Financial Stability and Bank Agency Discretion

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Following the 2008 global financial crisis, new mandates to address "financial stability" and "systemic risk" expanded financial regulators' discretion considerably. By predicating action upon these terms, the banking agencies took up issues beyond the express terms of their statutory mandates. Given the vagueness of the terms, actions taken on the basis of financial stability could easily evade congressional scrutiny and accompanying accountability. As a result, the pursuit of financial stability goals over the past fifteen years has fueled the perception that a regulatory "expertocracy" governs the field of banking, rather than market forces.

This Essay discusses four areas where financial stability or systemic risk mandates—either express or assumed—empowered bank regulators and supervisors to substitute their judgment for that of Congress: (1) the Financial Stability Oversight Council's power to designate nonbank systemically important financial institutions; (2) the Federal Deposit Insurance Corporation's power to bail out uninsured bank depositors; (3) the adoption of international standards of bank regulation through Basel; and (4) the Federal Reserve and Office of the Comptroller of the Currency's power to deny bank merger applications on financial stability grounds.

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INTRODUCTION

Although legitimacy questions have long dogged the American administrative state, public and judicial scrutiny of agency action has reached a high-water mark in 2024.[1] As some of the most powerful—yet least politically accountable—agencies, the financial regulatory bodies have found their legitimacy at the cynosure of this current debate.[2] Indeed, there is growing sentiment that banking regulators and supervisors increasingly act outside the rule of law—making their *own law* rather than "filling in the details" of Congress's law.[3] These agencies, it would seem, have accumulated too much discretion.

It is evident that discretion at banking agencies has widened considerably over the past fifteen years. Consider just three illustrative examples.

First, starting in 2021, all of the banking regulators became engaged in efforts at "[g]reening" the financial system[4] in response to an executive order requiring a "[g]overnment-wide approach" to climate change, despite the lack of a statutory mandate authorizing these agencies to address climate change.[5] These efforts have largely taken shape through opaque supervisory conversations, informal supervisory actions, and a newly created form of supervisory climate stress testing[6]—actions that are either wholly unobservable to the public eye or exempt from judicial review.

Second, in 2023, the Federal Reserve (Fed) and Federal Deposit Insurance Corporation (FDIC), acting in concert, backstopped all of the nation's bank deposits and wholesale short-term

1 *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265–68 (2024); West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2022); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203–04 (2020).

2 *See* Christina Parajon Skinner, *Central Bank Activism*, 71 DUKE L.J. 247, 312–16 (2021).

3 *See* Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN. L. REV. 725, 794–95 (2017).

4 *See Federal Reserve Board Announces It Has Formally Joined the Network of Central Banks and Supervisors for Greening the Financial System, or NGFS, as a Member*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Dec. 15, 2020), https://perma.cc/2WBV-2RAY. *See generally* Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg. 74,183 (Oct. 30, 2023) (discussing the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, and Federal Reserve Board interagency framework on climate-related financial risks).

5 *See* Exec. Order No. 14,008, 86 Fed. Reg. 7,619, 7,622–23 (Feb. 1, 2021).

6 *See* Christina Parajon Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301, 1337–47 (2021) [hereinafter Skinner, *Climate Change*].

debt, despite Congress's intent that deposit insurance caps should limit such sweeping government guarantees.[7] More specifically, the FDIC invoked the "systemic risk exception" to guarantee uninsured deposits at Silicon Valley and Signature Banks after placing those banks in resolution, while the Fed provided an open-ended liquidity facility to all other banks, allowing them to effectively guarantee their deposits and short-term creditors.[8] Statutory changes to deposit insurance law in 2008 had made it clear that lawmakers did not want the banking agencies to create this manner of broad-based deposit-guarantee schemes absent a joint resolution from Congress.

Third, two of the banking agencies—the FDIC and Office of the Comptroller of the Currency (OCC)—positioned themselves to significantly reshape banking market structure through revised merger policies. These proposed revisions implemented the spirit of an executive order asking all administrative agencies to restore a Brandeisian vision of competition.[9] By dictating merger activity as such, these agency actions risked compromising the model of bank merger policy that had characterized the U.S. economy for decades by instead imposing one dictated by those regulators' ideal banking landscape.[10]

Collectively, each of these three policy shifts reflected weighty political choices, and yet, they followed from agency discretion rather than the legislative process.

This Essay argues that the primary cause of this ratcheting in banking agency discretion was the adoption of "financial stability" as the overriding goal of financial regulation and supervision since 2010.[11] Although financial stability has always been an implicit goal of banking regulation and supervision, the term took on new meaning after the 2008 global financial crisis. In the aftermath of those events, bank regulators, supervisors, and central banks around the world collectively agreed that the big picture

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7 *See infra* Part II.

8 *See infra* Part II.C.

9 Robert C. Azarow, James P. Bergin, David F. Freeman, Jr., Amber A. Hay, Michael A. Mancusi, Sonia Kuester Pfaffenroth, Kevin M. Toomey, Anthony Raglani & Trevor Kirby, *OCC and FDIC Each Propose Policy Statements Focused on Greater Scrutiny of Bank Merger Transactions*, ARNOLD & PORTER (Mar. 26, 2024), https://perma.cc/C45G-F3TZ.

10 *See infra* Part IV.

11 At the time this Essay was finalized, President Trump had not yet nominated new agency heads at the various financial regulatory bodies. In all likelihood, those new agency leaders will adopt a different approach; and, in that sense, this Essay will stand as a retrospective analysis of financial regulation under the Obama and Biden administrations.

had been missed in the run-up to 2008. The supervisors of large, internationally active banks had failed to appreciate the interconnections among banks and between banks and other parts of the financial system, and regulation had failed to capture the risk associated with the buildup of speculative mortgage and mortgage-derivative products that had ballooned on these banks' balance sheets.[12] As such, the centerpiece of postcrisis efforts at legislative and regulatory reform was to focus on financial stability or the source of instability, namely, systemic risk.

In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act[13] was the legislative response to that diagnosis. Tellingly, the preamble to the Act describes the statute's primary purpose in those explicit terms: "To promote the financial stability of the United States."[14] The body of the Act is littered with the term "systemic risk"[15] and chiefly aims to single out "systemically important" financial institutions or utilities for heightened regulation and supervision.[16] Title I of the Act creates a new agency, the Financial Stability Oversight Council (FSOC), that is assigned the specific task of sniffing out financial stability risks and providing recommendations to other bank and market regulators on how to squelch them.[17]

On the agency level, the emphasis on financial stability and systemic risk reinforced the international bank regulatory community's commitment to developing an entirely new framework around macroprudential risk.[18] These efforts would call for significantly higher capital and liquidity requirements for banks, new stable funding rules, and tougher supervision, among other reforms.[19] Although U.S. regulators began implementing

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12 There are many accounts of the 2008 global financial crisis and the factors contributing to it. For one comprehensive account, see generally FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011).

13 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 18, 20, 22, 26, 28, 31, 42, and 44 U.S.C.).

14 *Id.* at pmbl., 124 Stat. at 1376.

15 *See, e.g.*, *id.* §§ 112(b)(1), 123(a)(1), 154(c)(1)(G), 124 Stat. at 1396, 1412, 1418.

16 *See id.* § 112(a)(2)(J), 124 Stat. at 1395.

17 *See id.* §§ 111–112, 124 Stat. at 1392–98.

18 *See* Ron Anderson, Jon Danielsson, Chikako Baba, Udaibir S. Das, Heedon Kang & Miguel Segoviano, *Macroprudential Stress Tests and Policies: Searching for Robust and Implementable Frameworks* 11–13 (Int'l Monetary Fund, Working Paper No. 18/197, 2018).

19 *See* Basel Comm. on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems*, BANK FOR INT'L SETTLEMENTS 9–10 (June 1, 2011), https://perma.cc/NV65-UQLA.

those internationally agreed reforms a few years after the crisis,[20] the financial regulators would continue to look for systemic risk in other corners of the financial markets.

Importantly, regulators had maximal discretion to hunt for financial stability and systemic risk because those terms were undefined. Although the Dodd-Frank Act used the term systemic risk 39 times, and the term financial stability a whopping 108 times, those terms were never defined in the statute; nor did the statute direct any of the agencies that were to implement the law to promulgate a definition for themselves.[21] Some academics were quick to point out that financial stability had become a "buzzword" and "surprisingly little attention ha[d] been paid to what these buzzwords actually mean[t]."[22] Henceforth, the goal of financial stability would be a moving target for the agencies to set.

With no concrete definition to cabin its meaning, financial stability regulation and supervision would, over time, become founded on significant speculation. The financial regulators decided that they were not required to *prove* that financial stability risk existed before they acted to address it—only to *imagine* a hypothetical scenario where such risk could cause "the world's financial system [to] collapse like a row of dominoes."[23] In the fifteen years after the passage of Dodd-Frank, banking regulators identified the possibility for financial stability risk in leveraged

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[20] *See Federal Reserve Board Approves Final Rule to Help Ensure Banks Maintain Strong Capital Positions*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (July 2, 2013), https://perma.cc/4YSV-EV7T.

[21] *See generally* Dodd-Frank Act, 124 Stat. 1376. The Government Accountability Office defines the term systemic risk as follows: "the risk that an event or events—within or outside the financial system—will substantially disrupt the provision of one or more financial system activities, resulting in significant adverse effects on the real economy." U.S. GOV'T ACCOUNTABILITY OFF., MACROPRUDENTIAL OVERSIGHT: PRINCIPLES FOR EVALUATING POLICIES TO ASSESS AND MITIGATE RISKS TO FINANCIAL SYSTEM STABILITY 3 (2021).

[22] Hilary J. Allen, *What Is "Financial Stability"? The Need for Some Common Language in International Financial Regulation*, 45 GEO. J. INT'L L. 929, 929 (2014).

[23] Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 193 (2008).

hedge funds,[24] private credit funds,[25] climate change,[26] stablecoins,[27] money market funds, and big insurance companies—among other areas of the financial markets that regulators had poor lines of sight into, poorly understood, or simply found too big.

The banking agencies' discretion to mitigate financial stability risks was further supported by their implicit assumption that this new field of regulation should be guided by a "precautionary principle."[28] That principle presumes that any regulation taken in the name of reducing financial stability risk would necessarily outweigh the costs because one cannot put a price on financial system safety.[29] Thus, reducing financial stability risk became an irreducible goal, and any consideration of marginal cost of additional regulation or supervisory intervention, relative to marginal benefit of decreasing the likelihood of financial instability, was largely absent from the financial stability conversation.[30]

Certainly, this level of open-ended discretion nettles the rule of law. Unelected financial regulators should not be deciding important economic issues, thereby doing the work of Congress. After all, the Constitution prohibits Congress from giving its Article I

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24 *See* John Kambhu, Til Schuermann & Kevin J. Stiroh, *Hedge Funds, Financial Intermediation, and Systemic Risk*, FED. RSRV. BANK N.Y. ECON. POL'Y REV., Dec. 2007, at 1, 7–9.

25 *See* Wulf A. Kaal, *The Systemic Risk of Private Funds After the Dodd-Frank Act*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 163, 172 (2015).

26 *See* Veena Ramani, *Addressing Climate as a Systemic Risk: A Call to Action for Financial Regulators*, HARV. L. SCH. FORUM ON CORP. GOV. (June 28, 2020), https://perma.cc/27SU-25RQ.

27 *See House Financial Services Committee Reports Digital Asset, ESG Legislation to Full House for Consideration*, FIN. SERVS. COMM. (July 27, 2023), https://perma.cc/E32L-KDHP.

28 The precautionary principle was previously applicable in situations like national security, where "high costs [of regulation] are justified even in the face of uncertain risk." Schwarcz, *supra* note 23, at 235 n.269 (citing Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1005–07 (2003)); *see also id.* at 235 ("In the principle's most utilized form, regulators may decide to regulate an activity notwithstanding lack of decisive evidence of the activity's harm.").

29 *See* HUGUES CHENET, KATIE KEDWARD, JOSH RYAN-COLLINS & FRANK VAN LERVEN, DEVELOPING A PRECAUTIONARY APPROACH TO FINANCIAL POLICY—FROM CLIMATE CHANGE TO BIODIVERSITY 5–6 (2022) ("Macroprudential policy can thus be seen as a precautionary action in the face of radical uncertainty to avoid large losses across scenarios, regardless of their probabilities.").

30 *See* Andrew T. Levin & Christina Parajon Skinner, *Central Bank Undersight: Assessing the Fed's Accountability to Congress* 23 (Hoover Inst., Working Paper No. 23120, 2024) (explaining that the Fed is not required to provide a cost-benefit analysis of its policies and does not have its efficiency or effectiveness reviewed by Congress); Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. CHI. L. REV. 1813, 1849–50 (2017) (explaining that the FSOC's regulatory regime is a way of implementing the precautionary principle).

legislative power away.[31] Yet by giving this much discretion to bank regulators, Congress has allowed bank regulators the latitude to expand their substantive purviews.

Ultimately, if this state of play persists, public confidence in the expertise and objectivity of these agencies will continue to dwindle. Heightened public dissatisfaction will, in turn, invite further judicial scrutiny of these agencies' governance, structure, funding, and mandates with a view to whether the banking agencies are sufficiently accountable to Congress.

This Essay proceeds in four parts. Each part provides a case study of how the term financial stability has expanded the discretion of bank regulators and supervisors. Part I discusses how the power to designate nonbank financial institutions as "systemically important" has been misused as a political tool to punish firms that Congress has otherwise chosen to exclude from the bank-like regulatory perimeter. Part II shows how use of the systemic risk exception to evade the least-cost resolution requirement in the Federal Deposit Insurance Act[32] (FDI Act) expanded the implicit federal safety net, thereby eroding market discipline and creating more room for top-down regulation of banks. Part III illustrates how the financial stability ethos permeated efforts at bank-capital reform in 2023 and 2024. Part IV explains how the introduction of a financial stability criterion in the Bank Merger Act of 1960[33] (BMA) gave banking agencies more room to control market structure in lieu of market forces. Each of these case studies is an important example of the explosion of financial stability discretion among the banking agencies.

I. THE FINANCIAL STABILITY OVERSIGHT COUNCIL

As earlier noted, Title I of the Dodd-Frank Act created the FSOC to address a perceived gap in the regulatory architecture. In particular, prior to the FSOC's creation, no single agency had responsibility for the bird's-eye view of the financial system with a focus on the buildup of macro risk.[34] The governance structure designed to effectuate this system-wide monitoring approach made the FSOC unique among the financial regulatory agencies.

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[31] *See* Levin & Skinner, *supra* note 30, at 8–9 ("The Framers of the U.S. Constitution specifically gave these powers [to regulate money and to borrow from the public] to the legislature, not the Executive.").

[32] 12 U.S.C. § 1811 et seq.

[33] 12 U.S.C. § 1828.

[34] *See About FSOC*, U.S. DEP'T OF THE TREASURY, https://perma.cc/33ZN-QNAQ.

Its membership is comprised of senior leadership from the bevy of financial and markets regulators.[35] But importantly, the agenda-setting power is lodged with the FSOC's director, the Secretary of the Treasury.[36] The FSOC is also administratively housed within the Treasury Department itself.[37] As such, the FSOC—and its analysis and determinations—is directly responsive to the U.S. President.

The FSOC's mandate is to respond to systemic risk, meaning it is tasked with "identify[ing] risks and respond[ing] to emerging threats to the stability of the U.S. financial system" and "respond[ing] to potential threats to financial stability."[38]

To that end, Congress gave the FSOC two main powers. The first is the power to designate nonbank financial institutions as systemically important based on its determination that the nonbank's size or mix of activities could generate financial instability if it were to be materially distressed.[39] The designation process follows two primary steps. First, the FSOC staff identifies companies that the FSOC should review.[40] The second stage involves an in-depth review of the nonbank using information collected from the firm or from public or regulatory sources.[41] Although the FSOC did not initially engage firms in this second stage, it revised its procedural guidelines in 2015 such that stage two now includes the input of the company under review.[42]

Upon completion of its review, two-thirds of the FSOC's voting members must agree to make the designation.[43] And the

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[35] The FSOC membership includes the heads of the Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Department of the Treasury, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Federal Insurance Office, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Financial Research, and Securities and Exchange Commission. 12 U.S.C. § 5321(b)(1)–(2). The FSOC also includes in its membership a state banking supervisor, a state insurance commissioner, a state securities commissioner, and an independent member with insurance expertise. *Id.*

[36] *See* MARK LABONTE, CONG. RSCH. SERV., R45052, FINANCIAL STABILITY OVERSIGHT COUNCIL (FSOC): STRUCTURE AND ACTIVITIES 3 (2021).

[37] *See id.* at 4.

[38] U.S. GOV'T ACCOUNTABILITY OFF., ASSESSING EFFECTIVENESS COULD ENHANCE RESPONSE TO SYSTEMIC RISKS 1–2 (2023) [hereinafter U.S. GOV'T ACCOUNTABILITY OFF., ASSESSING EFFECTIVENESS].

[39] *See* Christina Parajon Skinner, *Regulating Nonbanks: A Plan for SIFI Lite*, 105 GEO. L.J. 1379, 1390 (2017); 12 U.S.C. § 5323(a)(1).

[40] 12 C.F.R. § 1310 app.A (2024).

[41] *Id.*

[42] *See id.*; FIN. STABILITY OVERSIGHT COUNCIL, SUPPLEMENTAL PROCEDURES RELATING TO NONBANK FINANCIAL COMPANY DETERMINATIONS 2 (2015).

[43] 12 C.F.R. § 1310 app.A.

impact of that designation is incredibly significant for a firm: designation as a systematically important institution ports that firm into the regulatory and supervisory jurisdiction of the Federal Reserve.[44] After the designation is made, the Fed has the discretion to design a bespoke regulatory and supervisory regime for the firm which satisfies the Dodd-Frank Act's requirements that it be "heightened" relative to nonsystemically important banks and firms.[45]

The second power Congress gave the FSOC was to make recommendations for addressing what it identifies as potential or "emerging" risks to financial stability; it can do this either informally, in its annual report to Congress, or more formally, by making a recommendation directly to one of the other primary regulators that oversees the risky institution or activity.[46] Although the recommendations are technically nonbinding on the agency, they do generate significant public scrutiny because they are made on a "comply or explain" basis. This means that if the relevant regulator chooses not to adopt the recommended standards, they must explain in writing the reasons for not following the FSOC's recommendation.[47]

Unsurprisingly, given that the FSOC began its work in the same administration—and within the same Treasury—that spearheaded the Dodd-Frank Act, it zealously pursued designation right away: American International Group was designated in 2013, Prudential Financial in 2013, General Electric Capital in 2013, and MetLife in 2014.[48] But before the Federal Reserve could impose regulation and supervision on any of these firms, MetLife sued the FSOC, asking the federal district court for the designation to be overturned.[49]

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44 *See id.*

45 *See* 12 U.S.C. § 5365. The Fed is required to establish certain stringent standards for these companies. *Id.* § 3635(b)(1)(A). But it can also impose any additional prudential standards it "determines are appropriate." *Id.* § 5635(b)(1)(B).

46 *See* U.S. GOV'T ACCOUNTABILITY OFF., ASSESSING EFFECTIVENESS, *supra* note 38, at 1–2.

47 12 U.S.C. § 5330(c)(2) ("The [ ] agency shall impose the standards recommended by the Council . . . or shall explain in writing to the Council, not later than 90 days after the date on which the Council issues the recommendation, why the agency has determined not to follow the recommendation."); *see also* U.S. GOV'T ACCOUNTABILITY OFF., ASSESSING EFFECTIVENESS, *supra* note 38, at 6.

48 *See Designations*, U.S. DEP'T OF THE TREASURY, https://perma.cc/NH5S-THUE.

49 *See* MetLife v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 223 (D.D.C. 2016). Section 113(h) of the Dodd-Frank Act provides for judicial review either in the U.S. District Court for the District of Columbia or in the judicial district where the home office of the nonbank financial company is located. Dodd-Frank Act § 113(h), 124 Stat. at 1402.

In 2016, the U.S. District Court for the District of Columbia concluded that the designation had been "arbitrary and capricious."[50] For one, the court noted that although the FSOC had produced guidance defining what it meant by the phrase "could pose a threat to the financial stability of the United States," it did not follow its own definition by providing evidence that "material financial distress" at MetLife would cause "severe impairment of financial intermediation or of financial market functioning" that "would be sufficiently severe to inflict significant damage on the broader economy."[51] As such, the FSOC never "measure[d] both the susceptibility of a nonbank financial company to financial distress and the potential for that nonbank financial company's financial distress to spread throughout the financial system," as it said it would do.[52]

Moreover, the court found the lack of cost-benefit analysis important to its decision, reasoning that the "FSOC purposefully omitted any consideration of the cost of designation to MetLife," thus assuming "the upside benefits of designation (even without specific standards from the Federal Reserve) but not the downside costs of its decision."[53]

After the court's ruling, the other three designated nonbank systemically important financial institutions (SIFIs) challenged the validity of their designations as well. Because GE Capital had significantly divested itself of financial operations—purposefully, to shed the designation—the FSOC voted to rescind the designation in June 2016.[54] By January 2017, the Obama administration was succeeded by the Trump administration, and the remaining two SIFIs petitioned for de-designation;

50 *MetLife*, 177 F. Supp. 3d at 230.

51 *Id.* at 227, 237–39.

52 *Id.* at 228.

53 *Id.* at 230.

54 FIN. STABILITY OVERSIGHT COUNCIL, BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING GE CAPITAL GLOBAL HOLDINGS, LLC 21 (2016).

their requests were granted.[55] The FSOC was less active during the Trump administration.[56]

The FSOC resumed work under the Biden administration, mostly focusing on its recommendation power. Almost immediately, Treasury Secretary Janet Yellen identified climate change as one of the FSOC's main priorities, stating in her first meeting as chair that climate change is an "existential threat to our environment, and it poses a tremendous risk to our country's financial stability."[57]

Yet Secretary Yellen did not, at that time or at any point later, explain exactly how or why climate change was a financial stability risk—she only asserted that it was.[58] The lack of explanation or reasoning was puzzling, particularly given the determination to use the term financial stability risk very differently from how it had been used in the prior decade. By 2021, even as amorphous as the term was, financial stability risks (systemic risks) were at the very least understood to implicate risks that could prevent the banking sector from providing critical economic services—namely, credit intermediation or the provision of core services like payments. This would require either the insolvency of a major bank or a system-wide operational shutdown.

So understood, it was not obvious how climate change presented a financial stability risk. Insofar as a big bank's sudden insolvency could be a source of financial instability, that risk would come from some kind of credit risk lurking on the big bank's balance sheet. This, of course, is essentially what happened in 2007 and 2008 in connection with residential mortgage products.

But in order for that kind of 2008 Minsky-type moment to result from climate change, a number of bad things would have to

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[55] *See* FIN. STABILITY OVERSIGHT COUNCIL, NOTICE AND EXPLANATION OF THE BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING AMERICAN INTERNATIONAL GROUP, INC. (AIG) 7–10 (2017); FIN. STABILITY OVERSIGHT COUNCIL, NOTICE AND EXPLANATION OF THE BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING PRUDENTIAL FINANCIAL, INC. (PRUDENTIAL) 7–10 (2018).

[56] *See* Bill Flook, *House Bill Would Allow FSOC to Supersede SEC, Other Regulators*, THOMSON REUTERS (Apr. 17, 2020), https://perma.cc/RF83-WP6Z.

[57] *Remarks by Secretary Janet L. Yellen at the Open Session of the Meeting of the Financial Stability Oversight Council*, U.S. DEP'T OF THE TREASURY (Mar. 31, 2021), https://perma.cc/7LQV-GHWZ; *see also* Sarah Ewall-Wice, *Treasury Names "Forcefully Addressing the Threat of Climate Change" a Top Priority*, CBS NEWS (Feb. 3, 2021), https://perma.cc/BWY5-85HC.

[58] For a logical argument for why climate change cannot be objectively considered a financial stability risk, see generally Skinner, *Climate Change*, *supra* note 6.

happen first[59]: For one, the actual loans on banks' balance sheets would have to be impaired because of climate change. Under Fed regulation, "impaired" has a specific meaning—the borrower likely cannot repay the loan in whole or in part.[60] Accordingly, some physical event (like a storm) or policy change (forcing a transition away from certain carbon intensive practices) would have to make borrowers likely unable to repay loans in whole or in part. That seemed unlikely in 2021 given the mode of bank underwriting. Banks in the United States typically were loaning to corporates at 50% loan-to-value or less.[61] This meant that some event—physical or policy-oriented—would have to be so severe, and so sudden, as to wipe out 50% or more of these borrowers' value.

That also seemed highly unlikely given the structure of banks' balance sheets and business models. Regarding physical risk, because big banks are so geographically diverse, any physical manifestation of climate risk (think a storm series) would have to simultaneously transpire across multiple U.S. and global regions at once. Regarding transition risk, the magnitude of policy and regulatory change would have to be so sudden that none of these carbon-facing businesses could plan or adapt. But sudden policy transitions of such significance and scale are essentially impossible in a democratic society. Ultimately, though, the key point was that banks' exposure to carbon-exposed industry in 2021 was small, such that even if every one of their carbon-heavy loans had to be written off, the banks would still have been completely solvent.[62]

Although analysis to refute that logic was never offered, notably, the FSOC's pivot to addressing climate change as a financial stability risk followed on the heels of a May 2021 executive order regarding climate-related financial risk.[63] Section 3 of the executive order, titled "Assessment of Climate-Related Financial Risk by Financial Regulators,"[64] had directed the Treasury Secretary as Chair of the FSOC to (1) assess the financial stability risks of climate change; (2) facilitate climate-related data sharing among

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[59] *See id.* at 1321–23.

[60] *See Financial Accounting Manual for Federal Reserve Banks*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. § 81.03 (Jan. 2017), https://perma.cc/ZD7G-W3QG.

[61] *See* RACHEL BUCK, S&P GLOBAL RATINGS, PRESALE: BANK 2021-BNK34, at 14–15 (2021).

[62] *See* Skinner, *Climate Change*, *supra* note 6, at 1318 (providing concrete evidence based on a review of large bank balance sheets).

[63] *See generally* Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021).

[64] *Id.* at 27,968.

members of the FSOC and executive departments and agencies; and (3) issue a report to the President outlining the "efforts by FSOC member agencies to integrate consideration of climate-related financial risk in their policies and programs."[65] Mobilizing the banking sector to tackle climate change dovetailed with President Joe Biden's accompanying executive order calling for "efforts from . . . every level of government[ ] and every sector of our economy" to tackle climate change.[66]

The FSOC did just that. It required each of its member agencies to discuss at the plenary FSOC meeting—publicly—their efforts to retool their supervision to focus on climate risk in banks,[67] effectively peer pressuring the group. More concretely, in October 2021, the FSOC published a report in which it issued thirty-five recommendations to U.S. financial regulators on how to identify and address climate-related risks to the financial system.[68]

These agencies dutifully got to work. By January 2022, the Federal Reserve was piloting a "climate scenario analysis" for the nation's largest banks,[69] and by October 2023, the three banking agencies had promulgated *Principles for Climate-Related Financial Risk Management for Large Financial Institutions*—effectively, agency guidance for principles that provide a "high-level framework for the safe and sound management of exposures to climate-related financial risks."[70]

This inverts the way agency rulemaking and supervisory action is supposed to take place. These agencies are creatures of statute; they exist as appendages to the executive branch to help the President "take care" that the laws written by Congress are implemented effectively.[71] But the FSOC's power, and its relationship with the agencies, made it such that President Biden was able to exercise quasi-legislative power to define financial stability risk and pressure the agencies to effectuate his own version of

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65 *Id.*

66 Exec. Order No. 14,008, 86 Fed. Reg. at 7,622.

67 *See Readout of Financial Stability Oversight Council Meeting on March 31, 2021*, U.S. DEP'T OF THE TREASURY (Mar. 31, 2021), https://perma.cc/M8JB-2R79.

68 *See* FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK 118–25 (2021).

69 *Federal Reserve Board Announces That Six of the Nation's Largest Banks Will Participate in a Pilot Climate Scenario Analysis Exercise Designed to Enhance the Ability of Supervisors and Firms to Measure and Manage Climate-Related Financial Risks*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 29, 2022), https://perma.cc/KQB8-5HFB.

70 88 Fed. Reg. 74,182, 74,184 (Oct. 30, 2023).

71 *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1848 (2016).

the Dodd-Frank Act. This is all the more concerning given that none of these agencies has a mandate to address climate, the environment, or sustainability issues more generally.[72]

But Congress left itself little rope to rein the FSOC in. The FSOC is not subject to congressional appropriation. Its expenses are treated as part of the expenses of the Office of Financial Research (OFR).[73] The OFR is funded by the Financial Research Fund, which is established in the Treasury as a "separate fund."[74] The fund is populated from assessments on bank holding companies over $250 billion and nonbank SIFIs (to the extent any come to exist).[75] The OFR, and the FSOC in turn, have unrestricted use of those funds.[76] Lest there be any doubt, the statute states that these funds "shall not be construed to be Government funds or appropriated moneys," and so no congressional purse strings attach to what the FSOC does to banks and nonbanks.[77]

Climate change is not the only area where the FSOC has speculated about the existence of financial stability risk to pursue action in areas of the financial market that the Biden administration wished to regulate more tightly. One example of this relates to the FSOC's efforts to identify financial stability risk in private funds by hypothesizing that "an unexpected rate of default [by private-credit borrowers] may have a cascading effect across broader financial markets,"[78] without any information or evidence to prove that parade of horribles could happen.[79]

Another area of erstwhile FSOC focus was private payments and stablecoins.[80] The Biden administration was known to favor the introduction of a central bank digital currency and disfavored non-state-backed private payments innovations such as stablecoins; this stance was, again, articulated in an executive order.[81] In keeping with that stance, the FDIC and OCC speculated that

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72 *See supra* note 5.

73 12 U.S.C. § 5328.

74 *Id.* § 5345(a)(1)–(2).

75 *See id.* § 5345(d).

76 *See id.* § 5345(b).

77 *Id.* § 5345(b)(2). *But see Emmer Re-Introduces Legislation to Increase Oversight of the Financial Stability Oversight Council*, CONGRESSMAN TOM EMMER (Jan. 10, 2024), https://perma.cc/YZV6-MES3 (proposing legislation that would bring the FSOC under congressional appropriations and oversight).

78 FIN. STABILITY OVERSIGHT COUNCIL, ANNUAL REPORT 32 (2023).

79 *See id.*

80 *See* PRESIDENT'S WORKING GRP. ON FIN. MKTS., FED. DEPOSIT INS. CORP. & OFF. OF THE COMPTROLLER OF THE CURRENCY, REPORT ON STABLECOINS 9 (2021).

81 *See* 87 Fed. Reg. 14,143, 14,145–49 (Mar. 9, 2022).

"a stablecoin issuer or a key participant in a stablecoin arrangement (e.g., a custodial wallet provider) could pose systemic risk"[82]—without specifying how, or acknowledging the lack of systemic fallout from, the rapid demise of several large stablecoins and cryptocurrency exchanges in the years after it made that prediction.[83]

In 2023, the FSOC expressed renewed interest in reincarnating the nonbank designation power, which had not been used since 2014.[84] To that end, the FSOC promulgated guidance on nonbank financial company designations[85] and a new *Analytic Framework for Financial Stability Risk Identification, Assessment, and Response*.[86] Ostensibly, these two documents meant to give the public and markets a more detailed explanation of how the FSOC would identify potential risks in nonbank entities and how it would proceed to designate them.

But in reality, these guidance documents gave the FSOC more freedom and discretion than ever. Although the analytic framework provided a new interpretation of financial stability, this definition was so broad that it was capable of swallowing anything: "threat to financial stability" was defined to mean events or conditions that could "substantially impair" the financial system's "ability to support economic activity."[87] Likewise, although the FSOC presented this framework as the first ever "clear explanation of how the Council monitors, evaluates, and responds to potential risks to financial stability, regardless of whether they come from activities, individual firms, or other

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[82] PRESIDENT'S WORKING GRP. ON FIN. MKTS. ET AL., *supra* note 80, at 14.

[83] *See id.*

[84] U.S. GOV'T ACCOUNTABILITY OFF., ASSESSING EFFECTIVENESS, *supra* note 38, at 14.

[85] *See generally* Guidance on Nonbank Financial Company Determinations, 88 Fed. Reg. 80,110 (Nov. 17, 2023) (codified at 12 C.F.R. § 1310).

[86] *See generally* 88 Fed. Reg. 78,026 (Nov. 14, 2023).

[87] *Id.* at 78,032.

sources,"[88] it proceeded to list basically every aspect of the financial system as fair game[89] and every characteristic of a financial institution as a potential risk indicator.[90]

Importantly, one clear goal of the 2023 guidance documents was to nullify the FSOC's earlier 2019 guidance that had, in fact, taken important steps to restrain the FSOC's discretion.[91] That 2019 guidance document had committed the FSOC to engaging in cost-benefit analysis in connection with a designation.[92] It had also indicated a high bar for reaching a finding of systemic risk, namely, financial stability risk had to indicate the chance of "severe damage on the broader economy."[93] Further, the 2019 guidance stated that a nonbank SIFI designation would be a last resort; the FSOC would look for remedies to address underlying risk across all companies engaged in the putatively risky activity, rather than singling out firms for designation.[94] By 2022, however, the FSOC under new leadership decided that it preferred to focus on "emerging threats and vulnerabilities" rather than "extensive market analysis."[95] In other words, it preferred to stick with the more subjective, speculative approach.

Accordingly, the 2023 analytic framework and revised designation guidelines made clear that (1) cost-benefit analysis was not required to support FSOC decisions; (2) the FSOC was not

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88 *Remarks by Secretary of the Treasury Janet L. Yellen at the Open Session of the Meeting of the Financial Stability Oversight Council*, U.S. DEP'T OF THE TREASURY (Nov. 3, 2023), https://perma.cc/VHR7-QCRV.

89 These factors include markets for debt, loans, short-term funding, equity securities, commodities, digital assets, derivatives, and other institutional and consumer financial products and services; central counterparties and payment, clearing, and settlement activities; financial entities, including banking organizations, broker-dealers, asset managers, investment companies, private funds, insurance companies, mortgage originators and servicers, and specialty finance companies; and new or evolving financial products and practices. Analytic Framework, 88 Fed. Reg. at 78,033.

90 The factors that indicate "vulnerability" include leverage, liquidity risk and maturing mismatch, interconnections, operational risk, exposures, asset liquidation, the provision of a critical function or service, complexity or opacity, inadequate risk management, concentration, destabilizing activities, and contagion. *Id.* at 78,033–34.

91 *See* Guidance on Nonbank Financial Company Determinations, 88 Fed. Reg. at 80,111 ("The Final Guidance removes three significant but inappropriate prerequisites to the exercise of the Council's nonbank financial company designation authority that were created by the 2019 Interpretive Guidance.").

92 *See* Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 71,740, 71,763 (Dec. 30, 2019).

93 *Id.*

94 *Id.* at 71,742.

95 U.S. GOV'T ACCOUNTABILITY OFF., ASSESSING EFFECTIVENESS, *supra* note 38, at 22–23.

obligated to consider the *likelihood* of a company actually experiencing material financial distress before imagining what the impact of that distress would be; and (3) financial stability need not necessarily lead to severe damage on the broader economy. Instead, the 2023 documents water the standard down: a threat to financial stability only needs to "substantially impair" the financial system's "ability to support economic activity."[96]

By that point, with a definition of financial stability so broad it could encompass almost any financial (or nonfinancial) activity or institution, with no need to provide evidence that such risk could materialize, and no obligation to estimate the costs of intervention, at least some members of Congress expressed concern that the FSOC "ha[d] morphed into a political weapon for the administrative state."[97] There were effectively no limiting rules or legal principles to constrain the FSOC's discretion to identify and seek to minimize what it believed to be systemic risk.

II. THE SYSTEMIC RISK EXCEPTION

The FDIC has also creatively interpreted the term systemic risk to end-run the limits Congress placed on all-encompassing deposit and bank debt guarantees. To understand the genesis and purpose of the term within the FDIC's statutory framework, a bit of financial and legislative history is important.

The 1980s were rife with thrift and bank failures. As one Federal Reserve History recounts, "After the establishment of the [FDIC] in 1934[,] the number of bank failures in the United States averaged roughly fifteen per year until 1981, when the number of bank failures began to rise and reached roughly 200 per year by the late 1980s."[98] Throughout the '80s, thrifts, or savings and loans institutions, rapidly lost money due to rising interest rates and accompanying asset-liability mismatch.[99] Of the nearly 4,000 savings and loan associations, 563 failed between 1980 and 1988—by 1989, the Federal Savings and Loan Insurance Corporation, which insured deposits in those institutions, had failed, and its

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96 Analytic Framework, 88 Fed. Reg. at 78,032.

97 *Emmer Re-Introduces Legislation to Increase Oversight of the Financial Stability Oversight Council*, *supra* note 77.

98 Noelle Richards, *Federal Deposit Insurance Corporation Improvement Act of 1991*, FED. RSRV. HIST. (Dec. 19, 1991), https://perma.cc/SA6D-JUAN.

99 FED. DEPOSIT INS. CORP., AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S, at 168 (1997) [hereinafter FED. DEPOSIT INS. CORP., BANKING CRISES].

responsibilities were inherited by the FDIC.[100] Meanwhile, in the banking sector, 1,617 banks failed between 1980 and 1994 due to a combination of rising interest rates, competition from nonbanks, and the excessive risk-taking.[101]

Throughout this period, the FDIC often took action to protect uninsured depositors in the name of financial stability, which put serious strain on the FDIC's insurance fund.[102] By 1991, Congress was of the view that the FDIC had developed a "too-big-to-fail" policy in the preceding decade, namely, a practice of protecting uninsured depositors at very large banks.[103] The FDIC also routinely protected uninsured depositors at small and medium-sized banks simply because it could.[104] In view of that experience, Congress became concerned about moral hazard and set out to reestablish incentives for market discipline in banks.[105]

The cornerstone of that effort was the addition of § 13(c)(4) to the FDI Act, which came to be known as the "least-cost resolution" requirement.[106] This requirement has two important aspects. First, it requires the FDIC to choose the least costly resolution tool on the menu, thereby constraining its discretion to opt for open banking assistance or a purchase and assumption in lieu of a payout if the latter would have been less costly.[107]

Second, effective December 31, 1994, the FDIC cannot increase losses to the deposit insurance fund (DIF) by protecting "depositors for more than the insured portion of deposits" or "creditors other than depositors."[108] The Federal Deposit Insurance Corporation Improvement Act of 1991[109] (FDICIA) further clipped the wings of open banking assistance by requiring that any institution receiving such assistance must already be in receivership or that (1) "grounds for the appointment of a conservator or receiver exist or likely will exist in the future unless the depository institution's capital levels are increased" and (2) "it is unlikely

100 *See id.* at 168–69, 187–88.

101 *See id.* at 5, 13.

102 *See id.* at 252.

103 *See id.*

104 *See* FED. DEPOSIT INS. CORP., BANKING CRISES, *supra* note 99, at 249.

105 *See id.* at 250.

106 *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 141, 105 Stat. 2236, 2273–79 (codified at 12 U.S.C. § 1823(c)(4)).

107 *See id.* § 141(a)(1), 105 Stat. at 2273–74 (codified at 12 U.S.C. § 1823(c)(4)(A)–(E)).

108 *Id.* § 141(a)(1), 105 Stat. at 2275 (codified at 12 U.S.C. § 1823(c)(4)(E)).

109 Pub. L. No. 102-242, 105 Stat. 2236 (codified at 12 U.S.C. § 1811 et seq.).

that the institution can meet all currently applicable capital standards without assistance."[110]

With little doubt, Congress was concerned with moral hazard when it amended the FDI Act as such. But it was not blind to the reality that financial crises sometimes require decisive action by financial regulators to intervene to support institutions and markets in order to mitigate widespread economic fallout.

So, Congress also created an escape hatch within the least-cost requirement, namely, an exception for circumstances of systemic risk. In § 13(c)(4)(G), the FDICIA provided that the FDIC could side-step the least-cost requirement when (1) complying with it "with respect to an insured depository institution" for which "the Corporation has been appointed receiver" would result in "serious adverse effects on economic conditions or financial stability"[111] and (2) the FDIC could take "any action" or provide "assistance" that would "avoid or mitigate" that adverse effect.[112]

Importantly, however, Congress viewed this as a significant power that would be judiciously used. It thus created a process that would ensure that all relevant regulators agreed that the exception should be invoked. That process requires a written recommendation to the Treasury Secretary from two-thirds of both the FDIC Board and the Board of Governors of the Federal Reserve that both criteria of the exception are satisfied and the Secretary, in consultation with the President, must agree with that assessment.[113] In effect, Congress sought to create a process that would only be activated when there was "a broad[ ] government consensus that systemic risk exists and requires extraordinary government action."[114]

Not only did the process incorporate real-time political accountability, it also required ex post accountability. The Government Accountability Office (GAO) would be required to review and report to Congress any determination of systemic risk, including the basis for the determination, the purpose for which any action was taken pursuant to the clause, and the likely effect of the determination on the incentives and conduct of insured depository institutions and uninsured depositors.[115] Finally, the

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[110] *Id.* § 141(e), 105 Stat. at 2278 (codified at 12 U.S.C. § 182(c)(8)(A)(i)).

[111] *Id.* § 141(a)(1), 105 Stat. at 2275 (codified at 12 U.S.C. § 1823(c)(4)(G)(i)(I)).

[112] *Id.* (codified at 12 U.S.C. § 1823(c)(4)(G)(i)).

[113] *Id.*

[114] U.S. DEP'T OF THE TREASURY, MODERNIZING THE FINANCIAL SYSTEM: U.S. TREASURY DEPARTMENT RECOMMENDATIONS FOR SAFER, MORE COMPETITIVE BANKS 27 (1991).

[115] 12 U.S.C. § 1823(c)(4)(G)(iv).

systemic risk exception was also structured to encourage market discipline. The provision required the FDIC to recover any losses to the DIF associated with the FDIC's assistance by levying a special assessment on the banking industry.[116] The prospect of such assessment was meant to incentivize market discipline, given that an emergency use of the DIF by one bank would be paid for by all banks.

A. The Global Financial Crisis

The systemic risk exception was not used as a legal justification to depart from the least-cost requirement until 2008, in the context of the global financial crisis.[117] At the time, given the uncertainty surrounding mortgage-backed securities and their derivatives products—which populated the balance sheets of many large financial institutions and served as collateral in trillions of existing repurchase agreement contracts (i.e., collateralized a considerable amount of banks' short-term wholesale debt)—the interbank lending market froze.[118] Banks and money market funds, uncertain about the creditworthiness of their counterparties and the quality of existing collateral, simply refused to renew or "roll over" new short-term debt.[119] In October 2008, the Group of Seven finance ministers agreed on the importance of "tak[ing] all necessary steps to unfreeze credit and money markets and ensure that banks and other financial institutions have broad access to liquidity and funding."[120]

With that mindset, the FDIC used the systemic risk exception to provide assistance to facilitate the sale of Wachovia to Citigroup on September 29, 2008, and to provide open banking assistance to Citigroup on January 16, 2009, whereby the FDIC would absorb up to $10 billion in losses exceeding $39.5 billion.[121] Wachovia never ultimately used the FDIC's assistance because it merged with Wells Fargo.[122] For Citigroup, on the other hand, as the GAO reported, "according to Treasury and FDIC, the package of assistance provided by regulators may have helped to allow

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116 *See id.* § 1823(c)(4)(G)(ii)(I).

117 FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013, at 36 (2017) [hereinafter FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE].

118 *See id.* at 23–26.

119 *See id.* at 24–25.

120 *Id.* at 34.

121 *See id.* at 75, 82–84.

122 FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE, *supra* note 117, at 76.

Citigroup to continue operating by encouraging private sector sources to continue to provide liquidity to Citigroup during the crisis."[123]

The systemic risk exception was also used to provide broad-based assistance provided by the Temporary Liquidity Guarantee Program (TLGP) on October 14, 2008.[124] The program had two components. Through the Debt Guarantee Program (DGP), the FDIC guaranteed newly issued senior unsecured debt up to certain limits for insured institutions, their holding companies, and qualified affiliates.[125] The FDIC charged a fee ranging from 50 to 100 basis points (increasing along with the maturity of the debt); when the program was extended in May 2009, the FDIC added a surcharge on debt with a maturity of one year or greater.[126] The program lasted one year, and uptake was significant. At the height of the program's uptake, the FDIC guaranteed around $350 billion in newly issued debt.[127] And overall, the program was successful in accomplishing its immediate objective—to unclog short- and medium-term debt markets and lower institutions' cost of funding.

The TLGP also included a Transaction Account Guarantee program (TAGP) that essentially provided unlimited deposit insurance coverage on certain transaction accounts.[128] Again, the TAGP charged banks a fee—a 10 basis point annual assessment rate for insurance on amounts over $250,000 which, like the DGP, increased from that flat fee to a risk-based rate after the program was extended.[129] In effect, then, TAGP gave institutions the option to purchase additional insurance on deposits over the cap "to assure holders of the safety of these deposits and limit further outflows"[130]—in other words, banks could buy insurance for their uninsured depositors to stop them from running. The program

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[123] U.S. GOV'T ACCOUNTABILITY OFF., REGULATORS' USE OF SYSTEMIC RISK EXCEPTION RAISES MORAL HAZARD 27 (2010) [hereinafter U.S. GOV'T ACCOUNTABILITY OFF., SYSTEMIC RISK EXCEPTION]; *accord* Lee Davison, *The Temporary Liquidity Guarantee Program: A Systemwide Systemic Risk Exception*, *in* CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013, *as reprinted in The Temporary Liquidity Guarantee Program: A Systemwide Systemic Risk Exception*, 1 J. FIN. CRISES 1, 8–10, 23–24, 27–30 (2019).

[124] *See* FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE, *supra* note 117, at 37.

[125] *See id.* at 42–44.

[126] *Id.* at 45–46.

[127] *See id.* at 45; Davison, *supra* note 123, at 1.

[128] *See* FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE, *supra* note 117, at 51–52; *see also* Davison, *supra* note 123, at 1.

[129] FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE, *supra* note 117, at 52.

[130] U.S. GOV'T ACCOUNTABILITY OFF., SYSTEMIC RISK EXCEPTION, *supra* note 123, at 19.

ran for a little over two years, until December 31, 2010, and at peak usage the FDIC guaranteed about $800 billion in uninsured deposits.[131]

According to the then-chair of the FDIC, the TLGP was successful in restoring financial stability.[132] Reflecting on the experience, former FDIC Chair Sheila Bair stated, "if we ever again get into a situation where the entire financial system is seizing up, where even healthy and well-managed banks are having trouble accessing liquidity, I do think this is a good model to use."[133] A 2023 FDIC report similarly opined that "[t]his use of the systemic risk determination process likely helped to ensure that uninsured deposit runs did not play an important destabilizing role in the 2008–2013 banking crisis."[134]

But these regulators had to stretch the text of the statute to create this emergency FDIC power. The systemic risk exception referred only to insured depository institutions—not their holding companies and affiliates—and implied that the assistance would be given only to troubled institutions. The regulators had taken an expansive reading of the statute, namely, that "a systemic risk determination waives all of the normal statutory restrictions on FDIC assistance and then creates new authority to provide assistance."[135]

In later-published personal accounts of the crisis, regulators would admit the factors that pushed them toward this capacious interpretation. For one, at the time it was unclear where any organ of government could find, on a moment's notice, the resources necessary to stand behind the guarantees that they believed the markets needed.[136] Appropriation would have been the legally sound choice, but regulators apparently feared that

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[131] *See* FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE, *supra* note 117, at 53; Davison, *supra* note 123, at 1.

[132] *See* U.S. GOV'T ACCOUNTABILITY OFF., SYSTEMIC RISK EXCEPTION, *supra* note 123, at 22–23 (citing *FDIC Extends the Debt Guarantee Component of Its Temporary Liquidity Guarantee Program*, FED. DEPOSIT INS. CORP. (Mar. 17, 2009), https://perma.cc/C6PW-YPGL). According to the GAO's assessment, the ability of banking institutions to raise funds and lend during the global financial crisis was due in large measure to the security provided by the TLGP. *See id.* at 23.

[133] Joe Adler, *FDIC Debt Program Proves as Good as TARP, Without the Baggage*, AM. BANKER (Apr. 26, 2012), https://www.americanbanker.com/crisis-fdic-tlgp-tarp-debt-guarantee-bailout-1048795-1.html.

[134] FED. DEPOSIT INS. CORP., OPTIONS FOR DEPOSIT INSURANCE REFORM 8 (2023).

[135] U.S. GOV'T ACCOUNTABILITY OFF., SYSTEMIC RISK EXCEPTION, *supra* note 123, at 18.

[136] *See* TIMOTHY F. GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES 224–25 (2014).

Congress had no appetite to allocate more than what it already had for the Troubled Asset Relief Program (TARP).[137] The Fed, for its part, had no authority to guarantee bank debt.[138] In a second-best world, then, open banking assistance from the FDIC was perceived as the only remaining choice.[139]

Fair enough, one might think, but in its statutorily required review, the GAO concluded that Congress had not intended for the systemic risk exception to remove all requirements associated with the least-cost requirement.[140] It recommended that Congress pass legislation to clarify "the requirements and the assistance authorized under the exception."[141]

B. The Dodd-Frank Act

Congress clarified these limits of the systemic risk exception in the Dodd-Frank Act. Again, as it was in 1991, Congress was principally focused on the risk, as summarized by the GAO, that "[s]ystemic risk assistance [ ] raises long-term concerns about moral hazard and weakened market discipline."[142] Congress thus amended the systemic risk exception to make clear that assistance had to be directed to an insured depository institution for which the FDIC had *already* been appointed receiver—that is, for a bank that had already been determined to have failed.[143] This amendment would therefore preclude the FDIC from using the systemic risk exception to create a prophylactic like the TLGP, which applied to all banks, many of which were presumably in solvent and stable condition. The Dodd-Frank Act also made it so that the systemic risk exception could not be used to provide open banking assistance going forward.[144]

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137 *See id.* at 226; BEN S. BERNANKE, THE COURAGE TO ACT: A MEMOIR OF A CRISIS AND ITS AFTERMATH 338–39 (2015).

138 BERNANKE, *supra* note 137, at 340.

139 It would stand together with the Fed's commercial paper facility—which aimed to support short-term corporate funding—and the TARP capital injections to banks. *See* FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE, *supra* note 117, at 37.

140 *See* U.S. GOV'T ACCOUNTABILITY OFF., SYSTEMIC RISK EXCEPTION, *supra* note 123, at 51–52.

141 *Id.* at 44.

142 *Id.* at 38.

143 Dodd-Frank Act § 1106, 124 Stat. at 2125 (amending 12 U.S.C. § 1823(c)(4)(G)). For policymakers' views on the systemic risk exception as it was being considered, see generally *Economic Implications of the "Too Big to Fail" Policy: Hearing Before the Subcomm. on Econ. Stabilization of the H. Comm. on Banking, Fin, and Urb. Affs.*, 102d Cong. (1991).

144 *See* Dodd-Frank Act § 1106, 124 Stat. at 2125.

The Dodd-Frank Act did, however, create a separate authority for the FDIC to establish something like a DGP in the future. Sections 1104 through 1106 in Title XI set out a process for making a regulatory determination that a "liquidity event" was underway. Liquidity event was defined as:

> (A) an exceptional and broad reduction in the general ability of financial market participants—
>
> (i) to sell financial assets without an unusual and significant discount; or
>
> (ii) to borrow using financial assets as collateral without an unusual and significant increase in margin; or
>
> (B) an unusual and significant reduction in the ability of financial market participants to obtain unsecured credit.[145]

Such event would then justify the use of a "widely available program to guarantee obligations of solvent . . . institutions," much like the DGP.[146] Initially, the statute was clearly limited to debt guarantees and precluded broad-based deposit insurance protection like the TAGP.[147] Later, in 2020, the Coronavirus Aid, Relief, and Economic Security Act[148] amended the Dodd-Frank Act's § 1105(f) to extend the definition of "obligations" to include non-interest-bearing deposits.[149]

But a liquidity-event determination could not be made without the consent of Congress. Dodd-Frank first required a two-thirds vote of the FDIC Board and the Board of Governors.[150] But, unlike the systemic risk exception, Congress gave itself a veto. The statute requires that Congress authorize any action pursuant to a liquidity-event determination with a joint resolution.[151] Accordingly, as the law stands, the FDIC may only guarantee bank debt and uninsured deposits outside of receivership "during times of severe economic distress" if Congress first approves the program with a joint resolution.[152] The spirit of the law clearly

145 *Id.* § 1105(g)(3)(A)–(B), 124 Stat. at 2124–25.

146 *Id.* § 1105(a), 124 Stat. at 2121.

147 *See id.* § 1105(f), 124 Stat. at 2124 (stating "a guarantee of deposits . . . shall not be treated as a debt guarantee program").

148 Pub. L. No. 116-136, 134 Stat. 281 (codified at 15 U.S.C. § 9001 et seq.).

149 *See id.* § 4008(a)(1), 134 Stat. at 477 (amending Dodd-Frank Act § 1105(f), 124 Stat. at 2124). The current § 1105(f) reads: "For purposes of this section, a guarantee of deposits held by insured depository institutions in noninterest-bearing transaction accounts may be treated as a debt guarantee program." *Id.* (codified at 12 U.S.C. § 5612(f)).

150 Dodd-Frank Act § 1104(b), 124 Stat. at 2120.

151 *See id.* § 1105(c)–(d), 124 Stat. at 2121–22.

152 12 U.S.C. § 5612(a).

intends for Congress to acquiesce to a comprehensive guarantee of deposits and short-term bank debt.

Furthermore, the criteria for triggering a liquidity-event determination were much stricter than the criteria for establishing a systemic risk which, as will be recalled, required only a finding that conditions exist that threaten financial stability or general economic conditions.[153] A liquidity-event determination, in contrast, requires regulators to find, and Congress to agree, that credit markets are frozen or dislocated.

Despite Congress's efforts to ensure that the systemic risk exception would not be used to provide broad-based deposit guarantees, regulators relied on that exception again in 2023 and found a way to run around legislative intent.

C. March 2023

The post-Dodd-Frank effort to constrain the systemic risk exception was put to the test during the banking turmoil in spring 2023. At the cynosure of the storm was Silicon Valley Bank, known as SVB. That forty-year-old bank had built up a considerable banking business on the back of the growth of tech and venture capital (VC).[154] It specialized in lending to venture-backed tech start-ups, and the majority of its deposits were VC money.[155] For various reasons, this sector swelled during the COVID-19 pandemic, and tremendous amounts of deposits flowed into SVB in 2020.[156] SVB's balance sheet was, by standard accounts, straightforward. It consisted of loans to these VC-backed firms and long-dated Treasuries; the latter were generally considered to be some of the plainest vanilla, safest assets a bank could own.[157]

But they did carry interest-rate risk. When interest rates increased, the value of the Treasuries went down (as bond prices and yields are inversely related).[158] When the difference between

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153 *See supra* text accompanying notes 95–97.

154 *See* Emily Flitter & Rob Copeland, *Silicon Valley Bank Fails After Run on Deposits*, N.Y. TIMES (Mar. 10, 2023), https://www.nytimes.com/2023/03/10/business/silicon-valley-bank-stock.html.

155 *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., REVIEW OF THE FEDERAL RESERVE'S SUPERVISION AND REGULATION OF SILICON VALLEY BANK 19 (2023) [hereinafter BD. OF GOVERNORS OF THE FED. RSRV. SYS., SILICON VALLEY BANK].

156 *See* Flitter & Copeland, *supra* note 154.

157 *See* Telis Demos, *What Happened with Silicon Valley Bank*, WALL ST. J. (Mar. 14, 2023), https://www.wsj.com/articles/silicon-valley-bank-svb-financial-what-is-happening-299e9b65.

158 *See* Lawrence Wintermeyer, *SVB and the New Banking Crisis: The Anatomy of a Further Deterioration of Capitalism in Seven Days*, FORBES (Mar. 17, 2023),

the interest earned on fixed-income assets (the Treasuries) and the rate paid out on deposits (funding a portion of those assets) widened, the bank had a problem known as "asset liability mismatch."[159] At the same time, VC firms began backing away from their start-up sponsorships in light of the worsening economy. In reaction, the tech firms that had been relying on this VC funding started to draw down their deposits, further straining SVB's liquidity.[160]

On Wednesday, March 8, 2023, SVB tried to confront its unrealized losses by raising more equity capital in the market.[161] That effort alerted depositors to the fact (hidden in plain sight) that the bank had a solvency problem. Depositors panicked in response and withdrew about a quarter of their deposits.[162] And they did so more rapidly than in any banking run before. This sequence of events ultimately led to the bank's failure by Friday morning.[163]

On March 10, 2023, the California bank regulator closed SVB and handed it over to the FDIC to complete the bank's resolution.[164] SVB was resolved using a so-called bridge bank strategy, whereby the FDIC creates a national bank that it runs, which receives all of the deposits and healthy assets of the failed bank.[165] Depositors were eligible to withdraw their money as usual[166] and the critical functions of the bank continued (processing payments and receiving payments on loans) while the FDIC completed an orderly wind down of its assets and other operations.[167]

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https://www.forbes.com/sites/lawrencewintermeyer/2023/03/17/svb-and-the-new-banking-crisis-the-anatomy-of-a-further-deterioration-of-capitalism-in-seven-days.

159 *See id.*

160 *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., SILICON VALLEY BANK, *supra* note 155, at 4, 22–24.

161 *See id.* at 22–23.

162 *See id.*

163 *See id.* at 24.

164 *See FDIC Acts to Protect All Depositors of the Former Silicon Valley Bank, Santa Clara, California*, FED. DEPOSIT INS. CORP. (Mar. 13, 2023) [hereinafter *FDIC SVB Press Release*], https://perma.cc/AH8E-A8M2.

165 *See id.*

166 In this case, the Treasury announced that both insured and uninsured depositors would receive the full freight of their deposits, notwithstanding the $250,000 FDIC insurance cap. This was a controversial decision but one beyond the scope of this paper. *See id.*; Nick Timiraos, Andrew Ackerman & Andrew Duehren, *SVB, Signature Bank Depositors to Get All Their Money as Fed Moves to Stem Crisis*, WALL ST. J. (Mar. 13, 2023), https://www.wsj.com/articles/federal-reserve-rolls-out-emergency-measures-to-prevent-banking-crisis-ba4d7f98.

167 *See FDIC Press Release*, *supra* note 164.

A similar sequence of events unfolded surrounding Signature Bank. That bank had been heavily exposed to digital assets, had accumulated unrealized losses as well as depositor outflows, and eventually faced significant outflows when depositors learned that a similarly profiled bank, Silvergate, was experiencing distress.[168] On March 12, 2023, the New York State Department of Financial Services closed Signature Bank and appointed the FDIC as receiver.[169] The FDIC employed a bridge bank strategy there as well and transferred all deposits and a significant balance of the assets to a bridge bank, Signature Bridge Bank, N.A.[170]

On March 12, 2023, the Treasury Secretary invoked the systemic risk exception with respect to both SVB and Signature on the recommendation of the FDIC and Fed Board of Governors.[171] The FDIC and Fed Board were clearly concerned about contagion and runs from uninsured depositors. The GAO's ex post review summarizes these regulators' memorandum supporting their recommendation as reflecting concern that the least-cost rule "would intensify deposit runs and liquidity pressures on other U.S. banks."[172] The Fed noted that "many other financial institutions that derive large portions of their funding from uninsured deposits also were under considerable pressure, and the failure of the two banks would lead to even greater dislocations in deposit markets."[173] The FDIC, for its part, "reported that it already was aware of several reports of businesses, including large corporate borrowers, withdrawing large amounts of uninsured deposits."[174]

But even after invoking the systemic risk exception for those two banks, uninsured depositors continued to run at banks with profiles similar to SVB—regional banks with large uninsured depositor bases, most dramatically at First Republic Bank.[175]

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168 *See* FED. DEPOSIT INS. CORP., FDIC'S SUPERVISION OF SIGNATURE BANK 14–15 (2023).

169 *Id.* at 16.

170 *See FDIC Establishes Signature Bridge Bank, N.A., as Successor to Signature Bank, New York, NY*, FED. DEPOSIT INS. CORP. (Mar. 12, 2023), https://perma.cc/WKH8-LC47.

171 *See Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC*, FED. DEPOSIT INS. CORP. (Mar. 12, 2023), https://perma.cc/X5XK-2WSU.

172 U.S. GOV'T ACCOUNTABILITY OFF., PRELIMINARY REVIEW OF AGENCY ACTIONS RELATED TO MARCH 2023 BANK FAILURES 29 (2023) [hereinafter U.S. GOV'T ACCOUNTABILITY OFF., PRELIMINARY REVIEW].

173 *Id.*

174 *Id.* at 30.

175 Despite being viewed as a sound and well-managed institution, certain attributes of First Republic's business model and strategies made it vulnerable to contagion: rapid growth in assets and deposits, loan and funding concentrations, unrealized losses, overreliance on uninsured deposits, and a failure to sufficiently mitigate interest-rate risk. *See*

But rather than make a liquidity-event determination and get approval from Congress for a broad-based set of guarantees, the Federal Reserve amplified the message behind the FDIC's uninsured depositor guarantees at SVB and Signature by announcing an emergency liquidity facility under § 13(3) of the Federal Reserve Act, called the "Bank Term Funding Program."[176] Banks could borrow from that facility for up to one year and pledge their collateral at par.[177] These were generous terms indeed, given the fact that most discount window and § 13(3) facilities impose a haircut or a discount on the collateral. This was intended to encourage maximum uptake and plentiful liquidity, effectively, to ensure that banks could guarantee the entirety of their depositor base and avoid putting their short-term creditors at risk, just as if the FDIC had done so itself through a deposit- and debt-guarantee program.[178]

Perhaps such sweeping government intervention is a good thing in the moment, avoiding more painful economic fallout. But undoubtedly, such action increases moral hazard by decreasing short-term bank creditors' incentives to monitor their banks'

FED. DEPOSIT INS. CORP., FDIC'S SUPERVISION OF FIRST REPUBLIC BANK 7 (2023) [hereinafter FED. DEPOSIT INS. CORP., FIRST REPUBLIC BANK]; *see generally Recent Bank Failures and the Federal Regulatory Response: Hearing Before the S. Comm. on Banking, Housing, and Urban Affs.*, 118th Cong. (2023) (statement of Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp.). On March 10, 2023, First Republic Bank shares declined nearly 50%. By the end of the day, deposit outflows reached approximately $25 billion, or approximately 17% of total deposits. FED. DEPOSIT INS. CORP., FIRST REPUBLIC BANK, *supra*, at 7. Although it borrowed heavily from the Fed's discount window, the Federal Home Loan Banks, and a private consortium of banks (JPMorgan Chase & Co., Citigroup Inc., Bank of America Corp., and Wells Fargo & Co. contributed $5 billion each; Morgan Stanley and Goldman Sachs Group Inc. contributed $2.5 billion each; and U.S. Bancorp, PNC Financial Services Group Inc., Truist Financial Corp., Bank of New York Mellon Corp., and State Street Corp contributed $1 billion each), these various forms of public and private liquidity support could not carry First Republic through the storm. *See id.* at 20; *Bank of America, Citigroup, JPMorgan Chase, Wells Fargo, Goldman Sachs, Morgan Stanley, BNY Mellon, PNC Bank, State Street, Truist and U.S. Bank to Make Uninsured Deposits Totaling $30 Billion Into First Republic Bank*, BUSINESSWIRE (Mar. 16, 2023), https://perma.cc/HE9U-QA2W. First Republic borrowed $63.5 billion through the Fed's discount window and $13.8 billion via the newly established Bank Term Funding Program, while getting up to $28 billion from the Federal Home Loan Bank of San Francisco. *See* Lorenzo Migliorato, *First Republic Taps Fed Facilities in Effort to Plug Funding Hole*, RISK QUANTUM (Apr. 26, 2023), https://perma.cc/NW6F-J3KF. On May 1, 2023, JPMorgan Chase acquired the majority of assets and assumed the deposits and certain other liabilities of First Republic. *JPMorgan Chase Acquires Substantial Majority of Assets and Assumes Certain Liabilities of First Republic Bank*, JPMORGAN CHASE & CO. (May 1, 2023), https://perma.cc/9NU5-7ZB7.

[176] *See* U.S. GOV'T ACCOUNTABILITY OFF., PRELIMINARY REVIEW, *supra* note 172, at 32.

[177] *See id.* at 32–33.

[178] *See id.* at 32–34.

risk-taking and prudent management. Instead, after these 2023 interventions, the market will now likely assume that all deposits (and probably all short-term bank debt) will forevermore be guaranteed by the government during a panic. This outcome is squarely at odds with Congress's intent in FDICIA, which was reconfirmed in Dodd-Frank. Further, sweeping de facto public backstops provide more grist for regulators' financial stability mill—the more generous the safety net, the stronger the rationale for imposing up-front regulation on banks.

III. THE BASEL ENDGAME

The banking agencies' efforts to implement the final aspects of the Basel III Accord is a prime example of how a globally coordinated movement to secure financial stability among central bankers and bank supervisors prompted U.S. banking regulators to propose a suite of new banking regulations that was broad, costly to industry, lacking in U.S.-specific facts, and appeared counterproductive to genuine social and economic stability.[179]

By way of background, after the global financial crisis of 2008, the Basel Committee on Banking Supervision (BCBS) agreed to the Third Basel Accord in 2010, known as Basel III.[180] That set of standards recommended substantial increases in capital requirements for large, internationally active banks,[181] most of which are referred to as the global systemically important banks (G-SIBs), or Category I firms in U.S. regulatory parlance.[182] Basel III also proposed a myriad of other measures to attempt to reduce systemic risk, including capital buffers and surcharges on top of the capital minimums, a countercyclical capital buffer to turn on at regulators' discretion to cool down an overheating credit market, leverage restrictions, standards regarding liquidity maintenance, and rules about the stability of a bank's

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179 Part III is drawn from congressional testimony I provided regarding the Basel endgame rule. *See generally The Tangled Web of Global Governance: How the Biden Administration is Ceding Authority over American Financial Regulation: Hearing Before the Subcomm. on Fin. Insts. and Monetary Pol'y of the H. Comm. on Fin. Servs.*, 118th Cong. (2023) (statement of Christina Parajon Skinner).

180 *See generally* Basel Comm. on Banking Supervision, *supra* note 19.

181 *See id.* at 12–13.

182 *See Fact Sheet: Tailoring Capital and Liquidity Rule for Domestic and Foreign Banking Organizations*, FED. DEPOSIT INS. CORP. 1 (Oct. 15, 2019), https://perma.cc/V7ML-37FJ.

funding.[183] It also introduced new standards for supervisory stress testing, something that did not exist before the crisis.[184]

The U.S. regulators implemented this suite of Basel III standards by 2013.[185] Importantly, however, by then Congress had already passed sweeping postcrisis financial regulation legislation in the Dodd-Frank Act. Various provisions of the Dodd-Frank Act supported and coincided with the vision outlined in Basel III—that is, for heightened prudential standards.[186] Accordingly, although regulators described the rule to the public as implementing Basel III,[187] the actual authority to develop those standards into U.S. law was most specifically grounded in Dodd-Frank.

This is a key point. Basel is not a treaty-based organization. As such, its standards have no force in public international law, and they are not automatically binding rules in the United States.[188] Rather, the Basel Committee is a "soft-law" institution—it is a club of central bankers that agree to meet, brainstorm, and develop what they view to be the optimal minimum standards for capital in globally active banks. But in order for these standards to become domestic law, each member must implement them through their country's ordinary process for making public law.[189] The U.S. rulemaking process requires that the regulators who participate in Basel come home and promulgate a rule tailored to the specifics of the U.S. banking sector.[190] It can only become final after satisfying the Administrative Procedure Act's[191] (APA) requirements of notice and public comment.[192]

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183 *See* Basel Comm. on Banking Supervision, *supra* note 19, at 54–63.

184 *See id.* at 46–47.

185 *See Federal Reserve Board Approves Final Rule to Help Ensure Banks Maintain Strong Capital Positions*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (July 2, 2013) [hereinafter *Federal Reserve Board Approves Final Rule*], https://perma.cc/4YSV-EV7T.

186 *See* MARC LABONTE, CONG. RSCH. SERV., R47876, ENHANCED PRUDENTIAL REGULATION OF LARGE BANKS 8 (2023).

187 *See generally* Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 Fed. Reg. 62,018 (Oct. 11, 2013) (codified at 12 C.F.R. pts. 3, 5, 6, 165, 167, 208, 217, and 225).

188 *See Basel Committee Charter*, BANK FOR INT'L SETTLEMENTS (June 5, 2018), https://perma.cc/U54B-F6PY.

189 *See id.*

190 *See Federal Reserve Board Approves Final Rule*, *supra* note 185.

191 5 U.S.C. § 500 et seq.

192 *See id.* § 553.

The APA also effectively requires that agency rules are not "arbitrary" or "capricious."[193] This means that, at a minimum, the agency must be acting within the bounds of its statutory authority to promulgate a rule and must produce sound evidence to support it.[194] As noted above, the Dodd-Frank Act supplied the statutory motivation for the 2013 Basel implementation rule.[195] Further, the reforms ushered in by that rule were, for the most part, indicated by the source of weakness among U.S. banks that had led to and exacerbated the 2008 financial crisis. In other words, the 2013 rulemaking was supported by concrete evidence that, prior to that crisis, large, internationally active banks in the United States had been inadequately capitalized and inattentive to their liquidity and funding risk.

Accordingly, in the following decade, large banks in the United States grew much stronger and more stable, and thus reduced their systemic risk. Tellingly, U.S. banks weathered the next major economic shock relatively well, during the COVID-19 pandemic and accompanying lockdowns.[196] Indeed, the former Fed Vice Chair for Supervision, Michael Barr, noted in his 2022 confirmation hearing that "capital and liquidity in the system is very strong. The rules that Congress put in place after the financial crisis make it much less likely that [a too-big-to-fail] financial firm could get itself into trouble in a way that would cause problems for the broader economy."[197] At year-end 2022, all of the U.S. G-SIBs were well above the minimum capital-adequacy requirements in Basel III.[198]

Nevertheless, in July 2023, the Fed, OCC, and FDIC jointly proposed a rule that purported to finalize Basel III.[199] It was referred to as the Basel endgame. The proposed rule was described

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193 *Id.* § 706(2).

194 *See id.* § 706(2)(E).

195 The statutory authority for implementing the Basel Accords is the International Lending Supervision Act. *See generally* Pub. L. No. 98-181, 97 Stat. 1278 (1983) (codified at 12 U.S.C. § 3901 et seq.).

196 *See* Peter Ryan & Guowei Zhang, *Understanding the Current Regulatory Capital Requirements Applicable to US Banks,* SEC. INDUS. & FIN. MKTS. ASS'N (Feb. 6, 2023), https://perma.cc/3LDN-UBLT (noting "all domestic and internationally active banks came out the deep market downturn induced by the COVID-19 pandemic unscathed").

197 *Nominations of Michael S. Barr, Jaime E. Lizárraga & Mark Toshiro Uyeda: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 117th Cong. 32 (2022).

198 Peter Ryan & Guowei Zhang, *How the Basel III "Endgame" Reforms Will Transform US Capital Requirements,* SEC. INDUS. & FIN. MKTS. ASS'N (Feb. 27, 2023), https://perma.cc/4XC4-X6F7.

199 *See generally* Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity, 88 Fed. Reg. 64,028 (Sept. 18, 2023). It

as a response to the Basel Committee's 2017 framework for reducing variation between banks' calculations of their respective capital requirements.[200] That 2017 Basel document[201] was motivated by the fact that "a wide range of stakeholders lost faith in banks' internally modelled risk-weighted capital ratios" during the crisis.[202] The endgame was designed to fix that.[203]

Yet the proposed rule's requirements—and associated costs—seemed facially disproportionate to the cumulative level of balance-sheet risk in the big banking sector. Overall, the rule, as it had been originally proposed, would have significantly increased capital requirements for all four categories of large U.S. banks.[204] All banks with over $100 billion in assets would have had to transition to an "expanded risk-based approach"—a methodology designed to be more risk sensitive than current models by accounting for more possible sources of credit risk among a variety of credit exposure types.[205] This change would have increased capital requirements most for the largest banks.[206]

These banks would also have had to adopt new methods for calculating market and operational risk. Among other things, the new market-risk method was designed to require banks to stress test their trading book for potential losses arising from market shocks and volatility.[207] This new method is known as the Fundamental Review of the Trading Book (FRTB).[208] It is,

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bears emphasizing that this brief summary highlights only some of the key aspects of the proposed rule, which is over one thousand pages long.

200 ANDREW P. SCOTT & MARC LABONTE, CONG. RSCH. SERV., R47447, BANK CAPITAL REQUIREMENTS: A PRIMER AND POLICY ISSUES 33–34 (2023).

201 *See generally Basel III: Finalising Post-Crisis Reforms*, BASEL COMM. ON BANK. SUPERVISION (Dec. 2017), https://perma.cc/D3C3-5386.

202 Stefan Ingves, Chairman, Basel Comm. on Banking Supervision, Keynote Speech at the Institute for Law and Finance Conference: Basel III: Are We Done Now? (Jan. 29, 2018).

203 As the bank regulators have described it, the proposed rule aims to implement "enhanced regulatory capital requirements that align with the final set of 'Basel III' standards issued by the Basel Committee on Banking Supervision in December 2017." *Agencies Reaffirm Commitment to Basel III Standards*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 9, 2022), https://perma.cc/45UE-KQAE.

204 Notably, the Basel Committee had expressed desire for the endgame to be "capital neutral"—that is, while it would change methodologies for capital calculations, it would not increase the amount of capital required. *See* MARK LABONTE & ANDREW P. SCOTT, CONG. RSCH. SERV., R47855, BANK CAPITAL REQUIREMENTS: BASEL III ENDGAME 16 n.54 (2023). The U.S. rule is not capital neutral as currently proposed. *See id.* at 17.

205 *See* Regulatory Capital Rule, Large Banking Organizations, 88 Fed. Reg. at 64,032–33.

206 *See id.* at 64,169.

207 *See id.* at 64,092–95.

208 *See id.* at 64,092 n.220.

however, redundant with the Global Market Shock (GMS) method that is currently used in the United States to calculate the stress-capital-buffer capital charge.[209] As such, this change would have dramatically increased capital requirements for market risk where it applied.[210] Capital requirement add-ons to account for operational risk were also standardized in the proposed rule, which would have introduced a new capital component for regional banks.[211]

The proposed rule also changed the inputs to the capital-adequacy ratio. It revised what qualifies as eligible capital in the numerator of the capital to risk-weighted-asset (RWA) ratio. Among other things, the changes made regulatory capital levels more sensitive to unrealized losses for certain categories of banks.[212] Finally, the draft rule proposed adjustments to the calculation of how assets are weighted according to their risk (the denominator in the ratio) by adjusting the risk weights that apply to certain asset categories.[213] Inherently, altering these risk weights reflects a value judgment about certain types of bank investments, and it also inevitably skews a bank's behavior—a higher risk weight disincentivizes investment in that asset. It remains to be seen what the final Basel endgame rule will look like.

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[209] *See* Guowei Zhang, Peter Ryan & Carter McDowell, *Explaining the Overlap Between the FRTB and the Global Market Shock*, SEC. INDUS. & FIN. MKTS. ASS'N (May 30, 2023), https://perma.cc/EX8C-JNZC (explaining that both the FRTB and the GMS are designed to be stress-testing frameworks with largely overlapping objectives, risks captured, and modelling methodologies); *see also Statement by Governor Christopher J. Waller*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (July 27, 2023), https://perma.cc/MJM9-N76H (pointing out that the increase in capital "would be in large part driven by an increase in the capital required for operational and market risks—risks that [the Federal Reserve has] already been capturing in [its] stress testing for the past decade"). *See generally* Guowei Zhang & Peter Ryan, *Basel III Endgame Blog Series*, SEC. INDUS. & FIN. MKTS. ASS'N (June 25, 2024), https://perma.cc/R8AW-ML2J.

[210] *See* DAVIS POLK & WARDWELL, U.S. BASEL III ENDGAME PROPOSED RULE, at 147 (2023) (estimating that the Proposed Rule would increase risk-weighted assets associated with trading activity by 67% for Category I through IV banking organizations).

[211] *See id.* at 135.

[212] *See* Regulatory Capital Rule, Large Banking Organizations, 88 Fed. Reg. at 64,035 ("Banking organizations subject to Category III or IV capital standards would also apply the capital deductions and minority interest treatments that are currently applicable to banking organizations subject to Category I or II capital standards.").

[213] *See id.* at 64,167–69. The FDIC has estimated that the proposal will increase RWAs by 20% in aggregate across affected banking organizations at the holding-company level. *See Regulatory Capital Rule: Amendments Applicable to Large Banking Organizations and to Banking Organizations with Significant Trading Activity*, FED. DEPOSIT INS. CORP. 19 (July 27, 2023), https://perma.cc/9ZNB-HHKM.

Although at the time of this writing the Basel endgame rule is likely to be significantly revised, had it been finalized, it would have certainly imposed significant costs and unintended consequences from it. Increased capital requirements hamper many banks' ability and appetite to lend and thus drive up the cost of bank-supplied credit, incentivize consolidation among banks, erode the three-tier market structure (i.e., a banking system comprised of large SIFIs, regional, and community banks, each serving distinct customers and needs), and, more broadly speaking, empower regulators' hands within these banks.

Yet the regulators did not offer a compelling rationale to justify these expected costs. Although the proposed rule acknowledged that it "would have the effect of modestly increasing capital requirements for lending activity" and that "a slight reduction in bank lending could result from the increase in capital requirements," it ultimately concluded that financial stability trumped: "the economic cost of this reduction would be more than offset by the expected economic benefits associated with the increased resiliency of the financial system."[214] The regulators did not explain how these rules would have increased system resilience, nor did they attempt to quantify the marginal benefit of any such increased resilience relative to the cost of the regulation.[215]

Accordingly, industry and onlookers alike were perplexed about the rule's genuine rationale.[216] The endgame rulemaking effort begged the question whether bank regulators were attempting to honor their perceived commitments to Basel's regime—and its generalized promises to promote global financial stability—rather than the specifics of the U.S. economy or U.S. law.

Indeed, the rules for participating in the BCBS seem to compel the former. The Basel Committee's mandate is set out in its charter: "The BCBS is the primary global standard setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Its mandate is to strengthen

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[214] Regulatory Capital Rule, Large Banking Organizations, 88 Fed. Reg. at 64,167.

[215] *See generally* JOHN KAY & MERVYN KING, RADICAL UNCERTAINTY: DECISION-MAKING BEYOND THE NUMBERS (1st ed. 2020).

[216] *See* LATHAM & WATKINS LLP, COMMENTS ON THE BASEL III ENDGAME PROPOSAL 6–8 (2024) (explaining that 97% of comments on the endgame proposal, including those from academics, elected officials, and banks, expressed significant concerns about its implementation in the United States).

the regulation, supervision and practices of banks worldwide *with the purpose of enhancing financial stability*."[217]

Notably, the Basel Committee requires that its members, including the Federal Reserve, OCC, and FDIC, commit to implementing and enforcing its (ostensibly nonbinding) rules. Specifically, pursuant to § 5 of the Basel Committee Charter, members agree to (1) "implement and apply BCBS standards in their domestic jurisdictions within the pre-defined timeframe established by the Committee"; (2) "undergo and participate in BCBS reviews to assess the consistency and effectiveness of domestic rules and supervisory practices in relation to BCBS standards"; and (3) "*promote the interests of global financial stability and not solely national interests, while participating in BCBS work and decision-making*."[218]

Did the bank regulators propose an endgame rule that pursued a vision of global financial stability at the expense of U.S. economic interests?

IV. BANK MERGER REVIEW

Financial stability has also afforded bank regulators in the Biden administration the discretion they required to push bank merger policy away from its longstanding emphasis on consumer welfare and economic efficiency and toward a neo-Brandeisian vision of antitrust, which aims to beat back big as an end in itself.[219]

Congress created a statutory framework for bank merger policy in the 1950s and 1960s. The BMA requires the relevant "responsible" banking agency to give prior written approval for any (1) merger or consolidation between depository institutions or (2) depository institution's assumption of liabilities to pay the deposits of another depository institution.[220] Meanwhile, the Bank Holding Company Act of 1956[221] (BHC Act) required the Federal Reserve to approve any acquisition of a bank by any company;

[217] *Basel Committee Charter*, BANK FOR INT'L SETTLEMENTS § 1 (June 5, 2018), https://perma.cc/U54B-F6PY (emphasis added).

[218] *Id.* § 5(e)–(g) (emphasis added). Formally, such a commitment made by U.S. bank supervisors to foreign bank supervisors cannot tie the hands of Congress. But historically it has been the case that the Basel standards set sticky domestic defaults that usually find their way into binding U.S. law. *See generally* David Murphy & Christina Parajon Skinner, *Sovereignty and Legitimacy in International Banking Law*, 65 VA. J. INT'L L. (forthcoming 2025) (explaining the political economy of the Basel process).

[219] *See* Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519, 542 (2022).

[220] 12 U.S.C. § 1828(c)(1)–(2).

[221] Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. § 1841 et seq.).

and, likewise, it required the Fed to approve a bank's acquisition of a nonbank.[222] The lodestar of this framework was an assessment of the putative merger's effect on competition. By 1966, this framework prevented the banking agencies from approving mergers "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly."[223]

Although the 1960s were a period of highly active agency enforcement of bank mergers, by the 1970s, that approach had shifted. The so-called Chicago School of antitrust had become dominant in policy circles,[224] and its focus on economic efficiency and consumer welfare prompted a 1982 revision to the Department of Justice's (DOJ) Merger Guidelines.[225] These guidelines embraced an objective, analytical, evidence-based, and technocratic approach to merger review. In particular, they incorporated the Herfindahl-Hirschman Index (HHI) as a barometer of market concentration—the HHI measures market concentration in order to evaluate a merger's effect on competition by summing the squared market shares of every firm in a market; the higher the HHI, the more concentrated the market.[226] As such, regulators' roles were limited to evaluating whether consumer welfare would decrease as a result of a lessening in competition, but from there, market forces would ultimately determine banking market structure.

However, as in other important areas of banking and financial regulation, the Dodd-Frank Act ushered financial stability considerations into the merger review process, thereby empowering the bank regulators to impose their own preferences for banking market structure. In particular, § 604(f) of the Dodd-Frank Act amended the BMA to require the relevant banking agency to consider the "risk to the stability of the United States banking or financial system" in evaluating a proposed merger.[227] It also amended § 3(c) of the BHC Act to require the Federal Reserve to consider "the extent to which [a] proposed acquisition, merger, or

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222 12 U.S.C. §§ 1842(a), 1843(j).

223 *Id.* at § 1842(c)(5)(B). This statutory language was added in the 1966 revisions to the Bank Merger Act. *See* Pub. L. No. 89-485, § 7, 80 Stat. 236, 238 (amending 12 U.S.C. § 1842). That revision also instantiated coordination with the Department of Justice. *See id.*

224 *See* Kress, *supra* note 219, at 542.

225 *See generally 1982 Merger Guidelines*, U.S. DEP'T OF JUST. (Aug. 4, 2015), https://perma.cc/P3CZ-ECXA. Only in the following decade would bank-specific merger guidelines be produced by the banking agencies and DOJ.

226 *See id.*; Kress, *supra* note 219, at 544 (explaining this methodology).

227 Dodd-Frank Act § 604(f), 124 Stat. at 1602 (amending 12 U.S.C. § 1828(c)(5)).

consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system."[228]

Again, the term financial stability was not spelled out in the Dodd-Frank Act—or defined for the purposes of the BMA in any other rulemaking or guidance—and so regulators were left to apply its meaning on a case-by-case basis in the following years. The Federal Reserve apparently first applied the financial stability factor in 2012, in its decision regarding Capital One's acquisition of ING's retail banking operations.[229] It provided an extended discussion of how it interpreted the new financial stability criteria. On the one hand, the discussion was detailed, but on the other hand, it covered the waterfront of essentially every characteristic of a firm, suggesting that financial stability red flags could arise almost anywhere when two significant firms were merging. Specifically, the Fed explained:

> In reviewing applications and notices under sections 3 and 4 of the BHC Act, the Board expects that it will generally find a significant adverse effect if the failure of the resulting firm, or its inability to conduct regular-course-of-business transactions, would likely impair financial intermediation or financial market functioning so as to inflict material damage on the broader economy. This kind of damage could occur in a number of ways, including seriously compromising the ability of other financial institutions to conduct regular-course-of-business transactions or seriously disrupting the provision of credit or other financial services. To assess the likelihood that failure of the resulting firm may inflict material damage on the broader economy, the Board will consider a variety of metrics. These would include measures of the size of the resulting firm; availability of substitute providers for any critical products and services offered by the resulting firm; interconnectedness of the resulting firm with the banking or financial system; extent to which the resulting firm contributes to the complexity of the financial system; and extent of the cross-border activities of the resulting firm.[230]

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[228] *Id.* § 604(d), 124 Stat. at 1601 (amending 12 U.S.C. § 1842(c)).
[229] *See generally* Capital One Fin. Corp., Fed. Rsrv. Bd. Order No. 2012-2 (Feb. 14, 2012).
[230] *Id.* at 28–29.

Even as comprehensive as this laundry list is, the Fed still took care to note that "[t]hese categories are not exhaustive, and additional categories could inform the Board's decision."[231]

The FDIC indicated that it was using both quantitative and qualitative metrics to assess a firm's "systemic footprint" when approving a merger of SunTrust and BB&T.[232] Unnamed qualitative metrics can, of course, be defined (and redefined) to mean almost anything, and as one bank industry group noted, the FDIC never specified what quantitative metrics it used.[233]

The OCC, for its part, set out its understanding of financial stability in its comptroller handbook.[234] There, it noted the factors relevant to financial stability, including whether a merger would "contribute to the complexity of the financial system," would "materially increase the extent of cross-border activities of the combining institutions," or would increase the difficulty of a resolution.[235] One can readily see that almost any proposed merger or acquisition could be described in terms that would satisfy one or more of these red flags.

In 2024, both the OCC and FDIC proposed revisions to their respective policies for merger reviews, which flexed the meaning and applicability of financial stability analysis even further.

On January 29, 2024, the OCC issued a notice of proposed rulemaking indicating the agency would update its approach to M&A activity between national banks and federal savings associations.[236] The unvarnished goal of this policy update was to enable the OCC to actively shape banking market structure and engage in what is essentially economic engineering. According to Acting

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[231] *Id.* at 29. In subsequent decisions, the Fed also noted indications that a merger would *enhance* financial stability. In connection with Goldman Sachs's acquisition of GE Capital's financial assets, it referred to an improvement in Goldman Sachs's stability due to a new "funding profile" that had more diversified "sources of funding and increas[ed] stable funding." Goldman Sachs Bank USA, Fed. Rsrv. Bd. Order No. 2016-03, at 23 (Mar. 21, 2016). In connection with Morgan Stanley's acquisition of E*Trade, the Fed noted that bringing E*Trade into Morgan Stanley would subject E*Trade's activities to the higher regulatory standards that apply to U.S. G-SIBs, resulting in an overall increase to financial stability. *See* Morgan Stanley, Fed. Rsrv. Bd. Order No. 2020-05, at 23 (Sept. 30, 2020).

[232] BB&T Corp., Fed. Rsrv. Bd. Order No. 2019-16, at 54 (Nov. 19, 2019).

[233] *See* Greg Baer, Bill Nelson & Paige Pidano Paridon, *Financial Stability Considerations for Bank Merger Analysis*, BANK POL'Y INST. (May 16, 2022), https://perma.cc/J8XN-LRYV.

[234] *See generally* OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL: BUSINESS COMBINATIONS (2018).

[235] *Id.* at 8.

[236] *See generally* Business Combinations Under the Bank Merger Act, 89 Fed. Reg. 10,010 (Feb. 13, 2024) (to be codified at 12 C.F.R. pt. 5).

Comptroller Michael Hsu's remarks introducing the policy revisions, the goal embedded within them was to enable the OCC to "[d]evelop[ ] a sense of what good looks like regarding the overall structure of the U.S. banking system" by taking a more "macro" (i.e., financial stability focused) view.[237] To do that, the OCC would "develop modes of analysis for banking competition that go beyond retail deposits as a proxy for market power," namely, lean on their financial stability discretion.[238]

Accordingly, the proposed rule update clarified that the OCC will consider the following financial stability factors:

> (i) whether the size of the combined institutions would result in material increases in risk to financial stability; (ii) any potential reduction in the availability of substitute providers for the services offered by the combining institutions; (iii) whether the resulting institution would engage in any business activities or participate in markets in a matter that . . . would cause significant risks to other institutions; (iv) the extent to which the combining institutions contribute to the complexity of the financial system; (v) the extent of cross-border activities of the combining institutions; (vi) . . . the relative degree of difficulty of resolving or winding up the resulting institution's business in the event of failure or insolvency; and (vii) any other factors that indicate . . . a risk to the . . . financial system.[239]

The FDIC also issued a proposed statement of policy in March 2024, updating its prior policy. The focus in the FDIC revision was on size: the clear message in this revision was that any transaction resulting in an insured depository institution over $100 billion would be subject to heightened scrutiny, as these large transactions are "more likely to present potential financial stability concerns."[240] Importantly, this emphasis on size as the leading indicator of financial stability risk would replace the FDIC's prior approach, which was mostly concerned with a merger's impact on local deposit market share (again, replacing the

[237] Michael J. Hsu, Acting Comptroller of the Currency, OCC, Speech at the University of Michigan School of Business: What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced 4 (Jan. 29, 2024).

[238] *Id.* at 16.

[239] Business Combinations Under the Bank Merger Act, 89 Fed. Reg. at 10,012.

[240] Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 29,222, 29,232 (Apr. 19, 2024).

quantitative and objective test with a flexible, subjective one).[241] Lest there be any doubt that beating big was the intent of the policy revision, Consumer Financial Protection Bureau (CFPB) Director and FDIC Board member Rohit Chopra rolled out the policy proposal by remarking: "By codifying this [$100 billion threshold], boards of directors and management at large firms can understand that the likelihood of approval of megamergers will be low."[242]

In addition to size, the FDIC noted it would also consider the effect on available substitutes and the degree to which the firm's interconnectedness and complexity increase.[243] Lastly, the FDIC also proposed a financial stability catch-all: "In addition to the items previously noted, the FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system stability."[244]

Overall, the discretion to deny a merger application on financial stability grounds appears to have given regulators the discretionary power to override the market's viewpoint on market structure and determine their own ideal banking landscape.

At the Federal Reserve Board, meanwhile, the Vice Chair for Supervision at the time, Michael Barr, was known to be critical of bank mergers.[245] The Fed did not, however, introduce any formal revisions to its merger review policy, perhaps sensing the political nature of the tilt against mergers and wishing to protect the public's perception of its independence.

Indeed, these 2024 amplifications of financial stability discretion were a direct response to the Biden administration's goal to "undo the harms from the permissive, pro-merger policy posture of recent decades."[246] A few months after taking office, President Biden signed Executive Order 14036, setting out a "whole-of-government" approach to competition.[247] The executive order

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[241] *See* Rohit Chopra, Director, Consumer Fin. Prot. Bureau, Prepared Remarks at the Peterson Institute for International Economics Event: Revitalizing Bank Merger Review (Mar. 21, 2024) ("The policy statement makes clear that the agency's competitive effects analysis will go beyond the traditional focus on local deposit markets.").

[242] *Id.*

[243] *See* Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. at 29,232–34.

[244] *Id.* at 29,234.

[245] Benjamin Bain, *Fed's Barr Says Scrutiny of Bank Mergers Will Be a Priority*, BLOOMBERG (Sept. 7, 2022), https://www.bloomberg.com/news/articles/2022-09-07/fed-s-barr-says-more-scrutiny-of-bank-mergers-will-be-a-priority.

[246] *See* Chopra, *supra* note 241.

[247] *See* 86 Fed. Reg. 36,987, 36,989 (July 9, 2021).

aimed "to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony."[248]

With regard to banking agencies in particular, the executive order called for the following:

> [T]he Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency is . . . to review current practices and adopt a plan . . . for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956.[249]

It also asked the DOJ and banking agencies to update their bank-specific merger guidelines to "provide more robust scrutiny of mergers."[250]

Senator Elizabeth Warren reinforced this message. In a letter to the DOJ head of antitrust, the FDIC chair, and the Federal Reserve Vice Chair for Supervision, Senator Warren admonished these bank regulators that "[a]llowing additional bank consolidation would be a dereliction of your responsibilities, hurting American consumers and small businesses, betraying President Biden's commitment to promoting competition in the economy, and threatening the stability of the financial system and the economy."[251]

Certainly, the President has the constitutional authority to direct the agencies how to implement and enforce the law.[252] But transforming antitrust policy to reshape the structure of banking

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[248] *Id.* at 36,988.

[249] *Id.* at 36,992.

[250] *See Fact Sheet: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), https://perma.cc/9AMG-YX4L. Notably, the Order also established a White House Competition Council within the Executive Office of the President, mandated to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy." Exec. Order No. 14036, 86 Fed. Reg. at 36,990–91. Because the Treasury Secretary is on the White House Competition Council, the FSOC could be another vector for pressuring the banking agencies to tackle bank antitrust. *See id.* at 36,991.

[251] Letter from Elizabeth Warren, U.S. Sen., to Jonathan Kanter, Assistant Att'y Gen., Antitrust Div.; Michael Barr, Vice Chair for Supervision, Bd. of Governors of the Fed. Rsrv.; Martin J. Gruenberg, Chair, Fed. Deposit Ins. Corp.; Janet Yellen, Sec. of the Treasury, U.S. Dep't of Treasury; and Michael Hsu, Acting Comptroller of the Currency, Off. of the Comptroller of the Currency 4 (June 27, 2023) (available at https://perma.cc/CRS5-X79F).

[252] *See* U.S. CONST. art. II.

markets according to the *regulators'* prerogatives seems far more legislative than executive in nature.

CONCLUSION

A stable financial system is prerequisite to a well-functioning financial system. However, the pursuit of financial stability cannot legitimately function like a blank check for bank regulators to prohibit or make extremely onerous financial activity that they speculate could disturb financial markets. Stated simply, Congress must, in order to avoid unconstitutionally ceding its legislative power, act to constrain the meaning of financial stability and, in doing so, rein in bank regulators' currently unbounded discretion.