June 12, 2024

Submitted via Electronic Mail

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
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James P. Sheesley, Assistant Executive Secretary
Attention: Comments/Legal OES (RIN 3064-AF29)
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429.

Re: Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity (OCC Docket ID OCC-2023-0008; Federal Reserve Docket No. R-1813, RIN 7100-AG64; FDIC RIN 3064-AF29)

To Whom It May Concern:

We appreciate the opportunity to submit comments concerning the above-captioned proposed rulemaking (the Rule) of the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (FRB), and Federal Deposit Insurance Corporation (FDIC, collectively the federal banking agencies or FBAs).[1] One of us is an Assistant Professor of Legal Studies at the J. Mack Robinson College of Business at Georgia State University. The other is a Ph.D. candidate at Yale Law School. We submit these comments in our personal capacities.

This letter is based on our draft article titled *Capital Requirements' Safe and Sound Delegation*, which is available on SSRN.[2]

I. Summary of Comments

The FBAs' authority to promulgate capital regulations is based on Congress's intention of prohibiting or addressing "unsafe or unsound practice[s]."[3] In order to ensure the Rule's best chance of survival if challenged, the FBAs should explain in its preamble that the Rule was designed for this purpose, and how a failure to comply with the capital levels the final rule

[1] 88 Fed. Reg. 64028 (Sept. 18, 2023).

[2] Todd Phillips & Beau J. Baumann, *Capital Requirements' Safe and Sound Delegation*, SSRN (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4847718.

[3] *See* 12 U.S.C. §§ 1818(b)(1), 1848a(a)(1).

prescribes would "pose[] a reasonably foreseeable undue risk"[4] or would be "contrary to accepted standards of banking operations which might result in abnormal risk or loss."[5]

II. Claims that Statutes Authorizing Capital Regulations Violate the Nondelegation Doctrine

The nondelegation doctrine flows from Article I, section 1 of the Constitution, which grants to Congress "[a]ll legislative powers herein granted."[6] Under the nondelegation doctrine, Congress cannot grant other actors the authority to exercise legislative power.[7] Challenges are governed by the "intelligible principle" standard, which provides that Congress must "lay[] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform."[8] The Supreme Court has upheld statutes empowering agency to regulate in the "public interest,"[9] to set "fair and equitable" prices,[10] and to establish regulations that are "requisite to protect the public health."[11] The most recent demonstration of the intelligible principle standard came in *Gundy v. United States*.[12] Justice Elena Kagan, writing for the majority, emphasized the need to review text,[13] context,[14] purpose,[15] history,[16] and judicial precedent[17] in determining whether Congress provided an intelligible principle. Nevertheless, there may be a majority on the Supreme Court to revise the nondelegation doctrine such that Congress would be required to make "all the relevant policy decisions" and agencies would be left to "find facts and fill up details."[18]

Opponents of the Rule argue that the statutes authorizing capital regulations – including 12 U.S.C. §§ 1464(t), 1831o(c)(2), 1844(b), 1847a(g), 3907(a)(1), 5365(b), 5371(b) – may violate this "revitalized" version of the nondelegation doctrine. Four trade associations argue that the Rule "appears to be based on the agencies' erroneous belief that they have unlimited and unreviewable discretion to set capital requirements at whatever level they wish," and that if this is the correct interpretation of statute, "then any final rule will be vulnerable [*inter alia*] under the non-delegation doctrine."[19] Others claim that these statutes "fail[] to lay down with sufficient

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[4] Blanton v. OCC, 909 F.3d 1162, 1172 (D.C. Cir. 2018) (quotations removed).

[5] Greene Cnty. Bank v. FDIC, 92 F.3d 633, 636 (8th Cir. 1996).

[6] U.S. CONST. art. I, § 1.

[7] *See, e.g.*, Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 1 (2018) ("The nondelegation doctrine consequently posits that Congress may not even consent to permitting another federal entity to exercise its exclusively held legislative power—that is, Congress may not 'delegate' its legislative power to another federal entity[.]").

[8] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality op.) (cleaned up). *See also* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to forms, such legislative action is not a forbidden delegation of legislative power.").

[9] National Broadcasting Co. v. United States, 319 U.S. 190, 225–26 (1943).

[10] Yakus v. United States, 321 U.S. 414, 422 (1944).

[11] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472–76 (2001).

[12] Gundy v. United States, 139 S. Ct. 2116 (2019).

[13] *See id.* at 2127 (emphasizing SORNA's definition of "sex offender").

[14] *See id.* at 2127–28 (discussing SORNA's legislative history).

[15] *See id.* at 2126 (analyzing SORNA's purpose statement).

[16] *See id.* at 2128 (discussing regulatory antecedents under the relevant provision).

[17] *See id.* at 2123–24 (citing Reynolds v. U.S., 565 U.S. 432 (2012)).

[18] *See id*. at 2139 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting).

[19] Comment Letter from the Bank Policy Institute, Financial Services Forum, Securities Industry and Financial

specificity … policies and limitations to ensure that banking agencies merely carry out the rules set by Congress, rather than establishing their own rules and then demanding compliance" such that it violates the nondelegation doctrine.[20] Specifically, these authors claim that the directive in 12 U.S.C. § 3907 – that the FBAs must "cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital" – is an insufficient policy directive because "[a]ll the work is done by the word 'adequate,' but Congress did not define that term, nor is it pegged to any particular formula, rate, or cap."[21]

III. The Intelligible Principle is Prohibiting "Unsafe or Unsound" practices.

The history of the statutes authorizing capital requirements demonstrates that Congress intended for the FBAs to be guided by the principle of preventing or redressing "unsafe or unsound" practices.

In the Financial Institutions Supervisory Act of 1966 (FISA), Congress granted the FBAs authority to address insured depository institutions' (IDIs) improper behaviors without forcing their closures.[22] The Act contained provisions, codified throughout 12 U.S.C. § 1818, permitting the FBAs to penalize IDIs if, "in the opinion of the appropriate [FBA]," they, among other things, engage "in an unsafe or unsound practice."[23] These enforcement actions would be brought in formal adjudications, appeals of which were reviewable by the federal courts of appeals.[24] Though the term "unsafe or unsound" is nowhere defined in federal statute, courts and the FBAs generally adopted the Horne Standard: "[A]n 'unsafe or unsound practice' embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[25] In most circuits today, activities may generally be considered "unsafe or unsound" if they are "contrary to accepted standards of banking operations which might result in abnormal risk or loss."[26] The standard in other circuits is that such activities must merely "pose[] a reasonably

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Markets Association, and U.S. Chamber of Commerce to the FBAs (Jan. 12, 2024), https://bpi.com/wp-content/uploads/2024/01/Joint-Trades-Legal-Comment-on-Basel-III-Endgame-Proposal-FINAL.pdf.

[20] ROBERT HENNEKE & TRENT MCCOTTER, THE CONSTITUTIONALITY OF THE PROPOSED CAPITAL ADEQUACY RULE UNDER THE NONDELEGATION DOCTRINE 14 (Dec. 2023), https://www.texaspolicy.com/wp-content/uploads/2023/12/2023-12-Capital-Adequacy-Rule-Report-HennekeMccotter.pdf.

[21] *Id*. *See also id*. at 15 (claiming that the FBAs' wield "unconstrained power to both set capital requirements with no upper bound and determine how capital is risk-weighted" in a way that "allow[s] them to centrally plan bank lending through the back door").

[22] Congress later amended the provision to apply to BHCs, *see* Financial Institutions Regulatory and Interest Rate Control Act of 1978 § 107(b), Pub. L. 95–630, 92 Stat. 3641, and to uninsured national banks, *see* Garn-St. Germain Depository Institutions Act of 1982 § 404(c), Pub. L. 97–320, 96 Stat. 1469.

[23] Financial Institutions Supervisory Act of 1966 § 202, Pub. L. No. 89-695, 80 Stat. 1028, 1046.

[24] *See* 12 U.S.C. § 1818(h).

[25] 112 Cong. Rec. 26,474 (1966).

[26] Greene Cnty. Bank v. FDIC, 92 F.3d 633, 636 (8th Cir. 1996). *See also* Seidman v. OTS, 37 F.3d 911, 928 (3d Cir. 1994) ("The imprudent act must pose an abnormal risk to the financial stability of the banking institution"); Gulf Federal Savings and Loan Ass'n v. FHLB, 651 F.2d 259 (5th Cir. 1981) ("unsafe or unsound practices" are those "with a reasonably direct effect on an association's financial soundness"); Hoffman v. FDIC, 912 F.2d 1172, 1174 (9th Cir. 1990) (requiring "abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds"). *See generally* Thomas L. Holzman, *Unsafe or Unsound Practices: Is the Current Judicial Interpretation of the Term Unsafe or Unsound?*, 19 ANN. REV. BANKING L. 425 (2000) (describing this standard).

foreseeable undue risk."[27]

Following FISA's amendment of section 1818, the FBAs enforced capital requirements through this process, deeming IDIs' maintenance of deficient capital levels as an "unsafe or unsound practice" in enforcement actions.[28] Although the FBAs did not enact regulations mandating particular capital ratios, they could have, as Congress authorized the FBAs "to make rules and regulations with respect to any such proceedings."[29]

This framework of declaring deficient capitalization an "unsafe or unsound practice" worked until 1983, when, in *First National Bank of Bellaire v. OCC*, a Fifth Circuit panel found that "the Comptroller's finding that the Bank's capital level was unsafe and unsound was not supported by substantial evidence."[30] Reviewing the evidence, a panel majority explained, among other things, that the OCC's reliance on an expert witness was misplaced, as that witness's "analysis [that the bank poses 'an abnormal risk, damage, and/or loss to the institution, to the depositors, shareholders, and to the insurance fund of the FDIC'] does not support his conclusion."[31] The panel held that "[t]he Comptroller's finding was unreasonable because there was no rational relationship between the evidence, when looked at as a whole, and the finding."[32] Importantly, this was not an issue of the OCC attempting to enforce its 1981 policy—the FBA's cease-and-desist order would have required the bank to increase its capital levels to seven percent, not five or six as its policy statement would suggest.[33]

Congress responded to *Bellaire* in the International Lending Supervision Act of 1983 (ILSA).[34] In its report on the legislation, the Senate Banking Committee explained that the Fifth Circuit's decision "clouded the authority of the [FBAs] to exercise their independent discretion in establishing and requiring the maintenance of appropriate levels of capital," and that "establishing adequate levels of capital is properly left to the [FBAs'] expertise and discretion."[35] To that end, ILSA included a provision, codified at 12 U.S.C. § 3907, declaring that the FBAs "shall have the authority to establish such minimum level of capital" as each agency, "in its discretion, deems to be necessary or appropriate"—which, when combined with provisions of the APA, prohibited judicial review of the FBAs' capital requirements.[36] In addition, the statute

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[27] Blanton v. OCC, 909 F.3d 1162, 1172 (D.C. Cir. 2018) (quotations removed). *See also* Franklin Sav. Ass'n v. OTS, 934 F.2d 1127, 1145 (10th Cir. 1991) ("an unsafe or unsound condition exists where a financial institution is operated in such a manner as to cause unacceptable levels of risk to its depositors' funds").

[28] *See, e.g.*, In the Matter of: the * * * National Bank * * *, * * *, Respondent, 1977 WL 33741, at *7 ("The Comptroller concluded that Respondent Bank was engaging in unsafe and unsound practices because of the circumstances noted above, including the equity capital deficiency.").

[29] 12 U.S.C. § 1818(n). *See also* Indep. Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1169 (D.C. Cir. 1979) (explaining that "[t]he Comptroller was given authority to promulgate regulations in order to facilitate execution of his statutory powers" and that "[i]t would undermine the regulatory purpose of Congress to assume that the Comptroller must proceed solely by separate 'cease and desist' cases'").

[30] First Nat'l Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 684 (5th Cir. 1983).

[31] *Id*. at 686.

[32] *Id*. at 685.

[33] *See id*. at 684 (noting that the OCC's order directed the Bank to increase its "equity capital to total assets ratio … to not less than seven percent").

[34] Pub. L. No. 98-181 Title IX, 97 Stat. 1278.

[35] S. REPT. 98-122, at 16.

[36] 12 U.S.C. § 3907(a)(2). *See also* 5 U.S.C. § 701(a)(2) (providing that the APA's judicial review provisions apply "except to the extent that … agency action is committed to agency discretion by law"); Frontier State Bank Oklahoma City, Okla. v. FDIC, 702 F.3d 588, 597 (10th Cir. 2012) ("Section 3907 of ILSA forecloses our review of the FDIC's imposition of capital requirements because it commits the setting of capital levels to the FDIC's

required the FBAs to use that authority to affirmatively "establish[] minimum levels of capital" for banks.[37] It also clarified that banks' failures to meet their minimum capital levels is a *de facto* unsafe or unsound practice in APA adjudications, and allowed the FBAs to issue orders requiring banks to increase their capital to required levels without requiring APA adjudications.[38] In the words of the Senate Banking Committee, section 3907 was an effort "to clarify the authority of the banking agencies to establish adequate levels of capital requirements, to require the maintenance of those levels, and to prevent the courts from disturbing such capital."[39]

By including provisions requiring the FBAs to institute minimum capitalization levels for banks and prohibiting courts from second-guessing those levels, Congress made clear that it still expected adherence to the Horne Standard, even though it would be the FBAs, not the courts, that would decide what capitalization levels constitute "unsafe or unsound" practices. The Senate Banking Committee noted that the legislation was meant to "clarify the authority" of the regulators, not to give them entirely new authority.[40] Further reflecting the fact that section 3907 was a mere clarification is how it addressed banks' failure to comply with their capital requirements. The statute provides that a bank's failure to meet capital requirements may "constitute an unsafe and unsound practice within the meaning of section 1818," which the FBAs could then enforce via the same method it had attempted in *Bellaire*.[41]

Congress enacted the next major statute requiring bank capital regulations following the Saving and Loan Crisis of the late 1980s, which saw thousands of banks and thrifts fail, the Thrift Insurance Fund fail, and the Bank Insurance Fund (BIF) nearly turn insolvent. On the understanding that the FBAs' delay in closing failing banks resulted in unnecessary losses to the BIF,[42] Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) and with it, a statutory regime, codified at 12 U.S.C. § 1831o, requiring regulators' prompt corrective action (PCA) when insured depository institutions (IDIs) drop below certain

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discretion without giving us any standard to determine the correctness of the FDIC's decision."); FDIC v. Bank of Coushatta, 930 F.2d 1122, 1129 (5th Cir. 1991) (same finding).

Note also that by its text, Section 3907 does not apply to BHCs. *See* 12 U.S.C. § 3907 (referring generally to "banking institutions"); *id*. § 3902(2) (defining "banking institution" as a variety of depository institutions and not BHCs). It is possible, though has never been litigated, that courts could find they have the capacity to review the FRB's capital requirements for BHCs.

[37] *Id*. § 3907(a)(1).

[38] *See id*. § 3907(b)(1)–(2) (providing that the "[f]ailure of a banking institution to maintain capital at or above its minimum level … may be deemed by the appropriate [FBA], in its discretion, to constitute an unsafe and unsound practice" and that "the appropriate [FBA] may issue a directive to a banking institution that fails to maintain [capital] at or above its required level," which "shall be enforceable … to the same extent as an effective and outstanding order issued pursuant to [FISA]").

[39] S. REPT. 98-122, at 16.

[40] *Id*.

[41] 12 U.S.C. § 3907(b)(1). Reflecting a recognition that capital delinquencies must quickly be addressed and on-the-record hearings are overkill for that task, Congress also allowed the FBAs to issue directives requiring banks with capital delinquencies to increase their capital without ALJ hearings. *See id*. § 3907(b)(1)–(2). *See also* FDIC v. Bank of Coushatta, 930 F.2d 1122, 1131 (5th Cir. 1991) (explaining that "if a hearing were required, the directive would be delayed; by the time the matter was resolved, a bank's financially troubled status, requiring issuance of a directive, may have deteriorated substantially").

[42] S. REPT. 102-167, 32 ("The Committee is concerned that regulators have too often delayed in resolving the problems of troubled institutions."). *See also* U.S. General Accounting Off., GAO/GGD-91-69, Bank Supervision: Prompt and Forceful Regulatory Actions Needed 3 (Apr. 1991) ("GAO's analysis showed that bank regulators did not always use the most forceful actions available to correct unsafe and unsound banking practices. When they did, the enforcement process produced better results in terms of improving the condition of the bank.").

capital levels.[43] In enacting Section 1831o, Congress made clear that the purpose of the legislation was to narrow regulatory discretion in order to protect the BIF and require the regulators to engage in the prompt corrective action of firms they had been neglecting.[44]

FDICIA required the FBAs to enact regulations dictating the levels at which IDIs are considered "well capitalized," "adequately capitalized," "undercapitalized," "significantly undercapitalized," and "critically undercapitalized,"[45] with the last requiring tangible equity of "not less than 2 percent of total assets."[46] The law then placed activity limitations on undercapitalized IDIs[47] and required such IDIs to submit to their regulators and follow "capital restoration" plans that specify how they intend to become adequately capitalized.[48] The FBAs were authorized to issue directives requiring IDIs to take specific action to those failing to follow their plans, without requiring ALJ hearings.[49] For critically undercapitalized IDIs, regulators could jump straight to issuing directives.[50] The FBAs may apply to federal district court to enforce these directives and impose civil money penalties for violating them.[51] This PCA regime required the FBAs to closely monitor undercapitalized IDIs and take action if their capitalization levels were not improving.[52]

The PCA regime is guided by section 1818's "unsafe or unsound" framework. Congress enacted FDICIA in part on the recognition that the FBAs were too slow to act against undercapitalized banks, resulting in harm to the BIF; it was Congress's impression that the FBAs failed to adequately use their authority to prosecute regulatory violations or "unsafe or unsound" practices. Section 1831o's imposition of restrictions on IDIs deemed "undercapitalized," "significantly undercapitalized," or "critically undercapitalized" by the FBAs must be understood as Congress's effort to *require* the FBAs to act against IDIs engaged in "unsafe or unsound" practices.[53] Though this provision permitted the FBAs to issue capital directives directly and avoid Section 1818's ALJ hearings, the enforcement mechanism is just an evolution from Section 3907's capital directives and not something entirely new.

Congress's next and most recent changes to capital rules followed the 2008 financial crisis. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 made three

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[43] H.R. REPT. 102-157, 121 ("One of the keys to protecting the Federal deposit insurance funds is early identification of problems at troubled institutions so prompt corrective action may be taken before an institution becomes a threat to the BIF").

[44] Federal Deposit Insurance Corporation Improvement Act of 1991 § 131(a), Pub. L. No. 102-242, 105 Stat. 2236, 2253–66 (codified at 12 U.S.C. § 1831o(c)(2)).

[45] H.R. REPT. 102-157, 126 (explaining that "regulatory discretion to allow an insolvent institution to remain open is narrowed, and a system of tripwires and timetables is established to guide the regulators in how to handle a failing or insolvent institution").

[46] 12 U.S.C. § 1831o(c)(3).

[47] *See, e.g.*, *id*. § 1831o(e)(4) (imposing limitations on growth and needing "prior approval required for acquisitions, branching, and new lines of business").

[48] *Id*. § 1831o(e)(2).

[49] *See id*. § 1831o(f) (allowing action against an IDI that "fails in any material respect to implement a plan accepted by the agency")

[50] *See id*. (allowing action against an IDI that "is significantly undercapitalized").

[51] *See id*. 1818(i)(1) (allowing the FBAs to apply to federal district courts "for the enforcement of any effective and outstanding notice or order issued under … section 1831o").

[52] *See id*. § 1831o(e)(1)(A) ("Each [FBA] shall … closely monitor the condition of any undercapitalized [IDI]").

[53] *See* H.R. REPT. No 102-157 at 118 (1991) ("Although the Committee did not set actual capital standards, this legislation intends that banks should be well-capitalized.").

applicable changes.[54] First, it amended the BHCA to provide that the FRB may issue "regulations and orders relating to the capital requirements for [BHCs] … consistent with the safety and soundness of the company."[55] Second, it required the FRB to enact "risk-based capital requirements and leverage limits" for the largest BHCs.[56] Finally, it required the FBAs to enact for IDIs, BHCs, and non-banks regulated by the FRB "minimum leverage capital requirements" and "minimum risk-based capital requirements" that are "not be less than" those under the PCA regime as of Dodd-Frank's enactment.[57]

These changes are, again, guided by the "unsafe or unsound" framework. In its report on the legislation, the Senate Banking Committee made clear that the intention of the first change was not to provide the FRB new authority, but to clarify authority that the FRB already had.[58] The second should not be thought of as a new source of authority, but instead a directive from Congress to use existing authority in a new way, as he FRB already had authority to enact capital regulations to ensure the safety and soundness of BHCs; through this statute, Congress only intended to require the FRB to use that authority to impose capital rules that are tailored and are crafted with the financial system—not just institutions and the institutions' customers—in mind. The final change should similarly be read not as an independent source of regulatory authority, but as directives that the FBAs use authority found elsewhere.[59] Because the PCA regime applies only to IDIs, this statutory change applies to a much broader array of institutions and recognized the (more or less) adequate capitalization of IDIs during the 2008 Financial Crisis but *inadequate* capitalization of BHCs, and was intended to bring non-IDIs up to the level of IDIs.[60]

IV. How This History Should Affect the Rulemaking

As the above section demonstrates, the statutes authorizing bank capital requirements do not violate the nondelegation doctrine. This simple fact should be sufficient to ensure the Rule survives judicial review. Because ILSA provides that each FBA "shall have the authority to establish such minimum level of capital for a banking institution as [it], in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution,"[61] and because the APA's judicial review provisions do not apply "to the extent that … agency action is committed to agency discretion by law,"[62] the Rule is nonjusticiable.[63]

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[54] Pub. L. No. 111–203, 124 Stat. 1376.

[55] Dodd-Frank § 616(a) (codified at 12 U.S.C. § 1844(b)).

[56] *Id*. § 165(b)(1)(A)(i) (codified at 12 U.S.C. § 5365(b)(1)(A)(i)).

[57] *Id*. § 171(b)(1)–(2) (codified at 12 U.S.C. § 5371(b)(1)–(2)).

[58] *See* S. REPT. 111-176 at 88 ("This section clarifies that the Federal Reserve may adopt rules governing the capital levels of bank and savings and loan holding companies.").

[59] 12 U.S.C. § 5371(b)(1)–(2).

[60] *See* Press Release: Senator Collins Introduces Amendment to Impose Strong Capital Requirements on Financial Institutions to Help Prevent Future Economic Crises, SENATOR SUSAN COLLINS (May 7, 2010), https://www.collins.senate.gov/newsroom/senator-collins-introduces-amendment-impose-strong-capital-requirements-financial.

[61] 12 U.S.C. § 3907(a)(2).

[62] 5 U.S.C. § 701(a)(2).

[63] *See* Frontier State Bank Oklahoma City, Okla. v. FDIC, 702 F.3d 588, 597 (10th Cir. 2012) (explaining that this decision on the part of Congress "leaves banks in the position of enduring any vicissitude attending the exercise of the regulator's discretion" while recognizing that "Congress is permitted to prioritize the safety of the banking system over banks' interest in avoiding subjective or even harsh agency decisions.").

Nevertheless, if a court somehow finds that it does have jurisdiction to review a case involving the Rule, the FBAs must demonstrate that their policy decisions were not arbitrary and capricious. To meet this threshold, agencies must demonstrate that their rules are "based on a consideration of the relevant factors."[64]

If the FBAs do interpret their statutory authority to promulgate capital regulations as being constrained by the need to address "unsafe or unsound" practices, they should make that clear in the Rule's preamble. They should also explain *how* a failure to comply with the Rule's capital levels would be unsafe or unsound—that is, how failing to comply with the Rule would be "contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[65]

V. Conclusion

The statutes authorizing capital regulations do not violate the nondelegation doctrine because they are based in Congress's intent to prohibit "unsafe or unsound" practices. If they agree, the FBAs should make this understanding clear in the Rule's preamble and conduct an appropriate analysis to ensure the rule survives judicial review.

Sincerely,

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[64] Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983), *quoting* Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

[65] 112 Cong. Rec. 26474 (1966). *See also* notes 26–27 and associated test, *supra* (providing circuit court interpretations of the term "unsafe or unsound").