III. Lost In Capitalization: Examining Potentially Contradictory Policies on Commercial Real Estate Lending

A. Introduction

On December 18, 2015, the Federal Reserve Board (FRB), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the Agencies) issued an interagency statement "remind[ing] financial institutions of existing regulatory guidance on prudent risk management practices" relating to commercial real estate (CRE) loans.[1] For the purposes of the statement and guidance, CRE loans are only those both (1) used "to acquire, develop construct, improve, or refinance real property," and (2) repaid with either "the sale of the real property or the revenues from third-party rent or lease payments." [2] CRE loans thus include nonfarm nonresidential property (NFNR) loans, multifamily property (MF) loans, construction and land development (CLD) loans, and loans to real estate investment trusts (REITs),[3] but "do not include ordinary business loans and lines of credit in which real estate is taken as collateral."[4] On that same day, Congress passed, as part of the Consolidated Appropriations Act of 2016, the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), which made several

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[1] *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CORP. & OFFICE OF THE COMPTROLLER OF THE CURRENCY, STATEMENT ON PRUDENT RISK MANAGEMENT FOR COMMERCIAL REAL ESTATE LENDING (2015), http://www.occ.treas.gov/news-issuances/news-releases/2015/nr-ia-2015-163a.pdf [https://perma.cc/CJY3-NJA9] [hereinafter *Interagency Statement*] (highlighting the Agencies' supervisory findings regarding the current CRE lending market and setting out the Agencies' regulatory expectations for 2016). *See also* Fed. Deposit Insurance Corp., *Statement on Prudent Risk Management for CRE Lending* (Financial Institution Letter FIL-62-2015, 2015), https://www.fdic.gov/news/news/financial/2015/fil15062.pdf [https://perma.cc/735Y-LNZ8] (summarizing the *Interagency Statement*, and emphasizing that the regulatory guidance applies to all FDIC institutions, including those with total assets under $1 billion).

[2] *Interagency Statement*, *supra* note 1, at 1, n.1.

[3] Concentrations in Commercial Real Estate Lending, Sound Risk Management Practices, 71 Fed. Reg. 74580, 74582 (Dec. 12, 2006), *available at* https://www.gpo.gov/fdsys/pkg/FR-2006-12-12/pdf/06-9630. pdf [https://perma.cc/9B7U-S6KU] [hereinafter *Interagency Guidance*].

[4] *Interagency Statement*, *supra* note 1, at 1, n.1.

important CRE-related amendments to the Internal Revenue Code of 1986.[5]

While both the banking regulations and the tax amendments are expected to have significant impacts on the CRE market—and though both have received their respective shares of coverage—the policies' mutual compatibility (or lack thereof) has not yet been explored. To that end, this article seeks to compare the expected impact of these policies with their respective drafters' intended effect. Part B surveys the pre-Statement CRE market and highlights several important trends. Part C digs into the banking regulations, specifically the December 18th Interagency Statement (Interagency Statement) and the 2006 Interagency Guidance (Interagency Guidance) that the Interagency Statement reaffirmed, and considers both their intended and expected effects on CRE lending practices. Part D examines the PATH Act amendments, and delves into the intended and expected impact on the CRE market. Finally, Part E delves into the potential interplay between the banking regulation and tax amendments, and examines the early returns of both policies in the CRE lending market.

B. Sketching the Pre-Statement CRE Market

Since 2010, cheap credit—fueled by an almost non-existent federal funds rate, increasing foreign investment, and "the hunt for yield in [that] low-interest rate environment"—have combined to supercharge CRE property values.[6] Though new building expenditures remain unremarkable (at least for now), "U.S. commercial real estate prices are up 93% from a low in 2010 and 16% above the previous peak in 2007."[7]

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[5] Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. Div. Q, § 1 (2015), *available at* https://www.congress.gov/114/bills/hr2029/BILLS-114hr2029enr.pdf [https://perma.cc/W6YZ-WKRG].

[6] Jesse Hamilton, *Banks' Commercial Real Estate Lending Under Fire From Regulators*, BLOOMBERG BUS. (Dec. 18, 2015), http://www.bloomberg.com/news/articles/2015-12-18/banks-commercial-real-estate-lending-under-fire-from-regulators [http://perma.cc/97LP-3MV8].

[7] Jon Hilsenrath & David Harrison, *As Commercial Real-Estate Prices, Fed Weighs Consequences*, WALL ST. J. (Dec. 11, 2015), http://www.wsj.com/articles/as-commercial-real-estate-prices-soar-fed-weighs-consequences-1449885225 [https://perma.cc/D9AP-G4CV] (cataloguing indicators of potential valuation pressures and bubble behavior in the commercial real estate space, and discussing potential federal reactions thereto). The discrepancy between CRE construction and pricing is largely due to the fact

Such asset value spikes are especially noteworthy considering that CRE acquisitions are being fueled by heavy borrowing; in December 2015, aggregate U.S. bank-held CRE lending reached an all-time high of $1.769 trillion, $1.1 trillion of which was held by small banks.[8] Further, commercial mortgage backed securities (CMBS) issuance continues to climb: 2015 issuance climbed to $92.1 billion (a 7% increase from 2014 issuance levels and a 17% increase from 2013 issuance levels), and 2016 issuance is expected to top $125 billion, as 2006 CMBS issuances mature.[9] To many, these numbers suggest a potential bubble forming in U.S. CRE.[10]

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that the CRE boom has been limited to the six major metro areas (Boston, Chicago, Washington D.C. Metro, Los Angeles Metro, New York City Metro, and San Francisco Metro), where investor focus is more on "bid[ding] up rents and prices of existing CRE rather than build[ing] new CRE." Neil Howe, *The Reality of the Commercial Real Estate Boom*, FORBES (Feb. 24, 2016), http://www.forbes.com/sites /neilhowe/2016/02 /24/has-the-bubble-burst-in-commercial-real-estate/#740db15855c7.

[8] Ryan Tracy, *U.S. Banking Regulators Step Up Rhetoric on Commercial Real-Estate Loans*, WALL ST. J. (Dec. 18, 2015), http://www.wsj.com/articles/u-s-banking-regulators-step-up-rhetoric-on-commercial-real-estate-loans-1450452802 [https://perma.cc/7U4E-FX2N] ("Banks' holdings of commercial real-estate loans reached a record high of $1.769 trillion in the week ending Dec. 2, according to Fed data. Small banks held about $1.1 trillion of that total, a trend that has raised red flags among regulators because some small banks with high commercial real-estate exposures failed during and after the 2007-08 financial crisis."). A "small bank" is "an institution that, as of December 31 of either of the prior two calendar years [2014 or 2015], had assets of less than $1.216 billion." Press Release, Bd. of Governors of the Fed. Reserve Sys., Agencies Release Annual CRA Asset-Size Threshold Adjustments for Small and Intermediate Institutions (Dec. 22, 2015), *available at* http://www.federalreserve.gov/newsevents/press /bcreg/20151222a.htm [https://perma.cc/FS6Y-RLEV].

[9] Mark Heschmeyer, *Outlook Remains Positive as CMBS Market Entering Late Stages of Credit Cycle*, COSTAR GRP. (Jan. 6, 2016), http://www.costar.com/News/Article/Outlook-Remains-Positive-as-CMBS-Market-Entering-Late-Stages-of-Credit-Cycle/178644 [https://perma.cc/RBH9-L5GP] ("Full-year 2015 CMBS issuance topped out at $92.1 billion, according to analysts with Morgan Stanley Research[.] . . . Kroll Bond Rating Agency has the strongest outlook for CMBS issuance in 2016. It expects issuance to reach $125 billion in 2016 aided by the large volume of loans scheduled to mature during the year, coupled with borrowers seeking to lock-in new financing in anticipation of a rising interest rate environment.").

[10] Art Patnaude & Peter Grant, *Surge in Commercial Real-Estate Prices Stirs Bubble Worries*, WALL ST. J. (Aug. 12, 2015), http://www.wsj.

C. The Agencies Take Aim at CRE Lenders

1. Agency Action

The Interagency Statement first attempts to quell CRE bubble fears, noting that despite "historically low capitalization rates and rising property values," other asset-quality metrics indicate that lenders are generally holding strong CRE portfolios.[11] The bigger source of concern with respect to the spiking CRE market, according to the Agencies, is the industry-wide relaxing of underwriting standards and risk management policies.[12] Most notably, the Agencies highlight: "less-restrictive loan covenants, extended maturities, longer interest-only payment periods, . . . limited guarantor requirements[,] . . . underwriting policy exceptions[,] and insufficient monitoring of market conditions."[13] Indeed, the most recent OCC Credit Underwriting Practices Report revealed some troubling trends in CRE lending underwriting standards: (i) from 2011-2015, CLD loan underwriting eased at 3%, 5%, 18%, 33% and 20%, respectively; and (ii) from 2011-2015, other CRE loan underwriting eased at 9%, 12%,

com/articles/surge-in-commercial-real-estate-prices-stirs-bubble-worries-1439415930 [https://perma.cc/DK6C-7YQL] ("Investors are pushing commercial real-estate prices to record levels in cities around the world, fueling concerns that the global property market is overheating . . . . A [CRE] valuation index compiled by Green Street Advisors fell to 61.2 in 2009 from 100 in 2007. It crossed 100 again in 2013. [In August 2015,] it was at a record of 118.").

[11] *Interagency Statement*, *supra* note 1, at 1 (highlighting as positive indicia for the CRE portfolios: indicators of CRE market conditions (such as vacancy and absorption rates) and portfolio asset quality indicators (such as non-performing loan and charge-off rates)"). *But see* OFFICE OF THE COMPTROLLER OF THE CURRENCY, SEMIANNUAL RISK PERSPECTIVE 15 (2015), *available at* http://www.occ.gov/publications/publications-by-type/other-publications-reports/semiannual-risk-perspective/semiannual-risk-perspective-fall-2015.pdf [https://perma.cc/7C9N-5PDX] [hereinafter *OCC Risk Perspective*] ("[T]he national apartment vacancy rate . . . is expected to increase by nearly one percentage point over the next two years . . . [while] [m]arkets with the most new construction will likely see apartment vacancy rates rise by more than one percentage point and will experience significant pressure on rents and net operating income.").

[12] *Interagency Statement*, *supra* note 1, at 1.

[13] *Id.*

24%, 37%, and 36%, respectively.[14] Lending standards have not eased at such rates since just before the Great Recession.[15] Perhaps more troublingly, the OCC expects CLD and other CRE portfolio credit risk to increase by 39% and 54%, respectively, in 2016.[16] After outlining examples of underwriting and risk management policies that "are consistent with supervisory expectations," the Interagency Statement reaffirms the supervisory criteria set forth in the Interagency Guidance.[17] In turn, the Interagency Guidance established the following four independent criteria that may give rise to heightened supervisory scrutiny of a banking entity:

(1) "Rapid growth" in its CRE loan portfolio;
(2) "Notable exposure" to a particular CRE segment;
(3) Total CLD loans in an amount greater than or equal to 100% of the bank's total risk-based capital; or
(4) Total CRE (TCRE) loans in an amount greater than or equal to 300% of the bank's total risk-based capital, *and* (ii) a 50% increase in the outstanding balance of the bank's CRE portfolio over the preceding 36 months.[18]

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[14] OFFICE OF THE COMPTROLLER OF THE CURRENCY, 2015 SURVEY OF CREDIT UNDERWRITING PRACTICES 5-6 (2015), *available at* http://www.occ.gov/publications/publications-by-type/survey-credit-underwriting-practices-report/pub-survey-cred-under-2015.pdf [https://perma.cc/WL8S-S5JB] [hereinafter *OCC Survey*].
[15] Tracy, *supra* note 8, at 1.
[16] *OCC Survey*, *supra* note 14, at 24, 26.
[17] *Interagency Statement*, *supra* note 1, at 2-3.
[18] *Interagency Guidance*, *supra* note 3, at 74587 ("[A]n institution that has experienced rapid growth in CRE lending, has notable exposure to a specific type of CRE, or is approaching or exceeds the following [two] supervisory criteria may be identified for further supervisory analysis of the level and nature of its concentration risk. The supervisory criteria are: (1) Total reported loans for construction, land development, and other land represent 100 percent or more of the institution's total capital; or (2) Total commercial real estate loans as defined in the Guidance represent 300 percent or more of the institution's total capital and the outstanding balance of the institution's CRE loan portfolio has increased 50 percent or more during the prior 36 months.").

Satisfaction of any of the above may trigger a review of the entity's underwriting and risk management policies, the result of which could be heightened regulatory requirements and compliance costs.[19] The Agencies stress that these criteria are neither hard caps on an entity's CRE lending authority nor safe harbors for those CRE lenders that do not trigger any of the four; instead, the Agencies use the criteria as "high-level indicators to identify institutions potentially exposed to CRE concentration risk," only ramping up regulatory supervision when the lender's underwriting and/or risk management policy is not (according to the inspecting regulator) commensurate with their CRE portfolio risk.[20]

The Agencies' continued focus on CLD and TCRE concentration levels is largely due to the following. In 2006, prior to issuance of the Interagency Guidance, OCC analysis indicates that 31% of all commercial banks held excessive CLD and/or TCRE concentrations.[21] Banks with excessive concentrations in one or both categories were, unsurprisingly, more sensitive to the general market decline during 2007 to 2009 than were those banks which exceeded neither threshold; in fact, while just 0.5% of banks without excessive TCRE concentration failed during the three year period, those banks meeting or exceeding both CLD and TCRE concentrations failed at a 22.9% clip.[22] Between the two concentrations, CLD concentration was most indicative of bank failure.[23] Of the 1,909 banks exceeding the CLD concentration during 2007 to 2009, approximately 13% failed.[24] More jarringly, the OCC estimates 80% of the FDIC's insurance fund

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[19] *Id.*

[20] *Id.*

[21] These banks held nearly 40% of all outstanding CRE loans in the U.S. market, an estimated $378 billion. KEITH FRIEND, HARRY GLENOS & JOSEPH B. NICHOLS, AN ANALYSIS OF THE IMPACT OF THE COMMERCIAL REAL ESTATE CONCENTRATION GUIDANCE 1 (2013), http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-59a.pdf [https://perma.cc/MZU6-AVUF] (examining the effects of the 2006 interagency guidance on commercial real estate concentration and performance).

[22] *Id.* at 7 ("Of the banks that met or exceeded both concentration levels and the growth component in the supervisory criteria, 22.9 percent failed. In contrast, only 0.5 percent of banks that had concentration levels lower than those in the supervisory criteria failed.").

[23] *Id.* ("None of these factors had as strong an impact in determining risk of failure as CLD concentration levels.").

[24] *Id.* at 8.

losses during this period can be traced back to banks with excessive CLD concentrations.[25] Comparatively, banks that surpassed the TCRE concentration threshold (which obviously includes CLD loans), but featured sub-100% CLD concentrations, experienced just a 4.6% failure rate.[26]

2. Anticipated Impact

Before surveying the anticipated impact of the Interagency Statement, there are two important threshold questions to be addressed: what exactly is regulatory guidance, and how impactful of a regulatory device is it, generally? To the first: regulatory guidance is an agency-issued statement that sets out industry-wide standards, which are not per se legal requirements, but which can nonetheless "serve as part of the basis for regulatory action against a particular institution."[27] To the second: despite that regulatory guidance is still phrased as "a set of expectations rather than hard-and-fast requirements," it is now best practice in the banking industry to interpret guidance standards as legal mandates.[28] This is because noncompliance is often followed by some heightened regulatory

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[25] *Id.* ("Using FDIC data, we estimate that 80 percent of total FDIC insurance fund costs from this period are associated with banks whose CLD lending was 100 percent or more of total risk-based capital.").

[26] *Id.* ("The total CRE supervisory criterion, however, overlaps with the first criterion on CLD concentration levels, because CLD loans are also included in the non-owner-occupied CRE ratio calculation. When restricting the sample to banks that exceeded the total CRE concentration level—but remained below the 100 percent CLD concentration level—and had less than 50 percent CRE growth during the previous 36 months, 4.6 percent failed.").

[27] CONG. OVERSIGHT PANEL, 111TH CONG., FEBRUARY OVERSIGHT REPORT: COMMERCIAL REAL ESTATE LOSSES AND THE RISK TO FINANCIAL STABILITY 88 (2010), *available at* https://www.gpo.gov/fdsys/pkg/CPRT-111JPRT54785/pdf/CPRT-111JPRT54785.pdf [https://perma.cc/PKL4-QASC] [hereinafter *Oversight Panel*].

[28] DELOITTE CTR. FOR REGULATORY STRATEGIES, WHEN "SHOULD" BECOMES "SHALL": RETHINKING COMPLIANCE MANAGEMENT FOR BANKS 3 (2014), http://deloitte.wsj.com/riskandcompliance/files/2014/07/bank_Compliance_Management.pdf [https://perma.cc/8FZU-9XC9] ("In today's environment, the assumption that guidance is just an expectation, not required, is no longer acceptable. . . . Recent developments make it clear that "should" is increasingly be interested as "shall," at least for larger organizations.").

scrutiny, whether in the form of inspection, continuing oversight, and/or operational directive; in this way, noncompliance can impose on lenders very real costs, both in the operating and opportunity senses.[29] Thus, these seemingly non-binding guidelines bare serious teeth.[30] Guidance is especially impactful when, as here, it sets out "specific numeric thresholds," which banking entities tend to interpret as explicit caps (despite that regulators do not characterize them as such).[31] For these reasons, contemporary regulators are increasingly turning to such supervisory guidance so as "to influence [industry-wide] bank behavior in a more-flexible and more-timely manner than is possible with official rulemakings."[32]

Returning to CRE lending, the Interagency Guidance threatened non-compliant lenders with "increased supervisory scrutiny, a downgrade of the bank's official supervisory ratings, and involvement of supervisors in the decision making processes of the offending banks."[33] Despite the fact that CRE lending practices have regressed to such a state that the Agencies felt it necessary to issue a statement reaffirming the previously set-out standards, some experts maintain that the Interagency Guidance was effective in curtailing

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[29] SEAN M. HOSKINS & MARC LABONTE, CONG. RESEARCH SERV., R43999, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS 32 (2015) (emphasis in original) ("Regulatory burden on banks is manifested primarily in two different ways, operating costs and opportunity costs. *Operating costs* (or *compliance costs*) are the costs the bank must bear in order to comply with the regulation . . . *Opportunity costs* are the costs associated with foregone business opportunities because the additional regulation.").

[30] Kevin Jiang, *Are Compliance Costs Breaking Banks?*, TRULIOO (Aug. 25, 2015), https://www.trulioo.com/blog/2015/08/25/are-compliance-costs-hurting-banks-bottom-lines/ [https://perma.cc/E7PX-6PHB] ("'Regulations – and the continued intensity of regulation – continue to loom over banks, with a potential need for investment to be directed towards regulatory rather than growth projects. . .").

[31] William F. Bassett & W. Blake Marsh, *Assessing Targeted Macroprudential Financial Regulation: The Case of the 2006 Commercial Real Estate Guidance for Banks* 1-2 (Fed. Reserve Bd., Finance and Economics Discussion Series Working Paper No. 2014-49, 2014), http://www.federalreserve.gov/pubs/feds/2014/201449/201449pap.pdf [https://perma.cc/76MU-3ZT7] (internal citations omitted) ("[D]espite public assurances from regulators that the numerical thresholds in the guidance were not meant to be explicit caps on allowable CRE exposure, bankers feared that . . . examiners would enforce them in just that manner. . . .").

[32] *Id.* at 1.

[33] *Id*. at 2.

risky CRE concentration.[34] The Interagency Statement goes a step further than the Interagency Guidance, warning banking entities that inadequate underwriting or risk management policies could subject an offending entity to heightened regulatory scrutiny, which could range from "[1] develop[ing] a plan to identify, measure, monitor, and manage CRE concentrations, [2] [reducing] risk tolerances in their underwriting standards, or . . . [3] rais[ing] additional capital."[35]

It is difficult to determine, with any certainty, the exact impact the Interagency Guidance will have on the CRE market going forward; federal regulators need not issue anticipated costs,[36] and many factors are sure to play on the future of CRE lending (e.g. rising interest rates, demand, etc.).[37] That said, experts widely agree that the Agencies will make good on their promise to increase the frequency and rigor of their examinations during 2016.[38] In particular, examiners are most likely

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[34] *See, e.g.*, Friend, Glenos & Nichols, *supra* note 21, at 11 ("[W]hile we did not perform a formal econometric test to determine whether or not we would have seen the same degree of change in CRE loan growth if the guidance had not been issued, a simple comparison is illustrative that banks with higher CRE concentrations retreated from CRE lending in response to [2007-2009] market conditions more rapidly than lower concentration banks."); Bassett & Marsh, *supra* note **Error! Bookmark not defined.**, at 42 ("This paper argues that the unexpected and unprecedented introduction of quantitative thresholds into the process by which supervisors evaluated banks' exposures to commercial real estate under the guidance represents an exogenous shock to bank loan supply. Even after controlling for past growth in such loans, the financial condition of the bank, the economic conditions in its local markets, and national economic and financial conditions, we find evidence that the growth rate of CRE loans at banks above the specified thresholds slowed considerably, both relative to banks below the thresholds and relative to how those banks had adjusted to high concentrations before the guidance was issued.").

[35] *Interagency Statement*, *supra* note 1, at 2-3.

[36] HOSKINS & LABONTE, *supra* note 29, at 32 ("One reason that only incomplete information on regulatory burden exists is because no statute requires regulators to make quantitative estimates for all rules they issue.").

[37] Hamilton, *supra* note 6, at 1 (highlighting as contributors to commercial real estate lending levels: "low cost loans, foreign buyers and the hunt for yield in the low interest-rate environment").

[38] *See* Tracy, *supra* note 8, at 1 ("When the banking agencies issue a joint statement like Friday's, they often follow up with tougher scrutiny of the loans in question."); Charles M. Horn, *Banking Agencies Issue Cautionary Statement on Commercial Real Estate Lending*, MORGAN, LEWIS & BOCKIUS LLP (Dec. 18, 2015), http://blogs.morganlewis.com/finreg

to examine banks' (1) CRE underwriting standards (specifically: the extent to which they have loosened, and the number and type of exceptions made), (2) CRE loan terms (specifically: those practices outlined in the Interagency Statement), (3) analyses of borrower's repayment capacity, and (4) Board oversight over CRE concentration levels.[39] As discussed above, such scrutiny translates to increased compliance costs for banks.[40] Such a regulatory ramp-up "could curb banks' ability to continue to extend credit to a fast-growing sector," and, in so doing, "provide opportunities for nonbank lenders such as private-equity firms and real-estate investment trusts," which have "already been making headway into real-estate markets, in part because banks are grappling with postcrisis capital requirements that restrict the amount of borrowed money they can use to fund real-estate lending."[41] Thus, at the very least, banks are assured to face higher compliance costs next year, which would, ceteris paribus, tighten CRE credit markets.[42]

3. Intended Effect

Having set out the anticipated impact of the Interagency Statement, it is worth pausing to question the regulator's intent in issuing it. Facially, the Interagency Statement seeks only to improve underwriting and risk management policy in the CRE lending market. Indeed, the OCC recently identified easing CRE underwriting

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/2015/12/banking-agencies-issue-cautionary-statement-on-commercial-real-estate-lending/ [https://perma.cc/9GRN-SRGQ] ("Banking organizations should pay close attention to this statement and be prepared for a rigorous supervisory review of CRE lending activities and risk management cycles during their next safety and soundness examinations.").

[39] Faye Ricci, *Regulators Refocus on Commercial Real Estate Lending*, BANK L. MONITOR (Jan. 6, 2016), http://www.banklawmonitor.com/2016/01/regulators-refocus-on-commercial-real-estate-lending/ [http://perma.cc/BMF9-E364] (examining the Interagency Statement and setting out the potential regulatory implications going forward).

[40] *See supra* notes 27-30 and accompanying text.

[41] Tracy, *supra* note 8, at 1.

[42] Horn, *supra* note 38 ("Banking organizations should pay close attention to this statement and be prepared for a rigorous supervisory review of CRE lending activities and risk management cycles during their next safety and soundness examinations.").

standards as a "key risk issue,"[43] and Comptroller Curry highlighted lax CRE underwriting practices in a December 2015 conference call.[44] All that said, bolstering banks' credit underwriting and risk management may not be the only intent behind the Interagency Statement. Indeed, there are some indications that the Interagency Statement may have been deployed, at least in part, as part of macroprudential strategy to reduce CRE pricing pressures.[45]

Consider first that, despite assurances of CRE portfolio strength in the Interagency Statement, recent actions of the Agencies suggest a growing belief that an asset bubble may be forming in the CRE market and evince a fear that any sharp downturn in CRE value could have dire ramifications for the economy.[46] Next, consider that

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[43] *OCC Risk Perspective*, *supra* note 11, at 26.

[44] Thomas J. Curry, Comptroller of the Currency, Remarks on the OCC Semiannual Risk Perspective, Fall 2015 (Dec. 16, 2015), *available at* http://www.occ.treas.gov/news-issuances/speeches/2015/pub-speech-2015-161.pdf [https://perma.cc/6V77-AL69] ("As a result, we've seen banks and thrifts relax underwriting standards, layer risks in consumer and commercial lending products, and accumulate concentrations, particularly in commercial real estate. . . . [W]e see banks and thrifts reaching for yield and growth, sometimes extending their reach at the expense of sound underwriting, strong risk management, and adequate loan loss provisioning.").

[45] William C. Dudley, Pres. and CEO, Fed. Reserve Bank of N.Y., Panel Remarks at the Macroprudential Monetary Policy Conference (Oct. 3, 2015), *available at* https://www.newyorkfed.org/newsevents/speeches/2015/dud151003 [https://perma.cc/DL7N-YQGH] (highlighting supervisory guidance as one of contemporary regulators' preferred macroprudential tools).

[46] *See, e.g.*, Tobias Adrian et al., *Macroprudential Policy: Case Study from a Tabletop Exercise* 7 (Fed. Reserve Bank of N.Y. Staff Report No. 742, 2015), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr742.pdf [https://perma.cc/WSV7-JS9B] ("The compression of risk spreads, looser underwriting standards, and rising demand for commercial mortgage-backed securities (CMBS) fuel growth in commercial mortgage lending. As a result, valuation pressures emerge in the commercial property market, with the price index matching its pre-Lehman peak in real terms by end-2016 and expected to exceed it substantially by end-2018."); Dudley, *supra* note 45, at 1 ("[T]he [tabletop exercise's] scenario was much more detailed [than just an overheating commercial real estate market], but the commercial real estate sector was the major problem with respect to financial stability."); Steve Matthews, *Fed's Lockhart Says Rising Rates to Create Risks for U.S. Banks*, BLOOMBERG BUS. (Feb. 25, 2016), http://www.bloomberg.com/news/articles/2016-02-25/fed-s-lockhart-says-

the Agencies are divided on whether or not raising the federal funds rate is the best means of beating back CRE prices: though increasing interest rates could well make CRE a less attractive investment option relative to others (e.g. corporate bonds),[47] an interest rate increase is "a blunt instrument affecting the entire economy."[48] Such action may be inappropriate here: though the CRE market is trending into very risky waters,[49] many officials believe "[t]he financial system [as a whole] . . . looks far less vulnerable than it did before the 2008 crisis."[50] For this reason, rather than just hiking up interest rates—which could well damage otherwise healthy economic sectors—post-Crisis regulators are attacking specific classes of risky assets with industry-wide supervisory guidance, hoping that the attendant compliance requirements will divert bank assets away from the risky

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rising-rates-to-create-risks-for-u-s-banks [https://perma.cc/8DQV-7F9S] (statement of Federal Reserve Bank of Atlanta President, Dennis Lockhart) ("We remain concerned about the potential for the CRE market to overheat and hurt banks again . . . ."); Tracy, *supra* note 8, at 1 ("Mark Zandi, chief economist at Moody's Analytics, said he expects regulators will incorporate a significant downturn in commercial real estate into next year's annual 'stress tests' of large U.S. banks, a move that would put pressure on firms to constrain the growth of those portfolios.").

47 Sarah Mulholland, *Credit-Market Swoon Sends Somber Message to Property Investors*, BLOOMBERG BUS. (Dec. 4, 2015), http://www.bloomberg.com/news/articles/2015-12-04/credit-market-swoon-sends-somber-message-to-property-investors (highlighting (1) the narrowing divide between U.S. corporate debt and commercial real estate yield and (2) increasing capitalization rates signs that the commercial real estate market's five-year run of price gains is coming to an end).

48 Hilsenrath & Harrison, *supra* note 7, at 1 (emphasizing that Federal Reserve officials "disagreed on whether to use higher interest rates to stop bubbles").

49 Stanley Fischer, Vice Chairman, Fed. Reserve Bd., Financial Stability and Shadow Banks: What We Don't Know Could Hurt Us 3 (Dec. 3, 2015), *available at* http://www.federalreserve.gov/newsevents/speech/fischer20151203a.pdf [https://perma.cc/5ABU-WWB6] ("[S]igns of valuation pressures are emerging in commercial real estate markets, where prices have been rising at a solid clip and lending standards have deteriorated, although debt growth has not yet accelerated notably.").

50 Ryan Tracy, *Fed's Stanley Fischer Sees Financial System Far Less Vulnerable Than Before 2008 Crisis*, WALL ST. J. (Dec. 3, 2015), http://www.wsj.com/articles/feds-stanley-fischer-sees-financial-system-far-less-vulnerable-than-before-2008-crisis-1449166949 [https://perma.cc/BT56-EW3Q].

practices.[51] For example: the 2013 Interagency Guidance on Leverage Lending laid out numerical thresholds and regulatory expectations for private equity deals and leveraged financing transactions,[52] and, in so doing, effected a 13% drop in leveraged lending from 2014 to 2015.[53] In light of the expressed CRE bubble concerns and the widely-held assumption that the threat of increased regulatory oversight can so burden lenders as to dampen the CRE price spike, it appears that the Interagency Statement may have been issued as a macroprudential measure to impede further growth of the perceived CRE bubble.

D. Tax Law and Regulation

1. Foreign Investment in CRE

Much of the aforementioned spike in CRE pricing is due to increasing foreign investment, a product of the global economic crisis and the international perception that U.S. CRE offers a unique mixture

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[51] Rich Miller, *Fischer Worries Fed Can't Head Off, Contain Financial Crises*, CHI. TRIB. (Jan. 4, 2016), http://www.chicagotribune.com/news/sns-wp-blm-fed-fischer-c21e93fa-b305-11e5-8abc-d09392edc612-20160104-story.html [https://perma.cc/ASL8-CC7H].

[52] BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CORP. & OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERAGENCY GUIDANCE ON LEVERAGED LENDING (2013), *available at* http://www.federalreserve.gov/bankinforeg/srletters/sr1303a1.pdf [https://perma.cc/JY52-RUFL] ("This guidance describes expectations for the sound risk management of leveraged lending activities . . . .").

[53] Steven Davidoff Solomon, *Obstacles in Regulators' Push to Reduce Leveraged Loans*, N.Y. TIMES DEALBOOK (Jul. 7, 2015), http://www.nytimes.com/2015/07/08/business/dealbook/balancing-act-for-regulators-seeking-to-curb-leveraged-loans.html?_r=0 [https://perma.cc/VF2A-DPLL] ("[T]he regulator crackdowns made some headway. Banks began to pull back from providing private equity loans. Leveraged lending dropped 13 percent in the first half of 2015 compared with figures in the period a year earlier, . . . [while] [s]ignificant transactions . . . hit bumps because of an unwillingness of some lenders to back the deal, reportedly because of leverage issues."). *See also* Christine Idzelis, *Leveraged-Loan Sales Slump to Worst Since 2010 on Fed Scrutiny*, BLOOMBERG BUS. (Apr. 7, 2015), http://www.bloomberg.com/news/articles/ 2015-04-07/leveraged-loan-sales-slump-to-worst-since-2010-on-fed-scrutiny [https://perma.cc/7YQN-D33V] ("The market for loans to below-investment grade companies is off to its slowest start in five years as regulators step up efforts to curb risky underwriting and investors put their money elsewhere.").

of stability and yield.[54] This foreign investment trend is an increasing one: foreign investors accounted for just 8.1% of real estate investment from 2002-2012, but that figure jumped to approximately 16% in 2015, comprising $78.4 billion of the $483 billion CRE market.[55] Of that $78.4 billion, "[foreign] pension funds accounted for about $7.5 billion."[56] In actuality, due to certain data limitations and a lack of sovereign cooperation, both the amount of foreign investment and the percentage thereof attributable to foreign pension funds are likely significantly underreported.[57] The most interesting aspect of this

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[54] *See, e.g.*, Anika R. Khan, *Special Commentary: CRE Impact from Tax Extenders*, WELLS FARGO 5 (Jan. 15, 2016), https://www08.wellsfargomedia.com/assets/pdf/commercial/insights/economics/real-estate-and-housing/cre-tax-extenders-20160115.pdf [https://perma.cc/BE25-82DW] (internal citations omitted) ("Since 2009, foreign investors have had a pretty healthy appetite for U.S. commercial real estate. Slow global growth and low interest rate environment have resulted in a search for yield, which has made domestic CRE an attractive asset class . . . . [T]he U.S. CRE market is considered the most 'stable and secure' and represents the 'best opportunity for capital appreciation.'"); Hui-Yong Yu, *U.S. Eases 35-Year-Old Real Estate Tax on Foreign Investors*, BLOOMBERG BUS. (Dec. 18, 2015), http://www.bloomberg.com/news/articles/2015-12-18/u-s-poised-to-lift-35-year-old-real-estate-tax-on-foreigners [https://perma.cc/FMN7-TB2F] ("Foreign investors have flocked to U.S. real estate since the global economic meltdown, drawn by the relative yields and perceived safety of assets from office towers and shopping centers to apartments and warehouses. The demand has helped drive commercial real estate prices to record highs."); Randyl Drummer, *Latest AFIRE Survey: Foreign Investors As Bullish As Ever on U.S. Real Estate*, COSTAR GRP. (Jan. 4, 2016), http://www.costar.com/News/Article/Latest-AFIRE-Survey-Foreign-Investors-As-Bullish-As-Ever-On-US-Real-Estate/178587 [https://perma.cc/A2YQ-QZFJ] ("Even without knowledge of the FIRPTA changes, investor sentiment in the latest survey showed the strongest level of confidence in years about the U.S. as a safe harbor for investment, [James A. Fetgatter, chief executive officer of AFIRE,] said. 'We have a clearly recovering real estate market and the dollar is increasing. There are not a lot of roadblocks to worry about, like for example the immigration crisis in Europe, stock market fluctuations and a possible recession in China, and bubbles in the Brazil real estate market, Fetgatter said.").

[55] *Id.*

[56] *Id.*

[57] *See, e.g.*, Brian Bailey, *ViewPoint: Spotlight: Foreign Investment in CRE*, 28 Fed. Res. Bank of Atlanta Fin. Update, no. 2, 2015, at 1, *available at* https://www.frbatlanta.org/banking/publications/financial-update/2015/q2/viewpoint/spotlight-foreign-investment-in-cre.aspx

foreign investment trend is the fact that it occurred under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), which, prior to the aforementioned CRE-related amendments, imposed a host of tax barriers to foreign CRE investment.[58] Though "foreign persons" conducting business in the U.S. are generally exempt from U.S. capital gains taxes, FIRPTA made foreign investors' gains or losses from U.S. real estate sales taxable income.[59] This traditionally included returns on equity held in REITs and other U.S. real property holding corporations.[60]

[https://perma.cc/CQ4F-JR57] ("The amount invested and the proportion of overall CRE transactions were the highest recorded since tracking began in 2001. (It should be noted that these figures are considered to be conservative estimates of the amount of foreign investment in U.S. CRE.) There are limitations in using the data to track foreign capital that is placed into a U.S.-based corporation or with an individual."); Jason Meister, *Opinion: Foreign Investment in U.S. Real Estate Widely Under-Reported*, FOX BUS. (Aug. 20, 2014), http://www.foxbusiness.com/ politics/2014/08/20/opinion-foreign-investment-in-us-real-estate-widely-underreported.html [https://perma.cc/75XA-MS62] ("However despite the focus on foreign investment and the splashy headlines, the media have only managed to report on the tip of the iceberg—the actual amount of foreign capital pouring into U. S. real estate is vastly underreported. Data companies such as Real Capital Analytics look primarily at deed transfers to determine transfers to foreign investors, and therefore typically miss the substantial investments by foreign investors who partner with domestic operators.").

[58] *See, e.g.*, *Oversight Panel*, *supra* note 27, at 84 ("Outside investors are a possible solution to the equity crunch that might hit the commercial real estate sector over the next few years. Although many believe that billions of dollars in non-U.S. equity are waiting to be invested in U.S. commercial real estate, there can be negative tax consequences for non-U.S. purchasers of or investors in U.S. real estate. Non-U.S. investors can be hit with double or even triple taxation on their investments in U.S. real estate."); Yu, *supra* note 54, at 1 (internal citations omitted) ("FIRPTA has historically made direct investment in U.S. property a non-starter for trillions of dollars' worth of foreign pensions . . . .").

[59] Drummer, *supra* note 54, at 1 ("The tax and spending bill exempts qualified foreign pension funds and their entities from taxation under FIRPTA, a 1980 bill that imposes income tax on foreigners disposing of U.S. real estate interests.").

[60] *Omnibus Bill Includes Significant Changes to Tax Law Regarding FIRPTA, REITs, and RICs*, ROPES & GRAY LLP (Dec. 24, 2015), https://www.ropesgray.com/newsroom/alerts/2015/December/Omnibus-Bill-Includes-Significant-Changes-to-Tax-Law-Regarding-FIRPTA-REITs-and-RICs.aspx [https://perma.cc/R6SR-BYQA] ("FIRPTA imposes U.S.

2. FIRPTA, As Amended

Though the PATH Act was a wide-ranging omnibus bill, this article focuses predominantly on the amendments to FIRPTA.[61] With respect to FIRPTA, the most notable amendments set forth in the PATH Act are:

(1) Increasing the foreign individual exemption for distributions of minority interests in publicly traded companies (e.g. REITs) from 5% to 10%;
(2) Creating an exemption from tax treatment for qualified foreign pension funds[62] and their wholly-owned subsidiaries;

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federal tax and return filing obligations on most non-U.S. investors with respect to dispositions of "U.S. real property interests," which include stock in REITs and other so-called "U.S. real property holding corporations," and with respect to distributions by REITs that are attributable to the sale of U.S. real property interests.").

[61] Eliot Brown, *Congress Eases Curbs on Foreign Real-Estate Investors*, WALL ST. J. (Dec. 20, 2015), http://www.wsj.com/articles/congress-eases-curbs-on-foreign-real-estate-investors-1450657972 [https://perma.cc/LAD8-8XQK] ("[T]he [CRE] industry finally persevered, as the broad spending and tax measures passed by Congress relaxed [FIRPTA] . . . in a move some expect to bring billions of dollars of additional foreign investment into an already-robust market for office buildings, apartments and malls across the country . . . . But the broader tax and spending legislation contained other measures affecting real estate that offset the cost [of lost taxes on foreign CRE investment], . . . [t]he most prominent [of which] was a provision that restricts the ability of companies to spin off their property holdings into real estate investment trusts, which don't pay income tax.").

[62] A "qualified" foreign pension fund means "any trust corporation, or other organization or arrangement that [a] is created and organized under the laws of a country other than the United States; [b] is established to provide retirement or pension benefits to current or former employees (or their designees) of one or more employers in consideration for services rendered; [c] does not have a single participant or beneficiary entitled to more than 5% of its assets or income; [d] is subject to government regulation and provides annual information reporting about its beneficiaries to relevant tax authorities in the country in which it is established or operates; and [e] is entitled to certain tax benefits under the laws of the country in which it is established or operates." Joshua T. Brady and Daniel A. Nelson, *New PATH Act Changes*

(3) Creating an exception for domestically-controlled REITs (less than 50% of its shares held by non-U.S. persons), under which a non-U.S. investor's sale of such shares is not considered taxable income under FIRPTA;

(4) Making permanent the treatment of regulated investment companies as qualified investment entities; and

(5) Increasing the withholding rate on the gross proceeds from a non-U.S. person's disposition of U.S. real property interest (USRPI) from 10% to 15%.[63]

3. Expected Impact

Unlike the fractured opinion on the effect of the Interagency Statement, experts are relatively unanimous in their estimation that the PATH Act will increase foreign CRE investment going forward.[64] The

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Rules for Foreign Investment in US Real Estate and for REITS, MORGAN, LEWIS & BOCKIUS LLP (Jan. 5, 2016), https://www.morganlewis.com/pubs/new-path-act-changes-rules-for-foreign-investment-in-us-real-estate-and-for-reits [https://perma.cc/9UUM-385G]. A qualified fund can be either private and/or governmental. *Id.*

[63] *Id.*; *Congress Passes REIT and FIRPTA Reforms: REIT Spinoffs Restricted, But Generally Beneficial for Existing REITs and Foreign Investors in U.S. Real Estate Markets*, SIDLEY AUSTIN LLP 1-5 (Dec. 18, 2015), http://www.sidley.com/~/media/update-pdfs/2015/12/12-18-15-tax-update-pdf.pdf [https://perma.cc/2ENC-HX47]; Robert Knakal, *FIRPTA Changes Could Be Great for Investment Sales*, COM. OBSERVER (Feb. 3, 2016), https://commercialobserver.com/2016/02/firpta-changes-could-be-great-for-investment-sales/ [https://perma.cc/9N33-JLWC].

[64] *See, e.g.*, Randyl Drummer, *How Big a Factor Will New FIRPTA Rules Be in Attracting More Foreign Investment in U.S. Real Estate*, COSTAR GRP. (Jan. 13, 2016), http://www.costar.com/News/Article/How-Big-a-Factor-Will-New-FIRPTA-Rules-Be-in-Attracting-More-Foreign-Investment-in-US-Real-Estate-/178783 [https://perma.cc/UW4J-36RQ] ("Initial estimates suggested the new FIRPTA changes will generate an additional $20 billion to $30 billion in [foreign] investment in U.S. commercial real estate in 2016, according to Ken Rosen, professor of economics and chairman of the Fisher Center for Real Estate and Urban Economics at the University of California, Berkeley."); Howe, *supra* note 7, at 2 ("In December, Congress lessened the

PATH Act's facilitation of increased foreign pension fund investment is particularly important in light of the fact that, even before the amendments, "[f]oreign pension funds [were] some of the largest sources of international money [coming] into the U.S."[65] Considering foreign investment's well-recognized catalyzing role in the current CRE pricing spike, increased foreign inflows (all else held constant) will only serve to increase the aforementioned CRE pricing pressures.[66]

The withholding tax increase amendment could certainly dissuade some potential foreign investors who are not investing via qualified pension funds or publicly-traded REITS, but the variety of investment vehicles not subject to such tax should mitigate that amendment's negative effect on foreign CRE investment.[67] And, while the Fed's interest rate increases could mitigate the extent of foreign investment, some experts believe that foreign CRE investment is less sensitive than domestic CRE investment to interest rate increases

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tax burden on foreign CRE investors, a decision that could boost foreign investment by $20 or $30 billion a year. U.S. CRE looks like a good bet for investors from emerging markets such as China—which is already seeing capital flight thanks to its own economic woes."); *Congress Passes REIT and FIRPTA Reforms: REIT Spinoffs Restricted, But Generally Beneficial for Existing REITs and Foreign Investors in U.S. Real Estate Markets*, *supra* note 63, at 5-6 ("We expect non-U.S. pension plans will increase their investments in U.S. real estate, including U.S. infrastructure projects, given this change."); Yu, *supra* note 54, at 1 ("[S]aid James Corl, a managing director at private equity firm Siguler Guff & Co.[,] 'This tax-law modification is a game changer' that could result in hundreds of billions of new capital flows into U.S. real estate . . . . The change 'is a huge deal,' said Jim Fetgatter, chief executive of the Association of Foreign Investors in Real Estate. 'There's no question' it will increase the amount of foreign investment in U.S. property, he said.").

[65] Brown, *supra* note 61, at 1.

[66] Khan, *supra* note 54, at 1 ("[T]he expansion of FIRPTA could further increase CRE foreign investment in major markets and sectors that are already seeing record-breaking valuations.").

[67] Drummer, *supra* note 64, at 1 ("'The increased foreign withholding rate may have a chilling effect on direct and indirect investments in U.S. real estate by other non-U.S. persons' other than foreign pension funds, noted Matthew J. Norton, real estate law practice leader for K&L Gates based in Charleston, S.C. [However][,] [i]nternational investors may still avoid the FIRPTA tax by investing in and disposing of U.S. property through non-U.S. 'blocker' C corporations, or by requesting a determination from the IRS that a lower amount of withholding is appropriate.").

because safekeeping is a bigger driver of such investment than is pure yield-seeking.[68] Thus, the gradual rate increases may have a more negligible effect on foreign CRE investment than on domestic CRE investment.[69] Further, higher interest rates will not dampen CRE values if accompanied with inflation, which would allow for increased rent.[70]

4. Intended Effect

Though the purpose of the PATH Act is multi-faceted, it seems the intent behind the FIRPTA amendments is, primarily, to facilitate foreign investment in the U.S. real estate market (specifically: CRE), and, to a lesser extent, to put "[foreign] companies and pension funds on a more equal footing with their U.S. counterparts."[71]

E. Conclusions: Interplay and Early Returns

There is no reason to doubt the express intent behind the Interagency Statement: curing inadequate underwriting and risk management policies. However, if the Interagency Statement is also supposed to serve as a macroprudential curb on CRE pricing pressures, then the PATH Act's facilitation of increased foreign CRE investment (already identified as a significant factor in the CRE price spike) likely frustrates that purpose. Indeed, this could just be the latest battle in what has been described as a "Cold War" between the Federal Reserve and Congress.[72]

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[68] Meister, *supra* note 57, at 1 ("Foreign investors begin with different return expectations from those of domestic real estate investment trusts, institutional owners and pension funds. Since the main goal is to invest in a perceived safe-haven market where their money will be protected, foreign investors have lower return expectations and a much longer time horizon to achieve a profit. Making a current return is sometimes a secondary goal.").
[69] *Id.*
[70] Patnaude & Grant, *supra* note 10, at 1 ("[B]ulls counter that even if interest rates rise, property values might not necessarily be hurt if higher interest rates are accompanied by higher inflation, which typically allows landlords to raise rents.").
[71] Khan, *supra* note 54, at 1.
[72] Craig Torres, *How the Fed's Cold War With Congress Could Harm the U.S. Economy*, BLOOMBERG BUS. (Feb. 26, 2016), http://www.bloomberg.com/news/articles/2016-02-26/how-the-fed-s-cold-war-with-congress-

The early returns on both policies are mixed. Though domestic banks reported tightened CRE lending standards during the fourth quarter of 2015, those same banks reported increased demand for MF, CLD and NFNR loans during that same period (while demand declined for commercial and industrial loans).[73] Foreign banks also reported increased demand for MF, CLD and NFNR loans, but reported no change in their CRE lending standards.[74] To that end, foreign investors, prompted by both the FIRPTA amendments and the crashing price of oil, are indeed increasing their CRE investments.[75]

Conversely, despite these reports of strengthened demand and increased foreign inflows, Morgan Stanley recently reduced its 2016 CRE price growth projection from 5% to 0%, citing projected declines in loan-to-value ratios (due, in part, to tightening underwriting standards) on new CRE loans and its belief that net operating income will not increase commensurately.[76] Less pessimistically, after a slow January 2016, Real Capital Analytics still projects "both price appreciation and deal volume" to register "a single-digit pace of growth in 2016."[77] Ultimately, only time will tell how these two federal policies coexist in the CRE lending space.

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could-harm-the-u-s-economy [https://perma.cc/HL33-W4G7] ("Weak [congressional] support for unconventional tools 'raises questions about the Fed's capacity to fight a future recession.'").

[73] Press Release, Fed. Res. Bd., The January 2016 Senior Loan Officer Opinion Survey on Bank Lending Practices 1 (Feb. 1, 2016), *available at* http://www.federalreserve.gov/boarddocs/snloansurvey/201602/fullreport.pdf [https://perma.cc/XN5W-6JY5].

[74] *Id.* at 3.

[75] Farah Halime, *Buyers from Oil-Rich Nations Pivoting to CRE*, REAL DEAL (Feb. 2, 2016), http://therealdeal.com/2016/02/02/buyers-from-oil-rich-nations-pivoting-to-cre/ [https://perma.cc/5MLP-6MJD] ("Deep-pocketed investors hit by the plummeting price of oil are increasingly focusing on commercial property investments as they pull back from trophy residential acquisitions, brokers say.").

[76] Tracy Alloway, *Morgan Stanley Says U.S. Commercial Real Estate Price Growth Will Be Flat*, BLOOMBERG BUS. (Feb. 23, 2016), http://www.bloomberg.com/news/articles/2016-02-23/morgan-stanley-says-u-s-commercial-real-estate-price-growth-will-be-flat-this-year [https://perma.cc/9WLJ-5XDB].

[77] Elaine Misonzhnik, *CRE Valuations are Flat-Lining as Market Cycle Enters Ninth Inning*, NAT'L REAL EST. INV. (Feb. 22, 2016), http://nreionline.com/finance-investment/cre-valuations-are-flat-lining-market-cycle-enters-ninth-inning [https://perma.cc/S24C-AGDD]; *see* Randyl Drummer, *After Flurry of Year-End Activity, Commercial Property*

Devin Spencer[78]

Sales See Slowdown at Start of 2016, COSTAR GRP. (Feb. 26, 2016), http://www.costar.com/News/Article/After-Flurry-of-Year-End-Activity-Commercial-Property-Sales-See-Slowdown-at-Start-of-2016/180019 [https://perma.cc/YG88-A55D] (highlighting the 19.7% drop in average time on the market for commercial properties over the 12-month period ending January 2016 as a sign of continued CRE market strength); *U.S. Cap Rates Stabilize During Second Half of 2015*, REAL EST. WKLY. (Mar. 2, 2016), http://rew-online.com/2016/03/02/us-cap-rates-stabilize-during-second-half-of-2015/ [https://perma.cc/55JB-W8QJ] (scoring as positive factors for 2016 CRE outlook: stabilizing cap rates, increasing foreign investment, and strong property fundamentals).

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