September 12, 2023

Via Electronic Mail

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, D.C. 20551
Attention: Ann E. Misback, Secretary

James P. Sheesley, Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429
Attention: Comments/Legal OES (RIN 3064–AF29)

Office of the Comptroller of the Currency
Chief Counsel's Office
400 7th Street, SW, Suite 3E-218
Washington, D.C. 20219
Attention: Comment Processing

Re: ***Request for Re-Proposal of Regulatory Capital Rule to Remedy Administrative Procedure Act Violations*** (Federal Reserve Docket No. R-1813; FDIC RIN 3064-AF29; Docket ID OCC-2023-0008)

Ladies and Gentlemen:

The Bank Policy Institute, the American Bankers Association, the Financial Services Forum, the Institute of International Bankers, the Securities Industry and Financial Markets Association and the U.S. Chamber of Commerce[1] are writing with respect to the joint proposed rulemaking amending the capital requirements applicable to large banking organizations. The proposed regulations would significantly increase capital requirements for larger banks. Yet in support of these substantial new requirements, the proposed rule repeatedly relies on data and analyses that the agencies have not made available to the

[1] *See* Appendix for more information on the Associations.

public.[2] This reliance on non-public information violates clear requirements under the Administrative Procedure Act that agencies must publicly disclose the data and analyses on which their rulemaking is based. To remedy this violation, the agencies must make available the various types of missing material identified below—along with any and all other evidence and analyses the agencies relied on in proposing the rule—and re-propose the rule. To remain consistent with what the agencies themselves have determined to be an "appropriate" comment period, the agencies should provide for a new 120-day comment period in the re-proposal.[3] Absent a formal re-proposal, and at a minimum, the agencies must extend the comment period to no sooner than 120 days after the date on which the agencies disclose all necessary information.

As part of the APA's notice-and-comment requirements, all agencies have the "duty to identify and make available technical studies and data that [they] ha[ve] employed in reaching the decisions to propose particular rules."[4] Agencies "must explain the assumptions and methodology" underlying a proposed rule "and, if the methodology is challenged, must provide a complete analytic defense."[5] And, where an agency omits some of the "critical factual material" and analyses from a proposed rule, it must disclose the material and then provide "further opportunity to comment."[6] Indeed, "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[7]

The proposed rule violates these basic legal obligations. Key elements of the proposed rule rely on a wide variety of data, analyses and methodologies that have been withheld from public view and comment. For example:

- To select a multiplier of "15" in one element of the proposed rule's internal loss multiplier formula for operational risk, the proposed rule "extrapolates from average annual total net operational losses the potential for unusually large losses," in an apparent effort to "ensure" that banks "maintain[] sufficient capital."[8] But the proposed rule does not disclose to the public any analyses supporting a multiplier of "15," nor does it reveal what the agencies mean by "sufficient" and how they came to the conclusion that a multiplier of "15" would result in "sufficient" capital.

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[2] FDIC Director McKernan noted this point in his dissent from the proposed rule. *See* Statement by Jonathan McKernan, Member, FDIC Board of Directors, on the Proposed Amendments to the Capital Framework (July 27, 2023), n.5, https://www.fdic.gov/news/speeches/2023/spjul2723c.html ("The underlying data and calibration methodology used to estimate" large portions of the proposed rule "are not in the public domain.").

[3] Tr. Of July 27, 2023 Open Board Meeting, at 5, https://www.federalreserve.gov/mediacenter/files/open-board-meeting-transcript-20230727.pdf ("The extended 120-day comment period is appropriate and will allow all parties adequate time to fully analyze the issues presented in the rule.").

[4] *Owner-Operator Independent Drivers Association v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007) (Garland, J.) (quotation marks and citation omitted) (applying 5 U.S.C. 553(b)(3), (c)).

[5] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983).

[6] *Chamber of Commerce v. SEC*, 443 F.3d 890, 900–01 (D.C. Cir. 2006).

[7] *Owner-Operator Independent Drivers Association*, 494 F.3d at 199 (Garland, J.) (quotation marks and citation omitted).

[8] Release at 200.

- The proposed rule would include "minimum haircut floors," which are calibrated based on "observed historical price volatilities as well as existing market and central bank haircut conventions."[9] These underlying data and analyses have not been made available to the public.[10]

- The proposed rule increases the "supervisory parameter *p* for securitizations that are not resecuritization exposures from 0.5 to 1.0" to offset the decrease in "risk weights applicable to certain underlying assets under the proposal . . . and the proposed reduction in the risk-weight floor under SEC-SA for securitization exposures that are not resecuritization exposures."[11] No analysis used to calibrate the increase in the "*p*" parameter to offset the decrease in credit risk weights has been made available to the public.

- The proposed rule states that "[p]urchased credit protection through nth-to-default derivatives often does not correlate with the hedged exposure which inhibits the risk mitigating benefits of the instrument."[12] No data or analysis underlying this assertion has been made available to the public.

- The proposed rule would scale the capital requirement under the basic credit valuation method used to calculate the capital charge for credit valuation adjustment risk "by a factor of 0.65" to "ensure" that the basic approach "is calibrated appropriately relative to the" standardized approach."[13] Neither the analysis justifying the 0.65 factor, nor any explanation for what the agencies deem "appropriate[]" calibration, has been publicly released.

In addition, the proposed rule repeatedly relies on non-public analyses that are said to arise from the agencies' "supervisory experience" to justify various elements of the proposed rule. For example, to justify using lower real estate valuations for purposes of calculating loan-to-value ratios (thereby resulting in higher risk weights), the proposed rule states that "[s]upervisory experience has shown that market values of real estate properties can be temporarily impacted by local market forces and using a value figure including such volatility would not reflect the long-term value of the real estate."[14] Similarly, the proposed rule relies on "experience" for the proposition that "operational risk is inherent in all banking

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[9] *Id.* at 126.

[10] In this instance, the reliance on nonpublic supervisory experience at all is particularly puzzling, as public data is readily available that could be used to justify volatility assumptions in securities' values, and central bank haircut conventions are available on public websites.

[11] *Id.* at 145.

[12] *Id.* at 147.

[13] *Id.* at 451.

[14] *Id.* at 68–69.

products, activities, processes, and systems,"[15] an assertion which is fundamental to the imposition of an entirely new operational risk capital charge on many banks. At a minimum, the agencies must disclose the specific data supporting their calibration of operational risk and demonstrate that the operational risk component and other elements of the proposed rule do not impose duplicative capital charges. The proposed rule also relies on "supervisory experience" for narrow issues, such as to justify applying higher risk weights to acquisition, development and construction loans ("ADC")[16] than to other categories of real estate loans.[17] Neither these analyses nor any specifics of the agencies' "supervisory experience" have been made available to the public.

We recognize that some of the data and analyses referenced above may raise confidentiality concerns; however, nothing prevents the agencies from releasing such data and analyses in a manner that is anonymized or aggregated to the extent necessary to protect bank or other party confidentiality. But the agencies must either do so or refrain from relying on the data and related analyses in support of their proposed rule.

This list above is merely illustrative, not exhaustive. Furthermore, it does not include many other instances in the proposed rule where the agencies simply assert a proposition with no citation, evidence or analysis to back it up. For example:

- In order to justify a requirement that a corporate borrower or its parent company have securities outstanding that are publicly traded in order for its exposures to qualify for a preferential "investment-grade" risk weight, the proposal flatly asserts with no data or explanation that "publicly-traded corporate entities are subject to enhanced transparency and market discipline as a result of being listed publicly on an exchange."[18] Presumably, the agencies have concluded that company disclosures under the Securities Exchange Act of 1934 create this transparency and market discipline, but they do not explicitly state as much, nor do they make any attempt to tie these qualities to improved creditworthiness *vis-à-vis* unlisted borrowers, such that only publicly listed companies should qualify for the preferential risk weight.

- The proposal also posits without support that "proposed correlation parameters are sufficiently conservative to appropriately capture the potential interactions between risk factors that the market risk covered positions may experience in a time of stress."[19]

- The calculation of the capital requirement for non-modellable risk factors in the market risk rule includes a supervisory *p* factor of "0.6," the calibration of which is nowhere explained or

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[15] *Id.* at 185 ("Experience shows that operational risk is inherent in all banking products, activities, processes, and systems.").

[16] An ADC exposure is an exposure secured by real estate for the purpose of acquiring, developing or constructing residential or commercial real estate properties, as well as all land-development loans and all other land loans.

[17] *Id.* at 79 ("[S]upervisory experience has shown that ADC exposures have heightened risk compared to permanent commercial real estate exposures."); *see also, e.g.*, *id.* at 96 (asserting that "supervisory experience suggests that obligors similar to those with charge cards have average credit utilization rates equal to approximately 10 percent").

[18] *Id.* at 90.

[19] *Id.* at 337.

justified.[20] Instead, the proposal simply asserts that the calculation "would allow for a limited and appropriate diversification benefit that depends on the level of *p* parameter."[21]

In some cases, the agencies do not even assert a proposition, and instead simply propose calibrations with no justification or explanation at all. For example, the proposed market risk rule would apply a multiplier of between 1.5 and 2 to modeled requirements based on a firm's number of backtesting exceptions, but the proposal provides no justification or explanation for the calibration of this range of multipliers.[22] The proposal's deficiency in this respect extends to matters as fundamental and basic as the choice of the various new risk weights proposed in the revised credit-risk framework. It is not possible for any commenter to tell whether these risk weights were chosen arbitrarily, with no underlying data to support the calibrations, or whether they are based on specific supporting data or other evidence that has not been made available to the public; in either case, the proposal is fatally flawed.

There is one exception from this absolute lack of explanation of the calibration of credit risk weights: the proposal indicates that it raised the risk weights for residential real estate and retail credit exposures above the risk weights agreed to in the Basel standard in an "attempt[] to mitigate potential competitive effects between U.S. banking organizations."[23] It goes on to note that, absent the adjustment, "marginal funding costs on residential real estate and retail credit exposures for many large banking organizations could have been substantially lower than for smaller organizations not subject to the proposal," thereby potentially making smaller banks less competitive in this area.[24] Without agreeing or disagreeing that the competitiveness of small banks is a legitimate consideration for the calibration of credit risk weights, like the other instances of naked assertions noted above, the agencies provide no analysis that actually assesses the projected relative marginal funding costs of larger versus smaller banks. The agencies are required by basic principles of administrative law to make this missing material—and any other evidence, analyses or methodologies underlying the proposed rule—available to commenters.

In addition to the information that the agencies omitted from the proposed rule, the agencies have also acknowledged that they plan to "collect *additional* data to refine [their] estimates of the rule's effects" during the comment period, which will "inform finalization of the rule."[25] Collecting such data during, rather than before, the comment period is also legally improper—the purpose of the comment period is for the public to review the agency's proposal, including any supporting evidence, not for the agency to finish doing work that should have been completed before issuing the proposal. The agencies

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[20] *See id.* at 398.

[21] *Id.*

[22] *See id.* at 366.

[23] *Id.* at 501.

[24] *See id.* at 501-502.

[25] Tr. Of July 27, 2023 Open Board Meeting, at 4, 13, https://www.federalreserve.gov/mediacenter/files/open-board-meeting-transcript-20230727.pdf.

cannot fill in the blanks in the final rule.[26] Instead, to the extent the agencies intend to collect and analyze further data on which to base some or all of their rulemaking in this area, they must suspend the current open rulemaking, complete any data collection and analysis necessary to support their crafting and calibration of the rule, re-propose the rule in light of the additional analyses and data and make that information available to the public and then allow commenters an opportunity to respond. Any other approach would violate the agencies' duty to identify and make available for public review and comment the technical studies and data on which any rule is based. As noted above, anonymizing or aggregating data can address confidentiality concerns and still allow the agencies to meet their legal obligations.

Because of the critical procedural deficiencies described above, neither we nor other commenters are able to fully and properly comment on the proposal at this time. Accordingly, we request that the agencies make available the various types of missing material identified above—along with any and all other evidence and analyses the agencies relied on in proposing the rule—and re-propose the rule with a new comment period.[27] If the agencies are unwilling to re-propose the rule along with a complete evidentiary record in compliance with the Administrative Procedure Act then, at minimum, the agencies should extend the comment period to no sooner than 120 days after the date on which all necessary information is disclosed, including the agencies' ongoing analyses of the impact of the proposed rule. Our request is not just that the agencies "play by the rules," although a failure to do so should alone be sufficient to justify that request. Rather, this is a rule of sweeping impact and it is not only essential for our members, but also in the national interest, that the new requirements be adopted only after the public has a meaningful opportunity to scrutinize both the proposal and the underlying rationale.

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[26] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (noting that final rules with content that interested parties could not reasonably anticipate from the initial proposal may fail the "logical outgrowth test").

[27] As noted above, the examples cited in this letter are merely illustrative, and the undisclosed data and unexplained parameters, methodologies, standards and rationales are endemic and widespread throughout all elements of the proposal.

Thank you for your prompt attention to this request. If you have any questions, please contact the undersigned by email at *john.court@bpi.com*, *TPinder@aba.com*, *scampbell@fsforum.com*, *swebster@iib.org*, *SAhmed@sifma.org* and *bhulse@USChamber.com*.

Sincerely,

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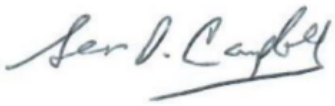
American Bankers Association



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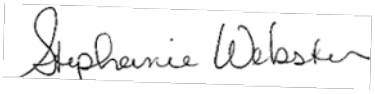

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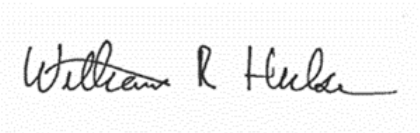

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cc: Mark Van Der Weide
(General Counsel, Board of Governors of the Federal Reserve System)

Harrel Pettway
(General Counsel, Federal Deposit Insurance Corporation)

Benjamin McDonough
(Chief Counsel, Office of the Comptroller of the Currency)

Appendix

The **Bank Policy Institute** is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The **American Bankers Association** is the voice of the nation's $23.5 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans.

The **Financial Services Forum** is an economic policy and advocacy organization whose members are the chief executive officers of the eight largest and most diversified financial institutions headquartered in the United States. Forum member institutions are a leading source of lending and investment in the United States and serve millions of consumers, businesses, investors, and communities throughout the country. The Forum promotes policies that support savings and investment, financial inclusion, deep and liquid capital markets, a competitive global marketplace, and a sound financial system. Visit our website, fsforum.com.

The **Institute of International Bankers** (IIB) represents internationally headquartered financial institutions from more than 35 countries around the world doing business in the United States. The membership consists principally of international banks that operate branches, agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States. The IIB works to ensure a level playing field for these institutions, which are an important source of credit for U.S. borrowers and comprise the majority of U.S. primary dealers. These institutions enhance the depth and liquidity of U.S. financial markets and contribute significantly to the U.S. economy through direct employment of U.S. citizens, as well as through other operating and capital expenditures.

The **Securities Industry and Financial Markets Association** is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

The **U.S. Chamber of Commerce** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.