after the House soundly defeated the most recent version of the banking overhaul legislation,⁷ the Senate was not even able to muster enough votes to restart debate on the measure.⁸ At this juncture, Congress's "overhaul" efforts may result in no more than increasing the nearly insolvent bank insurance fund's credit line with the Treasury and liberalizing the ability of the fund to borrow from taxpayers for its working capital.⁹ The desire of the Bush administration and many of the nation's largest financial institutions to push through regulations allowing banks to expand into the securities and insurance businesses continues to face enormous obstacles, not the least of which is the powerful securities and insurance lobbies.¹⁰

With prospects of sweeping overhaul looking less likely, Professor Lichtenstein's approach of fine tuning existing regulations looks increasingly inviting. She convincingly posits that regulators need to reestablish the precise evil that they are seeking to guard against in separating banking and

5. *Id.* at 230-40.

6. See Lichtenstein, *Thinking the Unthinkable: What Should Commercial Banks Or Their Holding Companies Be Allowed to Own?*, 67 *IND. L.J.* 251 (1992).

7. Labaton, *House Turns Down Banking Overhaul By 324-to-89 Vote*, *N.Y. Times*, Nov. 5, 1991, at A1, col. 6.

8. Labaton, *Banking Bill Is Delayed in the Senate*, *N.Y. Times*, Nov. 6, 1991, at C5, col. 6.

9. See Rosenbaum, *Banking Overhaul's Fate*, *N.Y. Times*, Nov. 6, 1991, at A1, col 2.

10. See Berke & Wayne, *Cacophony of Lobbying Overwhelms Bank Bill*, *N.Y. Times*, Nov. 6, 1991, at C5, col. 1. To be fair, the aftermath of the savings and loan debacle (which is often perceived as a result of deregulation), combined with scandals of sinister entanglements such as that involving the Bank of Credit and Commerce International (B.C.C.I.), also inspires hesitation in regulators. See Lohr, *2 Banks in U.S. Tied to B.C.C.I. Get Special Aid*, *N.Y. Times*, Nov. 8, 1991, at A1, col. 5.

commerce and then calibrate regulations accordingly. While conceding that regulators should consider prudential concerns,¹¹ that is preserving the health of banks, she argues that the current "5% of voting stock test" of the BHCA¹² imposes too many costs while striking wide of the mark in actually protecting against those prudential concerns. She also demonstrates that if overreaching is the concern (or an additional concern) in limiting banks' equity holdings, then the firewall provisions of section 23 of the Federal Reserve Act are sufficient to achieve neutrality in credit decisions.¹³ Moreover, Professor Lichtenstein points out that the misdirected "equity test" unfortunately has been imported into regulations addressing the foreign activities of United States banks—specifically the 1991 revisions of Regulation K—putting United States banks at a severe competitive disadvantage.¹⁴ As part of her recommended antidote, Professor Lichtenstein points Congress to the European Community's Second Banking Directive as a proper model for its efforts to limit banks' entrepreneurial interests in nonfinancial companies.

In the symposium's third article, Professor Hughes, as does Professor Rubin, identifies an area that perhaps has received regulators' attention more for its political impact than for its intellectual coherence. In addressing the problems of drug dealers using funds transfers for money laundering, Professor Hughes argues for reliance on existing regulations and disputes the necessity and efficacy of a recently proposed additional layer of regulation.¹⁵ She argues that the 1990 Funds Transfer Proposal will create a greater compliance burden for the banking industry,¹⁶ without any corresponding benefit flowing to law enforcement efforts to track money launderers.¹⁷ In an era when the "drug war" is often accused of being used as a vehicle to run roughshod over citizens' rights,¹⁸ Professor Hughes has arguably identified yet another victim of this war: the banking industry. Professor Hughes suggests that, instead of adopting new regulations under the 1990 Funds Transfer Proposal, new Uniform Commercial Code Article 4A, along with traditional police investigatory techniques, provides a sufficient mechanism to police money-laundering activities.¹⁹

Professor Hughes, who provided the genesis of this symposium with her 1990 Banking Law seminar at Indiana University School of Law, provides

11. Lichtenstein, *supra* note 6, at 280.

12. Bank Holding Company Act, § 4, 12 U.S.C. § 1843 (1988).

13. Lichtenstein, *supra* note 6, at 255-56.

14. *Id.* at 257-60.

15. Hughes, *Policing Money Laundering Through Funds Transfers: A Critique of Regulation Under the Bank Secrecy Act*, 67 *IND. L.J.* 283 (1992).

16. *Id.* at 300-07.

17. *Id.* at 307-15.

18. See, e.g., Guthrie, Note, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits*, 66 *IND. L.J.* 579 (1991).

19. Hughes, *supra* note 15, at 324-30.

fresh insight into the banking industry through her pragmatic scholarship. By paying close attention to the technical constraints within which the banking industry operates, Professor Hughes adeptly bridges the gap between theory and practice. In so doing, she avoids being swayed by the political tug of the desire to police money-laundering activities and instead concentrates on the efficacy of existing regulations.²⁰

Like Professors Hughes and Rubin, Michael Schrader also reveals an area in which the banking industry is the potential captive of a social agenda: the use of the Community Reinvestment Act (CRA) as a means to challenge bank mergers and lending policies.²¹ As Mr. Schrader suggests, CRA is becoming *the* standard by which potential bank mergers are evaluated under traditional "convenience and needs" analysis of bank merger guidelines. The increasing importance of CRA compliance is highlighted by the recent announcement by Fannie Mae that it will offer a data service to help banks and thrifts comply with the CRA.²² The service, called "FannieMaps," will supply demographic data on poor and low-income neighborhoods in major metropolitan areas.²³ Furthermore, for the first time, the Federal Reserve Board recently rejected a merger application solely on a bank's failure to satisfy CRA requirements, when First Interstate BancSystem of Montana's proposed merger with Commerce BancShares of Wyoming was denied.²⁴

With mounting evidence of widespread discrimination against minorities in banks' lending policies,²⁵ however, the use of the CRA that Mr. Schrader identifies may well be an appropriate foil to the immense power that financial institutions wield in society. As Mr. Schrader notes, in this age of "political correctness," a poor CRA rating could have numerous repercussions for financial institutions.²⁶ Mr. Schrader's insightful connection between CRA and bank merger or branching activities adeptly demonstrates that social concerns no longer remain in the shadow of the financial services industry's proffered competitive goals.

In providing a forum for authors to address several disorders that are plaguing the financial services industry, the Editors of the *Indiana Law*

20. As did Professor Hughes, the banking industry seems to be looking to U.C.C. Article 4A as the appropriate standard for wire transfers. In announcing its newly developed wire transfer system, Chase Manhattan Bank was careful to note that the system (called TX/Wireplus) enables banks to comply with U.C.C. Article 4A. See Iida, *Chase Wire Transfer System Tailored to Middle Market*, Am. Banker, Oct. 23, 1991, at 3.

21. Schrader, *Competition and Convenience: The Emerging Role of Community Reinvestment*, 67 IND. L.J. 331 (1992).

22. *Fannie Mae to Offer Data for CRA Compliance*, Am. Banker, Nov. 8, 1991, at 8.

23. *Id.*

24. Braitman, *CRA Report Trips Merger in Montana*, Am. Banker, Oct. 10, 1991, at 1.

25. See, e.g., *Excerpts from Fed Study on Bias in Home Lending*, Am. Banker, Oct. 28, 1991, at 9 (commenting on Federal Reserve Board study that showed, inter alia, that home lenders reject mortgage applications by blacks two to three times more often than applications by whites).

26. Schrader, *supra* note 21, at 344-47.

Journal have demonstrated that the relationships between international and domestic policy and between financial and social policy are often symbiotic ones. Still, there is more to be said and done. As financial markets become increasingly global and as financial power becomes increasingly concentrated, these complex relationships will intensify. Subjecting the work of financial regulators to the kind of rigorous analysis and criticism contained in this symposium is a vital component of efforts to restore order to the United States banking and finance industry and thus plays a necessary role in establishing a more just and productive relationship between law and finance.

