WRITTEN TESTIMONY OF

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HEARING ON IMPLEMENTING BASEL III: WHAT'S THE FED'S ENDGAME?

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Chairman Barr, Ranking Member Foster, and members of the subcommittee, thank you for the opportunity to discuss the federal banking agencies' recently issued Basel III endgame capital requirements proposal (the "Proposal").[1] My testimony is given in my personal capacity and not on behalf of Mayer Brown LLP or any of its clients.

The Proposal represents a major shift in bank regulatory policy. The Proposal is not a mere technical exercise to refine existing capital requirements for banking organizations. Rather, it will materially change the scope and nature of capital requirements for banking organizations that account for more than 70 percent of the assets of the U.S. banking system. The Proposal is more than the endgame of Basel III, but is in fact the whole game, where the winners and losers will be decided. By design, the Proposal will have substantial, long-term economic consequences for American households, businesses, and the overall economy. Yet, the significance of the Proposal is not only its economic impact, but its procedural and legal implications. The Proposal does not satisfy well-established, statutorily-prescribed procedural requirements intended to ensure transparency, informed decision-making, and accountability. As if these errors are not problem enough, there is a more fundamental problem with the Proposal: its disregard for congressional mandates governing capital requirements.

My testimony provides background on the history of U.S. bank capital regulation, Congress's important, historic role in establishing statutory conditions to govern the setting of capital requirements by federal banking agencies, and the serious process, policy and legal problems with the Proposal. My testimony concludes with a recommendation that Congress call for the banking agencies to withdraw the Proposal (which was issued as a Notice of Proposed Rulemaking ("NPRM")) and replace it with a statutorily-compliant proposal issued as an Advanced Notice of Proposed Rulemaking ("ANPR").

The Importance of Getting Capital Requirements Right.

The problematic nature of the Proposal is particularly consequential because capital requirements are among the most important regulations in economic policy. They not only ensure that the banking system is safe and sound, but also influence the allocation of credit, impacting if and on what terms credit is extended and by whom. In large measure, capital requirements determine how the nation's $17 trillion in bank deposits are deployed for investment purposes. Improperly calibrated capital requirements can skew their allocation to less productive uses, undermining economic growth and potentially threatening the stability of the financial systems. Further, capital requirements can impact the structure of the banking system and implicate geopolitical interests such as the vitality of the international financial and trading system and the United States' position as the world's financial capital. It is therefore critical that capital requirements are appropriately calibrated and durable.

Congressional Mandates and Oversight of Capital Requirements.

Given the importance of capital requirements, Congress has long played an active role in both mandating capital requirements and overseeing their implementation. This history shows

1 https://www.federalreserve.gov/newsevents/pressreleases/bcreg20230727a.htm

that Congress – not the banking agencies acting on their own accord – has set policy for capital requirements, while the banking agencies' task has been to implement that policy.

Modern capital requirements date back to the financial disruptions of the early 1980's and the passage of the International Lending Supervision Act of 1983 ("ILSA"), which authorized the banking agencies to establish capital standards.[2] ILSA also directed the banking agencies to consult with bank supervisors of other countries to adopt consistent supervision policies and practices for international lending. This congressional directive supported U.S. banking regulators' subsequent adoption of the original Basel Accords developed by the Basel Committee on Banking Supervision ("Basel Committee").[3]

In the wake of the Savings and Loan Crisis, Congress passed the Federal Deposit Insurance Corporation Improvement Act ("FDICIA"), which established the prompt corrective action framework and required each federal banking agency to take increasingly stringent supervisory actions with respect to banks if their capital levels deteriorate.[4] Each federal banking agency was also required to biennially determine whether capital requirements are sufficient to facilitate prompt corrective action.[5]

Most importantly for the present discussion, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") contained detailed provisions relating to the setting of capital requirements. Although the Proposal repeatedly states that the banking agencies have "broad authority to establish regulatory capital standards," the Dodd-Frank Act actually imposed substantial conditions on how banking agencies must calibrate capital requirements.

Section 171 of the Dodd-Frank Act (known as the "Collins Amendment") established minimum risked-based and leverage capital requirements for insured depository institutions and depository institution holding companies.[6]

Section 165 of the Dodd-Frank Act required the Federal Reserve to impose enhanced risk-based capital and leverage requirements on any bank holding company with $50 billion or more in assets. In 2018, this threshold was increased to $250 billion, but the Federal Reserve was also authorized to apply, subject to certain statutory conditions, enhanced prudential standards to bank holding companies with between $250 billion and $100 billion in assets, which it did in its implementing regulations. The Dodd-Frank Act mandated that the Federal Reserve apply these enhanced capital requirements in a manner that "increase in stringency" based on a long series of factors that include:

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2 See Tarullo, Daniel K., *Banking on Basel: The Future of International Financial Regulation* (2008).

3 Id.

4 Section 131, FDICIA; 12 U.S.C. § 1831o.

5 12 U.S.C. § 1828(p).

6 Section 171, Dodd-Frank Act; 12 U.S.C. § 5371.

- "the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;"

- "the importance of the company as a source of credit for households, businesses, and State and local governments;" and

- "the importance of the company as a source of credit for low-income, minority, or underserved communities and the impact that the failure of such company would have on the availability of credit in such communities."[7]

Section 165 of the Dodd-Frank Act also provided the Federal Reserve with discretionary authority to further tailor enhanced capital standards. In Section 165(a)(2), which is titled "Tailored application," the Federal Reserve was authorized to:

> differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk factor that the [Federal Reserve] deems appropriate.[8]

Congress made this additional tailoring mandatory in the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.[9] In 2019, the Federal Reserve finalized a rule to implement this statutory tailoring requirement.[10]

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7 Section 165(a)(1); 12 U.S.C. § 5365(a)(1)(B). Among the other factors the Dodd-Frank Act specifies that the Federal Reserve shall take into account when prescribing prudential standards under Section 165(a) are: (a) the extent of the leverage of the company; (b) the extent and nature of the off-balance-sheet exposures of the company; (c) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies; (d) the importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system; (e) the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities; (f) the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse; (g) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company; (h) the degree to which the company is already regulated by one or more primary financial regulatory agencies; (i) the amount and nature of the financial assets of the company; (j) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding; (k) the extent to which the company is subject prudential standards on a consolidated basis in its home country that are administered and enforced by a comparable foreign supervisory authority; and (l) any other risk-related factors that Financial Stability Oversight Council deems appropriate. 12 U.S.C. § 5323.

8 Section 165, Dodd-Frank Act; 12 U.S.C. § 5365(a)(2). The concept of tailoring enhanced prudential regulations originated in the Senate version of the legislation that became the Dodd-Frank Act, S. 3217, The Restoring American Financial Stability Act of 2010. The Senate Report accompanying S. 3217 states that: "With respect to bank holding companies, the heightened prudential standards would increase in stringency gradually as appropriate in relation to the company's size, leverage, and other measures of risk for those that have assets of $50 billion or more. This graduated approach to the application of the heightened prudential standards is intended to avoid identification of any bank holding company as systemically significant." *Senate Report* 111-176 at p. 2.

9 Section 401(a), The Economic Growth, Regulatory Relief, and Consumer Protection Act; 12 U.S.C. § 5365(a)(2).

10 See https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191010a.htm.

To ensure that the banking agency rules comply with statutory mandates, Congress has historically conducted active oversight of the development and implementation of capital requirements. For example, Congress conducted – on a bipartisan basis – extensive oversight of the implementation of the Basel II capital accords, including holding numerous hearings and requesting Government Accountability Office ("GAO") studies.[11] During this multi-year process, Congress raised serious concerns about the methodology and potential impacts of the Basel II capital proposal. This congressional engagement ultimately led to significant modifications of the proposal. Similarly, Congress's oversight of the implementation of the Dodd-Frank Act identified the need for capital requirements and other prudential regulations to be further tailored, resulting in the bipartisan passage of the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.

The Role of Congress with Respect to the Proposal.

Once again, Congress needs to exercise its oversight authority with respect to the adoption of new capital requirements as the Proposal's procedural and substantive problems far exceed those that existed with the Basel II capital proposal. Because the final responsibility for capital regulation lies with Congress, it is appropriate and necessary for Congress conduct oversight by (i) carefully examining the Proposal, (ii) requesting that the banking agencies provide the necessary information for Congress and the public to understand the basis for, and potential impacts of, the Proposal, and (iii) ensuring that no rule is finalized until Congress is certain that the final rule would both comply with all procedural and statutory mandates and be the best policy for the American people.

As the Committee conducts its oversight of the Proposal, several issues merit heightened attention.

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11 The congressional hearings on Basel II included: An Update on the New Basel Capital Accord, Hearing Before the Committee on Banking, Housing, And Urban Affairs, United States Senate, S. Hrg. 109-1084 (September 26, 2006); The Development of New Basel Capital Accords, Hearing Before the Committee on Banking, Housing, And Urban Affairs, United States Senate, S. Hrg. 109-890 (November 10, 2005); Review of the New Basel Capital Accord, Hearing Before the Committee on Banking, Housing, And Urban Affairs, United States Senate, S. Hrg. 108-495 (June 18, 2003); A Review of Regulatory Proposals on Basel Capital and Commercial Real Estate, Hearing Before the Committee on Financial Services, U.S. House of Representatives, Serial No. 109-120 (September 14, 2006); Private Sector Priorities for Basel Reform, Hearing Before the Committee on Financial Services, U.S. House of Representatives, Serial No. 109-57 (September 28, 2005); Basel II: Capital Changes in the U.S. Banking System and the Results of the Impact Study, Hearing Before the Committee on Financial Services, U.S. House of Representatives, Serial No. 109-27 (May 11, 2005); The New Basel Accord: Private Sector Perspectives, Hearing Before the Committee on Financial Services, U.S. House of Representatives, Serial No. 108-96 (June 22, 2004); The New Basel Accord: In Search of a Unified U.S. Position, Hearing Before the Committee on Financial Services, U.S. House of Representatives, Serial No. 108-40 (June 19, 2003); The New Basel Accord: Sound Regulation or Crushing Complexity, Hearing Before the Committee on Financial Services, U.S. House of Representatives, Serial No. 108-5 (February 27, 2003). GAO reports: GAO-07-253 Risk-Based Capital: Ban Regulators Need to Improve Transparency and Overcome Impediments to Finalizing the Proposed Basel II Framework; GAO-08-953 Risk-Based Capital: New Basel II Rules Reduced Certain Competitive Concerns, but Bank Regulators Should Address Remaining Uncertainties.

Lack of Factual Support Undermines the Notice and Comment Process.

Section 553 of the Administrative Procedure Act ("APA") requires that agencies provide the public with notice of proposed rules, including the basis for their policy choices, and an opportunity to comment.[12] However, the Proposal does not contain key rationales, data and other factual support for its policy choices and, thereby, prevents an effective notice and comment period as required by the APA.

The Proposal states that it is "generally consistent" with the framework issued by the Basel Committee, but in fact the Proposal contains significant, material divergences.[13] The Proposal tries to justify these deviations on generalized grounds that they are needed for technical reasons relating to U.S. market characteristics, U.S. accounting standards, U.S. banking practices, and U.S. legal requirements and policy objectives.[14] Such generalized justifications make it impossible for commentators to know why specific parameters (*e.g.* risk-weights) and conditions issued by the Basel Committee were changed and how the banking agencies derived alternatives in the Proposal. As a result, the mischaracterization of the nature of the Proposal is exacerbated by obfuscation of the factual support for the Proposal's policy choices.[15]

The Proposal also lacks detailed analysis about its potential impacts on several key public policy issues. To start, the Proposal does not provide data or analysis that demonstrates the need to substantially increase capital requirements or that the capital increase under the Proposal is the appropriate amount. Further, the Proposal's increase in the amount of capital reflects a change in policy by the banking agencies, which have stated consistently that current capital levels are appropriate and have approved bank capital levels under their stress testing regimes.[16] However, the Proposal does not explain why this change in policy has occurred. If banking regulators have determined that banking organizations are undercapitalized (in which case, banking regulators should have promptly informed Congress about rather continue to publicly state that the banking

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12 5 U.S.C. § 553.

13 See https://www.mayerbrown.com/en/perspectives-events/publications/2023/08/a-road-not-taken-where-the-us-capital-proposal-differs-from-basel.

14 The Proposal at p. 11.

15 The Proposal is not the only recent proposal issued by the Federal Reserve with this problem. Concurrent with the Proposal, the Federal Reserve issued a proposal to revise the methodology for identifying global systemically important bank holding companies (GSIBs). Those revisions indirectly resulted in nine Category III and IV banking organizations being moved into the Category II prudential regulatory category. No explanation of the need for this change in prudential regulation is contained in that proposal.

16 See Federal Reserve Board - Federal Reserve Board releases results of annual bank stress test, which demonstrates that large banks are well positioned to weather a severe recession and continue to lend to households and businesses even during a severe recession; https://www.federalreserve.gov/publications/files/2023-dfast-results-20230628.pdf at p. at iii ("The stress tests ensure that large banks are sufficiently capitalized and able to lend to households and businesses even in a severe recession. They evaluate the financial resilience of banks by estimating losses, revenues, expenses, and resulting capital levels under hypothetical eco nomic conditions."); See also https://www.fdic.gov/news/speeches/2023/spmay1723.html ("the industry remains well capitalized"); https://www.federalreserve.gov/newsevents/speech/barr20221201a.htm ("We have strong capital levels today").

system is well-capitalized), the Proposal should quantitatively demonstrate the capital shortfall and how the Proposal would remedy the situation. The Federal Reserve has stated that it conducted a "holistic review" of bank capital, but the quantitative results of that review have yet to be disclosed either in the Proposal or otherwise.[17] The Proposal does not explain why this information was not provided.

The Proposal states that the banking agencies have conducted analysis of its potential impact on lending activities but does not provide the analysis.[18] As a result, there is little information about whether the Proposal would lead to reduced bank lending to consumers or American businesses. Yet, the Proposal includes major changes to capital requirements for consumer loans (including mortgages and credit cards), tax equity investments, and commission-based financial services (including insurance and investment advisory). For example, the Proposal imposes higher capital charges on loans to certain small and medium-sized private companies (which do not have access to the capital markets and rely on bank loans for financing) than to large public companies. The Proposal does not indicate whether this treatment will unfairly disadvantage these small and medium-sized companies. Further the Proposal's risk-weights for mortgages do not account for the reduced risks for mortgages with mortgage insurance, penalizing homebuyers who must purchase mortgage insurance to obtain a mortgage. The Proposal does not indicate whether the banking agencies conducted any data analysis to support this decision. Nor does the Proposal estimate whether and to what extent the revised capital requirements would cause financial activities to migrate from banking organizations and undermine the stability of the banking industry or adversely impact consumers and communities.

With respect to the impact of the Proposal's changes to capital requirements for trading activities, the Proposal notes that the changes would have a substantial impact, but does not provide any analysis of its potential impact on market making activity and liquidity and only notes that the question "remains a research question needing further study."[19] Given the important role that deep and liquid capital markets play in maintaining financial stability and the possibility that the Proposal could diminish the resiliency of U.S. capital markets, the Proposal's failure to examine this issue reveals a potential disconnect between a stated purpose of the Proposal (improving financial stability) and its possible outcome (increased financial instability).

Moreover, the Proposal does not discuss its potential impacts on the structure of the banking system. By extending the Proposal to all banking organizations with more than $100 billion in assets, the Proposal may create new incentives for firms to merge over time. The operational costs and complexity of the Proposal inherently favor large institutions that can amortize the costs over a larger asset base. To the extent the Proposal alters the financial prospects of institutions, mergers could very well be the result. Over time, these potential consequences of the Proposal could create a "donut hole" in the banking system, where there are just a few very large banks and many community banks, but few banks in the middle. This could have a particularly adverse impact on consumers and middle-market companies who have

17 https://www.federalreserve.gov/newsevents/speech/barr20230710a.htm

18 The Proposal at p. 497 – 500.

19 The Proposal at p. 502.

traditionally relied upon such banks. Although an active M&A process is part of a competitive and dynamic banking industry, market conditions – not capital requirements – should drive outcomes.

The absence of the data and analysis behind the Proposal and its potential impacts undermines the notice and comment process as set forth by the APA. The purpose of the notice and comment period is not to inform the public that a new regulation is forthcoming. Instead, the notice and comment process is part of the process of formulating the rule under the APA. It is designed to provide an agency with valuable information from the public about how a rule could operate and its potential impact so that the agency can use the information to improve the rule. It is hard to understand why the Proposal omits important information that the public could have used to provide more useful comments to the banking regulators and thereby help them improve the rule. This suggests that the banking agencies have already decided against making material changes to the Proposal.

Legal Challenges.

Because, as discussed above, the Proposal fails to provide the data and analysis supporting its policy choices as required by the APA, the Proposal is vulnerable to legal challenges.[20] The Proposal relies on "supervisory experience" as justification for many determinations in the Proposal, but the case law demonstrates that conclusory assertions of "knowledge and experience" are insufficient grounds for agency action.[21] In addition, the Proposal also violates the APA because it does not sufficiently explain why the agencies are rescinding existing rules that were just recently adopted in 2019, or why they changed their position on the adequacy of bank capital.[22]

However, the Proposal's most serious violation is its disregard for the statutory mandates for the Federal Reserve to tailor capital requirements contained in the Dodd-Frank Act and the Economic Growth, Regulatory Relief, and Consumer Protection Act. The Proposal moves toward establishing uniform capital requirements for all banking organizations with $100 billion or more in assets and all but eliminates the prudential tailoring scheme adopted to implement the 2018 legislation. As the Proposal states:

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20 See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983); Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986); Owner-Operator Indep. Drivers v. FMCSA, 494 F.3d 188, 199 (D.C. Cir. 2007); Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005); Pub. Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 936 (D.C. Cir. 2004); Pub. Citizen, Inc. v. Mineta, 340 F.3d 39 (2d Cir. 2003); Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001); Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 1983); Owner-Operator Independent Drivers Ass'n v. FMCSA, 494 F.3d 188 (D.C. Cir. 2007); Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); MetLife Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219 (D.D.C. 2016).

21 See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84 (D.C. Cir. 2010) (Ginsburg, Rogers, and Garland).

22 See Motor Vehicle Manufactures Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983); FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009); Encino Motorcars, LLC v. Navarro, 579 U.S. 211 (2016).

> For banking organizations subject to Category III or IV capital standards, the Proposal would align the calculation of regulatory capital – the numerator of the regulatory capital ratios – with the calculation for banking organizations subject to Category I or II, *providing the same approach for all large banking organizations*.[23]

This language directly contravenes the statutory mandate that the Federal Reserve "shall" tailor capital standards.[24] Congress mandated tailoring of enhanced prudential regulation so that regulations reflect the risks presented by institutions. This mandate recognizes that a $2 trillion banking organization should be regulated differently than an institution that is only 5% of that size. Uniform one-size-fits-all regulation may be easier for banking agencies to implement, but it neglects the diversity of business models and risk profiles of banking organizations and risks conforming bank activities. The U.S.'s $23 trillion economy requires a broad range of financial institutions with diverse businesses models to fund its highly-specialized and diverse financial needs. By imposing the tailoring mandate, Congress recognized the importance of ensuring that regulations do not undermine the vibrancy of our financial system. Despite the clear statutory language, the Proposal does not provide the reasons why the banking agencies fail to comply with the statutory tailoring requirements. Indeed, in the entire 1,087-page Proposal, tailoring is only mentioned in a single footnote.[25]

If the banking agencies believe that tailoring is no longer appropriate or existing law impedes their ability to craft appropriate capital standards, the constitutionally-prescribed course is to request that Congress change the statute. Otherwise, tailoring remains the law of the land. It is the legal obligation of agencies to follow their statutory mandates – not to selectively choose which to disregard.

To be clear, strong capital requirements are essential. In the lead up to the 2008 financial crisis, capital requirements across regulated financial entities were inadequate and needed to be overhauled. Since then, capital has increased substantially, and our banking system successfully weathered the 2020 COVID-economic shock. Certainly, regulators need to be mindful of changes in the marketplace that may require revisions of capital requirements. However, changes need to be properly calibrated and promulgated in accordance with the APA and congressional mandates. Courts have been very clear that agencies should not initiate new major policies without clear statutory mandates.[26]

What is to be Done?

Going forward, what should be done to address the serious problems with the Proposal? Originally, the banking agencies should have issued an ANPR to begin a discussion with the public on how capital requirements should be modified. The advantage of an ANPR is that it

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23 The Proposal at p. 14 (emphasis added).

24 Section 401(a)(3), The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.

25 Proposal at p. 552.

26 West Virginia v. EPA, 587 U.S. ___ (2022).

provides a more flexible format for the agencies to solicit and review comments on a proposal. By proceeding directly to a NPRM for the Proposal, the banking agencies have limited their ability to make major changes because the revised Proposal would need to be re-proposed.[27] The Proposal is highly complex, so it is reasonable to expect that there would be material problems that need to be addressed. An ANPR process would have provided more flexibility to make such changes before moving to a NRPM. In addition, proceeding first with an ANPR would have allowed for more time for thoughtful analysis of the Proposal's potential impacts. In addition, it would have afforded Congress time to request that the GAO study the proposal's potential economic and financial stability impacts.

The implementation of the Basel II capital accord started with an ANPR, which facilitated a productive, public discussions of the proposal that improved the final rule. It allowed for Congress to conduct hearings and help build consensus around the final rule. In the end, despite very sharp differences among the banking regulators during the process, the final rule was adopted unanimously. Given the sharp dissents and questions raised by members of both the FDIC and Fed boards with respect to the Proposal, an ANPR could be a viable means to try and build consensus. While policy differences may legitimately result in a rule receiving less than unanimous support, the APA envisions a process that at least seeks to foster consensus to the extent possible through the deliberative and transparent consideration of a proposal. However, the rushed nature of the Proposal is counterproductive to both building consensus among the banking regulators and crafting a final rule that will endure through future changes in administrations. An ANPR approach could prove to be a much more productive approach for proceeding with the Proposal. Just last year, the banking agencies adopted an ANPR approach for their proposal to impose a long-term debt requirement on certain banking organizations.[28]

There is no reason that the banking agencies cannot now shift to an ANPR approach and return to preparing a proposal that better reflects the framework issued by the Basel Committee and complies with statutory mandates. Congress should call on them to do so. If Congress can help facilitate this prudent shift in approach, the country will be the better for it.

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27 American Water Works Ass'n v. EPA, 40 F.3d 1266 (D.C. Cir. 1994).

28 https://www.federalreserve.gov/newsevents/pressreleases/bcreg20221014a.htm.