V. Congressional Oversight of the Federal Reserve System in the CARES Act

A. Introduction

Congress exercises supervisory control over the Federal Reserve System (Fed) in several ways. Congress votes on the confirmation of Fed Governors, conducts oversight hearings over the Fed, regularly meets with Fed staff, and receives outside audits of the Fed's activities and programs.[1] However, unlike many federal agencies, the Fed enjoys considerable freedom from congressional oversight. Fed Governors are insulated from removal by Congress and the President, and the Fed's budget is not reliant on annual appropriations by Congress.[2] This insulation was first thought necessary to protect the integrity of the nation's financial programs and ensure that the Fed was not subject to political interference.[3]

During periods of relative normalcy, the system functions as intended; the Fed, in conjunction with the Department of the Treasury (USDT), works to regulate the nation's economy with periodic oversight by Congress. However, during periods of emergency—most notably the Financial Crisis of 2008 and now the COVID-19 Pandemic—the Fed has quickly invoked its emergency authority and exercised considerable power outside congressional control.[4] Surely, the

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[1] BOARD OF GOVERNORS OF THE FED. RES. SYS., OVERSIGHT OF THE FEDERAL RESERVE SYSTEM (last updated Apr. 24, 2009), https://www.federalreserve.gov/monetarypolicy/bst_oversight.htm [https://perma.cc/WHK6-F7JP] [hereinafter FED OVERSIGHT] (describing various oversight mechanisms of the Fed; 31 U.S.C. §714.

[2] Humphreys Executor v. United States, 295 U.S. 602, 630–32 (1935) (restricting the power of president to remove a commission of the Federal Trade Commission); Peter Conti-Brown, *What Happens If Trump Tries to Fire Fed Chair Jerome Powell?*, BROOKINGS INST. (Sept. 9, 2019), https://www.brookings.edu/blog/up-front/2019/09/09/what-happens-if-trump-tries-to-fire-fed-chair-jerome-powell/ [https://perma.cc/8FDN-PWLP].

[3] Gregory Daco, *The Fed Must Be Insulated from Trump's Political Objectives*, THE HILL (July 20, 2018), https://thehill.com/opinion/finance/398024-the-fed-must-be-insulated-from-trumps-political-objectives [https://perma.cc/WM99-3S73] (explaining the benefits of having a Fed insulated from political pressure).

[4] MARC LABONTE, CONG. RES. SERV., R44185, FEDERAL RESERVE: EMERGENCY LENDING 1 (2020), https://fas.org/sgp/crs/misc/R44185.pdf (explain-

Fed must be able to respond quickly to changes in economic conditions, free from political interference.[5] But the Fed's swift invocation of emergency authority has drawn the ire of critics who argue that the Fed's emergency actions exceed the authority delegated to it by Congress, and favor the interests of large corporations.[6] This concern was particularly pronounced following the Financial Crisis of 2008, where many claimed the Fed's policy goals were geared more towards protecting large industries than regular people.[7] Recognizing these concerns, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)—passed by Congress in response to the COVID-19 Pandemic of 2020—included several checks on the Fed's power.

This article will explore the regulatory structure of the Fed, focusing on existing oversight mechanisms and pointing out the greater degree of latitude afforded to the Fed compared to other agencies in terms of congressional oversight. Next, this article will highlight the growing role of the Fed overseeing the nation's monetary policy, evidenced by its actions taken in response to the Financial Crisis of 2008 and the COVID-19 Pandemic of 2020. Finally, this article will address the congressional oversight provisions included in the CARES Act as applied to the Fed's administration of multibillion-dollar lending programs. The utility of these oversight programs is weighed against the benefits associated with Fed independence for the purpose of identifying possible future oversight reforms.

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ing how the Fed invoked its Section 13(3) powers for the first time since the 1930s to engage in emergency lending during the Financial Crisis of 2008).

5 MARC LABONTE, CONG. RES. SERV., R42079, FEDERAL RESERVE: OVERSIGHT AND DISCLOSURE ISSUES 13–14 (2017), https://fas.org/sgp/crs/misc/R42079.pdf (explaining the benefits associated with a politically insulated Fed).

6 Rachel Siegel, *Debate over Fed's Powers Prove Stumbling Block to Stimulus Talks*, WASH. POST (Dec. 18, 2020), https://www.washingtonpost.com/business/2020/12/18/stimulus-fed-facilities-toomey/ ("[Senator] Toomey said the Fed shouldn't be engaging 'in fiscal policy, social policy or allocating credit,' and instead should leave those decisions to elected leaders on Capitol Hill.").

7 LABONTE, *supra* note 5, at 1 (describing the Dodd-Frank Act's mandatory audit of the Fed's emergency activities and governance following the Financial Crisis of 2008).

B. Existing Oversight of the Federal Reserve System

Congressional oversight of the Federal Reserve system begins with the confirmation process of presidential appointments to the Board of Governors of the Federal Reserve System (Federal Reserve Board). The President appoints the seven members of the Federal Reserve Board, subject to vetting and ultimately confirmation or rejection by the United States Senate through a simple majority vote.[8] Additionally, Congress statutorily limited who can be appointed to the Board of Governors by mandating that appointments must yield a "fair representation of the financial, agricultural, industrial, and commercial interests and geographical divisions of the country …."[9] Neither elected officials nor members of the President's administration may serve on the Federal Reserve Board to ensure that Fed policy is not influenced by political considerations.[10]

Congress sets broad statutory goals for the Fed to achieve—such as "maximum employment" and "stable prices"—and leaves the Fed and its experts to formulate policy suited to achieve those objectives.[11] In overseeing the Fed's execution of these monetary

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[8] 12 U.S.C § 241 ("The Board of Governors of the Federal Reserve System … shall be composed of seven members, to be appointed by the President, by and with the advice and consent of the Senate …."); *See, e.g.*, Christopher Rugaber, *Senate Panel Approves Trump's Controversial Fed Nominee*, THE ASSOCIATED PRESS (July 21, 2020), https://apnews.com/article/5f52de941c4ab03934ebe3bb6fc4802d [https://perma.cc/YV4A-AYEJ] (describing the confirmation process of Judy Shelton, President Trump's controversial, and ultimately unsuccessful, appointee to the Federal Reserve Board of Governors).

[9] 12 U.S.C § 241.

[10] *What Does It Mean That the Federal Reserve Is "Independent Within the Government"?*, BD. OF GOVERNORS OF THE FED. RES. SYS. (last updated Mar. 1, 2017), https://www.federalreserve.gov/faqs/about_12799.htm [https://perma.cc/6BU8-MQRD] ("Elected officials and members of the Administration are not allowed to serve on the Board.").

[11] 12 U.S.C. § 225a ("The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall … promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."); Ben Bernanke, *"Audit the Fed" Is Not about Auditing the Fed*, BROOKINGS INST. (Jan 11. 2016), https://www.brookings.edu/blog/ben-bernanke/2016/01/11/audit-the-fed-is-not-about-auditing-the-fed/ [https://perma.cc/7ZL6-MWBG] (explaining how Congress had managed the Fed by setting monetary policy goals to foster "maximum employment" and "stable prices").

policy goals, Governors of the Federal Reserve System —particularly the Chair and Vice Chair—are regularly called to testify before Congress and meet with congressional staffers.[12] This process includes the statutorily-required semiannual testimony before the House Committee on Financial Services and the Senate Banking, Housing, and Urban Affairs Committee.[13] Additionally, the Fed has assumed an increasingly public role in recent years, with Governors often delivering speeches, speaking with reporters, and making public appearances in an attempt to explain the complexities of Fed monetary policy to the general public.[14]

On a more systemic level, Congress occasionally directs the Government Accountability Office (GAO) to conduct periodic audits of the Fed. These external audits are supplemented by the Fed's own internal audits performed by the Office of Inspector General (OIG) in an effort to promote efficiency and detect fraud or waste.[15] Legislation such as the Dodd-Frank Act of 2010 increased the frequency of GAO reviews of the Fed, with nearly 70 GAO reviews of Fed operations completed in the five years following the Financial Crisis of 2008.[16] Those audited reports are reviewed in congressional committees and subcommittees, providing Congress an opportunity to exercise its oversight authority.[17] By statute, Congress also requires the Federal Reserve Board to complete an annual external audit of the financial

[12] *See, e.g.*, *Coronavirus Aid, Relief, and Economic Security Act Before the S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. (Dec. 1, 2020) (testimony of Jerome H. Powell, Chair, Bd. of Governors of the Fed. Res. Sys.), www.federalreserve.gov/newsevents/testimony/powell20201201a.htm [https://perma.cc/8P2F-YP99].

[13] 12 U.S.C. 225b ("The Chairman of the Board [of Governors of the Federal Reserve System] shall appear before the Congress at semi-annual hearings ….").

[14] Bernanke, *supra* note 11 ("The Fed chair faces reporters in four press conferences each year and testifies before a variety of Congressional committees, including two rounds explicitly focused on monetary policy.")

[15] FED OVERSIGHT, *supra* note 1; OFFICE OF INSPECTOR GENERAL, *Introduction to the OIG* https://oig.federalreserve.gov/introduction.htm [https://perma.cc/T75D-PCUQ] ("The [Office of Inspector General's] mission is to provide independent oversight by conducting audits, investigations, and other reviews relating to the programs and operations of the Board ….").

[16] Bernanke, *supra* note 11 ("Since the financial crisis, the GAO has done some 70 reviews of aspects of Fed operations.").

[17] *Id*. ("The Fed chair … testifies before a variety of Congressional committees ….").

statements of the Federal Reserve Board and the twelve Federal Reserve Banks throughout the country.[18] These public financial statements include disclosure information identifying and describing every single security owned by the Fed.[19]

Despite these considerable formal and informal oversight mechanisms, the Fed is more insulated from congressional oversight than most other government agencies. Fed Governors are appointed to staggered terms lasting fourteen years—terms considerably longer than those of Commissioners of the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC), for example, who are appointed to five and seven year terms, respectively.[20] These staggered and unusually lengthy terms ensure that neither the current President nor Congress can exercise significant control over the composition of the Federal Reserve Board and, in theory, insulate the Fed from outside political influence.[21] Removal of Fed Governors prior to the expiration of their fourteen-year terms must be initiated by the President, not Congress, and can only be "for cause," which federal courts recognize as a high degree of impropriety characterized by "inefficiency, neglect of duty, or malfeasance in office."[22] Other high-ranking Fed employees—such as some members of the Federal Open Market Committee (FOMC)—are subject to neither Presidential appointment nor Senate approval, yet wield significant power when, for example, making influential recommendations on setting national

[18] *Id*. (explaining the process by which the Fed is already audited and criticizing politicized calls for further auditing).
[19] *Id*. ("Every security owned by the Fed … is also available online.").
[20] 12 U.S.C § 241 (Governors of the Federal Reserve System shall be "appointed … for terms of fourteen years …."); 15 U.S.C. § 78d ("Each [SEC] Commissioner shall hold office for a term of five years …."); 15 U.S.C. § 41 (FTC Commissioners "shall be appointed for terms of seven years ….").
[21] *What Does It Mean That the Federal Reserve Is "Independent Within the Government"?*, BD. OF GOVERNORS OF THE FED. RES. SYS., https://www.federalreserve.gov/faqs/about_12799.htm [https://perma.cc/7L3A-2BQA] [hereinafter FED INDEPENDENCE] ("The Congress also structures the Federal Reserve to ensure that its monetary policy decisions focus on achieving [its] long-run goals and do not become subject to political pressures … [s]o, members of the Board of Governors are appointed for staggered 14-year terms ….").
[22] *See* Humphreys Executor, *supra* note 2, at 623 (permitting "for cause" removal only in cases of "inefficiency, neglect of duty, or malfeasance in office.").

interest rates.[23] Finally, unlike many other agencies which receive funding through annual appropriations by Congress, the Fed is funded primarily through bank assessments and interest on U.S. government securities acquired on the open market.[24] This system of self-financing enables the Fed to operate with a greater degree of freedom from congressional oversight and control compared to other agencies, which annually must receive appropriations through Congress' normal budgetary process.[25]

C. Expanding Role of the Fed during the COVID-19 Pandemic

Section 13(3) of the Federal Reserve Act enables the Fed to invoke its emergency authority to provide loans to individuals, partnerships, and corporations unable to secure credit accommodations in the banking sector to enhance market liquidity and promote market stability.[26] The Dodd-Frank Act, passed following the Financial Crisis

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[23] *Federal Open Market Committee: about the FOMC*, BOARD OF GOVERNORS OF THE FED. RES. SYS., www.federalreserve.gov/monetarypolicy/fomc.htm [https://perma.cc/CVR8-DHBJ] (explaining that the FOMC is made up of twelve members, including the seven members of the Board of Governors of the Federal Reserve and five members from the Reserve Banks regional banks. These Reserve Bank representatives are not subject to presidential appointment and congressional approval).

[24] Seila Law LCC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2194 (2020) (Kagan, J., dissenting) ("The Federal Reserve … [is] funded outside the appropriations process through bank assessments."); FED INDEPENDENCE, *supra* note 21 ("The Fed's income comes primarily from the interest on government securities that is has acquired through open market operations.").

[25] HENRY B. HOGUE, CONG. RES. SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 26 (2017), https://fas.org/sgp/crs/misc/R43391.pdf [https://perma.cc/FYA9-ANWZ] ("The appropriation and authorization process provides Congress a regular opportunity to evaluate an agency's performance … Congress also might influence the activities of these agencies by legislating provisions that allocate resources or place limitations on the use of appropriated funds to better reflect congressional proprieties.").

[26] 12 U.S.C. § 343(3)(A) (2018) ("In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System … [may] discount for any participant in any program or facility with broad-based eligibility, notes, drafts, and bills of exchange …."); Michael Barr et al., *The Financial Response to the COVID-19 Pandemic* 4 (Working Paper, 2020).

of 2008, included several new restrictions on the Fed's emergency lending power under Section 13(3). For example, Section 1101 requires disclosure of the identities and amount loaned to borrowers under the Fed's emergency lending authority, and Section 1102 allows for a GAO audit of any emergency lending for operational integrity, financial reporting, and potential favoritism.[27] Still, the extent of the Fed's emergency authority remains considerable.

Attempting to limit the economic impact of the COVID-19 Pandemic, the Fed engaged in emergency lending totaling nearly $2.3 trillion.[28] For the first time since the Financial Crisis of 2008, this emergency authority was invoked at the onset of the COVID-19 Pandemic to reinstate a host of lending programs overseen by the Fed and the USDT.[29] These programs, previously created in response to the Financial Crisis of 2008, include the Money 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).[30] These lending programs have been backed by over $20 billion from the USDT's Exchange Stabilization Fund.[31]

The Fed's actions to combat the economic ramifications of the COVID-19 Pandemic have expanded far beyond its emergency lending programs. Indeed, the Fed swiftly cut the nation's interest rates to near zero percent, engaged in a multibillion-dollar purchase of treasury and mortgage-backed securities, relaxed many of its regulatory requirements (such as the "reserve requirement," which sets

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[27] MARC LABONTE, CONG. RES. SERV., R46411, THE FEDERAL RESERVE'S RESPONSE TO COVID-19: POLICY ISSUES 34 (2020), https://crsreports.congress.gov/product/pdf/R/R46411 (explaining various provisions of the Dodd-Frank Act designed to enhance oversight of the Fed).

[28] Jeffrey Cheng et al., *What's the Fed Doing in Response to the COVID-19 Crisis? What More Could It Do?*, BROOKINGS INST. (Jan. 25, 2021), https://www.brookings.edu/research/fed-response-to-covid19/ [https://perma.cc/T8ZL-R9TY] ("The Federal Reserve stepped in with a broad array of actions to limit the economic damage from the pandemic, including up to $2.3 trillion in lending ….").

[29] Barr, *supra* note 26, at 5 ("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 ….").

[30] *Id*. (explaining some of the revived lending facilities utilized by the Fed).

[31] *Id*. ("The Treasury pledged $20 billion from its Exchange Stabilization Fund (ESF) to backstop both the MMLF and CPFF facilities ….").

the percentage of deposits banks must hold in reserve to meet cash demands), and insulated U.S. money markets from international pressure through "swaps" with foreign central banks.[32] The Fed also significantly expanded its lending facilities to support non-financial firms and municipalities, as well as smaller firms with poor credit ratings and non-investment-grade securities.[33] Many of these actions mirror those taken by the Fed in response to the Financial Crisis of 2008.[34] Then, and now, the Fed has been met with significant criticism for allegedly abusing its emergency authority without sufficient oversight by Congress.[35]

D. Congressional Oversight in the CARES Act

Passed in response to the COVID-19 Pandemic in March 2020, the CARES Act provided for over $2 trillion in assistance in an attempt to stabilize the economy.[36] Cognizant of the expansive power the Fed exercised over the nation's economy during the Financial Crisis of 2008 and the significant cost of the CARES Act, Congress included several oversight mechanisms in the legislation. Entrusting the administration of many of the key components of the CARES Act with the Fed made sense due to its overall expertise and apparent insulation from political pressure. However, calls for greater oversight

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[32] Jessica Dickler, *Fed Holds Rates Near Zero—Here's Exactly What That Means for Your Wallet*, CNBC (June 10, 2020), https://www.cnbc.com/2020/06/10/fed-holds-rates-near-zero-heres-what-that-means-for-your-wallet.html [https://perma.cc/M747-59DC]; Cheng, *supra* note 28 (describing the various steps and programs the Fed has initiated in response to the COVID-19 Pandemic); LABONTE, *supra* note 27 ("In March 2020, [the Fed] reduced short-term interest rates to a range of 0% to 0.25%.").

[33] LABONTE, *supra* note 27, at 16 ("[The Fed] has created lending facilities for nonfinancial firms and municipalities that have seen their revenues collapse.").

[34] Barr, *supra* note 26, at 4–6 (identifying several parallels between the Fed's response to the Financial Crisis of 2008 and the COVID-19 pandemic, including the "Alphabet Soup" programs).

[35] Jeanna Smialek, *The Year the Fed Changed Forever*, N.Y. TIMES (Dec. 23, 2020), https://www.nytimes.com/2020/12/23/business/economy/jerome-powell-federal-reserve.html ("The Fed's emergency loan programs became a sticking point in negotiations over the government spending package ….").

[36] H.R. 748, 116th Cong. § 4018, 4020 (2020).

of the Fed remained fervent during the CARES Act debate.[37] Congress, it seems, struck somewhat of a balance with the CARES Act.

The CARES Act, among other things, appropriated nearly $500 billion to support the Fed's lending programs.[38] The CARES Act further authorized and appropriated funds to the Fed to purchase $600 billion in loans through its Main Street Lending Program (MSLP), expanded credit to financial institutions to originate Paycheck Protection Program (PPP) loans, and established and partially funded a Municipal Liquidity Facility (MLF) that offers loans to financially-struggling municipalities nationwide.[39] To oversee the implementation of these programs and others, Congress included several new oversight provisions in the CARES Act.

The Fed is now required to submit data to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services identifying who received loans through the Fed and the terms of loans issued pursuant to the Fed's emergency lending authority.[40] Further, PPP loans above $150,000 must also be reported

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[37] Emily Cochrane & Nicholas Fandos, *Senate Approves $2 Trillion Stimulus After Bipartisan Deal*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/us/politics/coronavirus-senate-deal.html ("Democrats insisted on stricter oversight [of the Fed], in the form of an inspector general and a five-person panel appointed by Congress" to oversee the nearly $500 billion appropriated to support Fed lending programs).

[38] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-180, FEDERAL RESERVE LENDING PROGRAMS: USE OF CARES ACT-SUPPORTED PROGRAMS HAS BEEN LIMITED AND FLOW OF CREDIT HAS GENERALLY IMPROVED 1 (2020) ("To provide economic relief, section 4003(b)(4) of the act made available up to $454 billion and potentially certain other amounts for the Department of the Treasury (Treasury) to support the Board of Governors of the Federal Reserve System (Federal Reserve) in establishing emergency lending programs ….").

[39] Andrew Budreika et al., *CARES Act and Federal Reserve Offer Economic Assistance to Stabilize US Economy*, MORGAN LEWIS (July 29, 2020), https://www.morganlewis.com/pubs/2020/07/cares-act-and-federal-reserve-offer-economic-assistance-to-stabilize-us-economy-cv19-lf [https://perma.cc/ 79JQ-JTNS] (describing the CARES Act provisions as they relate to the Fed).

[40] 12 U.S.C. § 343(C)(i)(I) ("The Board shall provide to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives … the justification for the exercise of [emergency] authority …."); Barr, *supra* note 26, at 27 (explaining the Fed's disclosure requirements to Congress when authorizing certain loans).

by the USDT.[41] To ensure equitable distribution and prevent fraud, the CARES Act created the Pandemic Response Accountability Committee, made up of nine Inspectors General across several governmental agencies.[42] Relatedly, the CARES Act also created a new Office of the Special Inspector General to oversee $500 billion in direct lending earmarked in the CARES Act,[43] as well as the Congressional Oversight Commission which broadly oversees the implementation of the CARES Act by the Fed and the USDT.[44] This Commission is composed of members selected by congressional leadership and must submit regular reports directly to Congress for review.[45]

Undoubtedly, these provisions strengthen congressional oversight of the Fed. However, Congress regularly considers other reform proposals purportedly seeking to strike a balance between allowing the Fed to independently oversee the nation's monetary policy while also ensuring that policy goals and outcomes of an unelected Federal Reserve Board are subject to some degree of Congressional oversight. The following section identifies and evaluates a few of these possible reforms.

E. Prior Reform Efforts

Legislative efforts to rein in the Fed's power over monetary policy have been a consistent feature animating congressional debate for decades. Indeed, academics have demonstrated that the number of bills introduced in Congress threatening to restructure or limit the Fed's authority positively correlates with higher public disapproval of the economy.[46] Though seldom successful, the looming specter of these legislative efforts enhances Fed transparency and disclosure, and concomitantly increases informal congressional influence over the

[41] Barr, *supra* note 26, at 27 ("[T]he Treasury Department agreed in June to provide data on PPP loans above $150,000.").
[42] H.R. 748, 116th Cong. § 15010(b) (2020) (authorizing the creation of the Pandemic Response Accountability Committee).
[43] H.R. 748, 116th Cong. § 4018 (2020).
[44] H.R. 748, 116th Cong. § 4020 (2020).
[45] *Id*.
[46] Peter J. Boettke & Daniel J. Smith, *Federal Reserve Independence: A Centennial Review*, 1 J. PRICES & MKTS. 31, 36 (2013) (explaining how there are more bills introduced in Congress to reign in Fed power when the economy's "misery index" is higher).

Fed.[47] In addition to enhancing congressional oversight, many argue that greater transparency and disclosure would actually create more consistency in financial markets, ultimately benefitting consumers.[48] The remainder of this article will identify some of these transparency and disclosure reform efforts introduced in Congress, evaluate their efficacy, and conclude by offering recommendations.

1. Legislative Efforts to Address Fed Transparency

Some of the most popular reform proposals were included in the Fed Oversight Reform and Modernization Act (FORM Act), which passed the Republican-led House in November, 2015, but failed to be taken up by the Senate.[49] The FORM Act would have required the Fed to conduct a cost-benefit analysis when adopting new rules, report on certain negotiations between the Fed and leading financial regulatory institutions such as the SEC and the Office of the Comptroller of the Currency (OCC), and rein in the permissible uses of the Fed's emergency lending powers.[50] Collectively, these reforms sought to heighten existing transparency requirements of the Fed to more easily facilitate a greater degree of congressional oversight. Rightfully, however, these proposals failed to gain traction among congressional Democrats

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[47] *Id.* (explaining that while seldom enacted into law, the constant threat of legislative efforts to curtail the Fed's power effectively serves as a tool of congressional oversight).

[48] *Id*.; Christopher Crowe & Ellen Meade, *Central Bank Independence and Transparency: Evolution and Effectiveness* (Int'l Monetary Fund, Working Paper WP/08/119, 2008) (finding that enhanced central bank transparency practices are associated with the private sector making greater use of information provided by the central bank).

[49] *House Passes Bill Calling for Rule-Based Monetary Policy*, REUTERS (Nov. 19, 2015), https://www.reuters.com/article/us-usa-fed-house/house-passes-bill-calling-for-rule-based-monetary-policy-idUKKCN0T82HD20151119 [https://perma.cc/XF7F-DR7U] (describing the passage of the FORM Act in the House of Representatives).

[50] Hal S. Scott, *Congress Is Playing with Fire over Fed Power*, CNBC (Dec. 8, 2015), https://www.cnbc.com/2015/12/07/congress-is-playing-with-fire-over-fed-power-commentary.html [https://perma.cc/9QKS-X3L5] (describing the various key provisions of the FORM Act).

because of the legislation's significant administrative burdens and constraints on the Fed's emergency lending power.[51]

More recent congressional reform efforts have sought to significantly expand the role of congressional oversight of Fed activities beyond what had been included in the FORM Act. For instance, H.R. 2912 would have created a commission consisting of twelve voting members drawn entirely from the House and Senate tasked with examining and making recommendations on Fed monetary policy.[52] H.R. 5983 called for bringing the budget of the Federal Reserve Board directly within the congressional appropriations process.[53] As previously noted, the insulation of the Fed's budget from the usual congressional appropriations process is a hallmark of its political independence. Fed Governors, Federal Reserve Bank Presidents, and employees are also well-respected experts in monetary policy. These proposals, while perhaps appealing in theory, undermine the Fed's political independence and insert Congress into a highly-expertized policy area which Members of Congress are not well-suited to address.

Finally, legislative efforts have focused intensely on reforming existing audit procedures as a means of increasing Fed transparency. For example, the Federal Reserve Transparency Act of 2015 included provisions which would have dramatically expanded GAO's investigatory authority by repealing existing restrictions on GAO's ability to review "deliberations, decisions, or actions on monetary policy matters[,]" as well as communications by Fed Governors and other employees related to monetary policy.[54] This proposal was designed, in particular, to increase oversight of the FOMC, a regular target of congressional animus due to the Committee's ability to effectively set national interest rates.[55]

GAO audits do not currently disclose any confidential information identifying institutions that have borrowed from the Fed or

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[51] *Id.* (highlighting criticism of the FORM Act because it would "unduly slow the Federal Reserve's ability to quickly respond to an emerging crisis.").
[52] LABONTE, *supra* note 5, at 7 (explaining various legislative proposals to expand congressional oversight of the Fed).
[53] *Id.*
[54] Bernanke, *supra* note 11.
[55] *Id.* ("The repeal of the existing restrictions would accordingly allow the GAO to view all materials and transcripts related to a meeting of the Fed's Federal Open Market Committee (FOMC) at essentially any time ….").

specific terms of the lending transactions to the public.[56] Further, the statutory focus of these audits is only for "waste, fraud, and abuse" perpetrated by the Fed, not the efficacy of the Fed's lending programs.[57] Allowing for GAO or outside review of the efficacy of Fed lending programs and disclosure of details of Fed transactions would provide an additional layer of transparency that could be examined by Congress and the public. It is important to note, however, that the Fed has consistently argued such a heightened level of transparency and disclosure could politicize the institution and undermine investor confidence in the companies seeking Fed lending assistance.[58] The Fed is not wrong in this regard—scholars have quantitatively shown that monetary policy is more effective when central banks are insulated from short-term political pressures in formulating long-term economic policy.[59]

Historically, elected officials have pressured the Fed to keep interest rates low in an effort to garner public support and improve reelection prospects.[60] This short-term strategy of low interest rates frequently conflicts with the Fed's long-term goal of containing inflation.[61] Legislative attempts to allow substantive GAO review of the efficacy of Fed monetary policy and make public deliberations by the Fed and FOMC appear to invite greater political interference in Fed monetary policy. As former Fed Chairman Benjamin Bernanke

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[56] LABONTE, *supra* note 5, at 1 (The Fed cannot "release any confidential information identifying institutions that have borrowed from the Fed or the details of other transactions.").
[57] *Id*.
[58] *Id*. at 13 ("The Fed has argued that allowing the public to know which firms are accessing its [lending] facilities could undermine investor confidence in the institutions receiving aid because of a perception that recipients are weak or unsound.").
[59] Bernanke, *supra* note 11; *see, e.g.*, Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY, CREDIT & BANKING 151, 154 (1993) (finding a strong relationship between inflation variability and central bank independence).
[60] Jim Puzzanghera & Don Lee, *Is the Fed Politically Biased? Look at Its Interest-rate Decisions as Elections Near*, L.A. TIMES (Sept. 19, 2016), http://www.latimes.com/business/la-fi-federal-reserve-election-20160919-snap-story.html (explaining how, for example, President Richard Nixon pressured then-Fed Chair Arthur Burns to enact expansionary monetary policy to improve Nixon's reelection prospects in 1972).
[61] *Id.*

pointed out, detailed minutes of FOMC deliberations are already made available to the public three weeks after meetings are held, and full transcripts are released after five years.[62] Former Chairwoman Janet Yellen aptly argued this type of extensive GAO audit "would politicize monetary policy and bring short-term political pressures into the deliberations of the FOMC by putting into place real-time second guessing of policy decisions."[63] Thus, the profound interest in maintaining Fed insulation from political pressure far outweighs any benefits from further GAO review.

2. *Legislative Efforts to Address Fed Disclosure*

To enhance Fed disclosures to Congress and the public, H.R. 3189 would have, for example, required the Fed to engage in a cost-benefit analysis and post-implementation impact assessment for any of its policy initiatives.[64] Further, the legislation would have required the Fed to solicit additional public and congressional comments at least 30 days prior to commencing international financial standards negotiations.[65] In response to this legislation, former Chairwoman Yellen asserted that the bill would "effectively put the Congress and the GAO squarely in the role of reviewing short-run monetary policy decisions and in a position to, in real time, influence the monetary policy deliberations leading to those decisions."[66] More directly, these proposed reforms would excessively burden the Fed and invite congressional oversight to a degree harmful to the Fed's necessary political independence.

It has not solely been the House spearheading Fed reform efforts. S. 1484 (introduced by Republican Senator Richard Shelby of Alabama) and S.1910 (introduced by Republican Senator John Boozman of Arkansas) would have required the release of FOMC transcripts after three years (as opposed to the current five-year

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[62] Bernanke, *supra* note 11 ("Detailed minutes of each FOMC meeting are released three weeks after the meeting is held, and verbatim transcripts after five years.")

[63] LABONTE, *supra* note 5, at 14.

[64] *Id.* at 7.

[65] *Id.*

[66] Letter from Janet Yellen, Chair, Bd. of Governors of the Fed. Rsrv. Sys., to Paul Ryan, Speaker of the House of Representatives, and Nancy Pelosi, Minority Leader of the House of Representatives (Nov. 16, 2015) (available at https://www.federalreserve.gov/foia/files/ryan-pelosi-letter-20151116.pdf).

period), as well as a publicly recorded vote by the Fed on any bank enforcement actions exceeding $1 million.[67] The legislation was intended to achieve the seemingly laudable objective of ensuring the Fed is not engaged in favoritism by bailing out corporations.[68] However, divulging the transcripts of FOMC meetings and the contents of enforcement actions runs the risk of seriously undermining investor confidence in the companies identified by the Fed and FOMC.[69] The investing public would almost certainly perceive these companies as financially unstable, leading to a loss of investment that would only compound the financial woes of these companies and make them less likely to participate in Fed lending programs moving forward.[70]

F. Recommendations

As the previous section summarized, Fed reform efforts have focused primarily on increased transparency and disclosure. Effective reform proposals must balance the necessity of Fed political independence with Congress' constitutional oversight role. Adequate transparency and disclosure are the dual pillars of public oversight critical to effective program assessment, and must be carefully weighed in any reform recommendations. This section identifies and argues for a few of these reforms.

1. Independent Review of Fed Policy by Outside Experts

As noted above, some legislative proposals sought to create congressional commissions to review Fed monetary policy or allow the GAO to evaluate the efficacy of Fed initiatives. Because of the expertized nature of monetary policy and risk of political bias tainting these evaluations, both proposals would likely be ineffective. However, Congress should consider creating and funding a specific outside review board composed of industry experts and academics to review Fed monetary policy. This proposal would significantly reduce

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[67] LABONTE, *supra* note 5, at 7.
[68] *Id.*
[69] *Id.* at 29 ("The Fed has argued that allowing the public to know which firms are accessing its [lending] facilities could undermine investor confidence in the institutions receiving aid because of a perception that recipients are weak or unsound.").
[70] *Id.*

the risk of political bias in evaluating Fed monetary policy while also ensuring that the merits of Fed programs are publicly reviewed by experts outside of government.

2. *Release in the Aggregate*

Releasing the names of organizations receiving lending support by the Fed risks undermining consumer confidence in those companies and would likely discourage other companies from participating in Fed programs.[71] A lack of participation in Fed lending programs risks greater company insolvency and would threaten market liquidity, impacting consumers nationwide.[72] More general disclosures about Fed lending programs and activities, without naming specific parties to the transaction, would achieve the broader policy goal of evaluating the efficacy of Fed programming. If, after evaluation, these lending programs are deemed ineffective, a sounder policy response would be to simply eliminate or reform the lending program, as opposed to publicly "shaming" the companies participating.[73]

3. *Make Permanent CARES Act Emergency Lending Oversight Programs*

Congress recognized in the CARES Act that the Fed must have the freedom to quickly respond to worsening economic conditions brought on by the COVID-19 Pandemic by greenlighting Fed emergency lending programs. Indeed, Congress signified its approval by appropriating nearly $500 billion in the CARES Act to directly finance Fed lending programs.[74] However, such a substantial appropriation necessitated additional oversight requirements to ensure a fair and effective distribution of funds. The CARES Act created new, yet temporary, oversight departments designed to ensure an equitable distribution of the nearly $500 billion in CARES Act lending funds

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[71] *Id.* ("If institutions feared [a loss of investor confidence], the Fed argues, the institutions would be wary of participating in the Fed's programs.").
[72] *Id.*
[73] *Id.* at 13–14 ("Although preventing favoritism is a valid policy goal, releasing the identities of borrowers to 'name and shame' them is more questionable . . . .").
[74] Cochrane & Fandos, *supra* note 37 (describing the provisions included in the CARES Act intended to facilitate oversight of the Fed's $500 billion lending programs).

and to prevent fraud.[75] These departments included the Pandemic Response Accountability Committee consisting of nine Inspectors General across several governmental agencies, as well as the new Office of the Special Inspector General.[76] These oversight departments must regularly submit reports evaluating the results of Fed lending programs to Congress.[77] Making these departments permanent would strengthen oversight of Fed lending programs, particularly programs funded directly through congressional appropriations, while still allowing the Fed to act independently and respond quickly to serious economic downturns.

G. Conclusion

The Financial Crisis of 2008 and the COVID-19 Pandemic have raised concerns regarding the Fed's swift invocation of emergency authority to engage in expansive lending programs.[78] As Republican Senator Rand Paul of Kentucky argued, the Fed "currently operates under a cloak of secrecy and it has gone on for too long."[79] To address these concerns, the CARES Act incorporated several new safeguards designed to enhance congressional oversight of Fed lending activities. Other reforms have been floated in recent years, with a particular emphasis on transparency, disclosure, and limiting the scope of the Fed's emergency lending authority.[80]

[75] *Id.*
[76] H.R. 748, 116th Cong. § 15010(b) (2020) (authorizing the creation of the Pandemic Response Accountability Committee).
[77] H.R. 748, 116th Cong. § 4020(b)(1)(B) (2020) (requiring the Congressional Oversight Commission to submit its reports on Fed lending activities to Congress directly).
[78] Thomas Franck, *Last-Minute Fight over the Fed's Lending Powers Is Hampering Covid Stimulus Deal*, CNBC (Dec. 18, 2020), https://www.cnbc.com/2020/12/18/coronavirus-stimulus-fight-over-fed-lending-powers-holds-up-deal.html (describing the partisan divide in Congress over the Fed's emergency lending authority during the COVID-19 Pandemic).
[79] Catherine Rampell, *Audit the Fed? Not So Fast*, WASH. POST (Jan. 29, 2015), https://www.washingtonpost.com/opinions/catherine-rampell-audit-the-fed-not-so-fast/2015/01/29/bbf06ae6-a7f6-11e4-a06b-9df2002b86a0_story.html.
[80] *See, e.g.*, Scott, *supra* note 50 (detailing the provisions of the FORM Act designed to enhance Fed transparency and disclosure).

Striking a balance between Fed independence and congressional oversight will remain a challenging and pressing policy issue for Congress post-COVID-19.

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