STATEMENT OF

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BEFORE

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OF THE HOUSE COMMITTEE ON FINANCIAL SERVICES

UNITED STATES HOUSE OF REPRESENTATIVES

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# REGULATORY OVERREACH: THE PRICE TAG ON AMERICAN PROSPERITY

MARGARET E. TAHYAR BIOGRAPHY

My name is Margaret E. Tahyar, known as Meg, and I head the Financial Institutions Group at Davis Polk & Wardwell LLP where I have been a partner for 27 years and where I have toiled in the field of banking regulation for 35 years. I am one of the co-authors of the law school textbook, *Financial Regulation and Policy* (Barr, Jackson, Tahyar, 3rd Edition, Foundation Press 2021). I represent a large range of financial institution clients, but I am here today in my individual capacity and not on behalf of any client. The views I express are my own, and not necessarily those of Davis Polk, any client or any other organization with which I am or have been affiliated.

**The Art of Supervision**
**What We Don't Know**

Let me start by paying homage to the art of supervision and the many examiners and their managers who are talented and dedicated experts. Bank examinations and visitorial supervisions have existed since well before the creation of federal deposit insurance in the New Deal with the first formalized bank examination system emerging in New York in 1829.[1] But, I submit to you that, in our country today, bank supervision needs modernizing reform.[2] You might reasonably ask, how I can support this statement since I have never been a supervisor and I am not a commissioned examiner. How do I know? That gets directly to one of the key challenges with supervision. Most people don't know very much about how bank examination and supervision work in practice. Folks in banks experience it in action. Examiners and their managers know it intimately. Top level principals grow over time to understand it. Lawyers can have access to exam reports, MRAs, and MRIAs but rarely attend supervisory meetings.

But, many who comment upon it or are charged with overseeing it do so without ever having seen supervisory materials or attended a meeting with supervisory staff and, worse, have limited information about it. It is an open question how Congress can effectively oversee the supervisory actions of the federal banking agencies when most of those actions occur behind closed doors. Banks cannot share with Congressional committees information about supervisory actions, including whether or not they have even taken place, without a serious threat of being charged with having committed a crime.[3] Even the Treasury Secretary has limited access to supervisory information.

The culture of secrecy around supervision has expanded far beyond its original goal of protecting against bank runs in a pre-deposit insurance era. This expansion in the culture of secrecy has occurred alongside a fundamental transformation in supervision from its quantitative core of credit, interest, and market risk to a highly discretionary function involving qualitative judgements about management, governance, and controls.[4] One example in that change is that, in the early years of the 20th century, examiners used to focus largely on the quantity of reserves and the duration of loans. There was less need for accountability around these quantitative tasks. Today, examiners look at the quality of loans and other illiquid assets, compliance with law (especially consumer law), the effectiveness of governance and controls, and assess the quality of management.[5] These are highly discretionary tasks and more accountability is needed. This increased discretion coupled with decreased transparency calls into question the scope of the accountability of the supervisory staff and their managers to the Senate-confirmed principals at the federal banking agencies where they work, Congress, and the public they serve.

[1] *See* Peter Conti-Brown and Sean H. Vanatta, Private Finance, Public Power: A History of Bank Supervision in America, at 33-34 (forthcoming 2025).

[2] To avoid cluttering this testimony with technical terms, I use the word "bank" to include bank holding companies, savings and loan holding companies, savings associations, and any other entities supervised by any of the federal banking agencies.

[3] 18 U.S.C. § 641.

[4] *See* Testimony of Margaret E. Tahyar Before the U.S. Senate Committee on Banking, Housing and Urban Affairs (Apr. 30, 2019), https://www.banking.senate.gov/imo/media/doc/Tahyar%20Testimony%204-30-19.pdf.

[5] *See* Peter Conti-Brown and Sean H. Vanatta, Private Finance, Public Power: A History of Bank Supervision in America (forthcoming 2025).

Here are some things Congress and the broader public don't know about today's bank supervision.

- **Does bank supervision work to keep banks safer in business as usual and in troubled situations? And if so how? What are its greatest strengths and weaknesses?** We don't know because there is no way for the vast majority of researchers and others to assess exam reports and other supervisory materials, even very old ones or aggregated data.[6] Those studies that rely on confidential supervisory information cannot be assessed or replicated by others.[7] We know that the CAMELS ratings are out of sync with current reality.[8] We know that reputational risk has been poorly deployed.[9] We know that supervision of failed banks typically shows a serious supervisory failure alongside a serious management failure.[10] But, there are no overall studies on the effectiveness of supervision. In particular, we do not have good data on how supervision actually works or how it could be tailored to be more efficient and effective in practice.

- **Why isn't it more transparent?** I am not suggesting body cams on examiners or even that recent exam reports and other supervisory materials be made public. It is, however, an open question whether we know enough about how supervision works to assess or improve its efficiency or effectiveness. There are too many unknown unknowns. There are several ways to address the lack of transparency into bank supervision.

    - One way to get more data here would be to release very old exam reports and supervisory materials that have become stale – say from 35 or more years ago. A good start would be to release deeply historical exam reports from the first part of the 20th century. I understand why recent exam reports of existing banks where both supervisory staff and management are still in seat and which contain competitive information or information that might threaten financial stability need to be confidential. It is, however, not only a "tragedy" to destroy very old exam reports, it prevents study into the efficiency and effectiveness of supervision.[11]

[6] Bank examiners have multiple ways of referring to the many different types of examination reports and supervisory findings. The Federal Reserve and OCC bank examiners use "Matters Requiring Attention" (MRAs) and "Matters Requiring Immediate Attention" (MRIAs) to communicate supervisory findings and demands, not requests, for actions or changes to a bank's management or the board of directors. The FDIC uses "Matters Requiring Board Attention" (MRBAs). I will refer to "exam reports and other supervisory materials" for simplicity.

[7] *See, e.g.*, Beverly Hirtle, Anna Kovner, and Matthew Plosser, *The Impact of Supervision on Bank Performance*, Federal Reserve Bank of New York Staff Reports, no. 768 (Mar. 2016; revised May 2019).

[8] *See, e.g.*, Greg Baer and Bill Nelson, *A Better M for CAMELS* (Feb. 13, 2025), https://bpi.com/a-better-m-for-camels/; BPI Staff, *Myth vs. Reality: Bank Supervision* (Mar. 25, 2025), https://bpi.com/myth-vs-reality-bank-supervision/. Reforming CAMELS ratings is a goal of the CAMELS Rating Modernization Act of 2025. *See* CAMELS Rating Modernization Act of 2025 (discussion draft).

[9] *See* Julie A. Hill, *Regulating Bank Reputation Risk*, 54 GA. L. Rev. 523 (2020); Testimony of Stephen T. Gannon Before the U.S. Senate Committee on Banking, Housing and Urban Affairs (Feb. 5, 2025), https://www.banking.senate.gov/imo/media/doc/gannon_testimony_2-5-25.pdf (hereinafter "Gannon Testimony").

[10] *See* Office of Inspector General, *Material Loss Review of Silicon Valley Bank* (Sept. 25, 2023) (concluding that a failure of interest-rate risk management 101 by SVB's senior management and board of directors was not detected or made a matter of the highest urgency by the supervisory staff because they did not tailor their supervision to focus on SVB's most salient risks, instead focusing on relatively trivial process and documentation deficiencies, and recommending that the supervisory staff prioritize the most salient risks in future examinations at other regulated banks), https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf (hereinafter "OIG SVB Report"); FDIC, *FDIC's Supervision of Signature Bank* (Apr. 28, 2023), https://www.fdic.gov/sites/default/files/2024-03/pr23033a.pdf.

[11] Peter Conti-Brown, *The curse of confidential supervisory information*, Brookings (Dec. 20, 2019), https://www.brookings.edu/articles/the-curse-of-confidential-supervisory-information/.

- o There should be much more recent aggregate data at a more granular level made available.[12] Only very recently has some high level aggregate data been made available.[13] Why isn't there more aggregate data available on a more consistent basis?

  - Aggregate data should be provided at a detailed enough level so that it enables Congress, scholars, the banking sector, and the broader public to assess how supervision is performing, including whether ratings follow the business cycle and how supervision has changed over time. Why, for example, is there such an "odd mismatch" in the aggregate data recently made available in which management ratings are low but financial ratings are high?[14]

- o Acknowledge the uneasy truce between the regulatory traditions of confidential bank supervision and of transparency and public accountability in a democracy, which are reflected in the federal securities laws. As I have previously noted, the culture of secrecy in supervision enforced at the edge of the sword of criminal penalties for unauthorized disclosures is in tension with the disclosure requirements of the federal securities laws.[15] These tensions remain unresolved and unexamined.

- o We should stop the asymmetric information warfare that permits the federal and state banking agencies to make selective disclosures of confidential supervisory information of their choosing when they feel it suits,[16] sometimes by organized leaks, but forbids banking organizations, under threat of criminal prosecution, from sharing such information even with Congress. This asymmetry almost certainly chills some constitutionally protected speech because of the vagueness of the definition of confidential supervisory information, leaving people to guess what is prohibited and inviting arbitrary and discriminatory enforcement.[17]

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[12] This thought is also contained in one of the draft bills, the Banking Regulator Accountability Act. *See* Banking Regulator Accountability Act (discussion draft).

[13] The Federal Reserve's semiannual report on supervision and regulation reported that in the first half of 2024 two-thirds of large financial institutions (LFIs) were rated less than satisfactory by their examiners as apparently measured by the quality of management and governance and controls, while at the same time concluding that the U.S. banking system was strong as measured by capital and liquidity levels. Federal Reserve Board, Supervision and Regulation Report (November 2024), https://www.federalreserve.gov/publications/files/202411-supervision-and-regulation-report.pdf. Bloomberg News reported in 2024 that the OCC in its confidential assessments found 11 of the 22 large banks it supervises have "insufficient" or "weak" management of operational risk. Hannah Levitt and Katanga Johnson, *Secret Bank Ratings Show US Regulator's Concern on Handling Risk*, Bloomberg (July 21, 2024), https://www.bloomberg.com/news/articles/2024-07-21/secret-bank-ratings-show-us-regulator-s-concern-on-handling-risk.

[14] *See* Federal Reserve Governor Michelle Bowman, *Brief Remarks on the Economy and Accountability in Supervision, Applications, and Regulation* (Feb. 17, 2025), https://www.federalreserve.gov/newsevents/speech/files/bowman20250217a.pdf.

[15] *See* Margaret E. Tahyar, *Are Banking Regulators Special?*, Banking Perspectives (2018), https://www.davispolk.com/sites/default/files/tch_banking_perspectives_-_are_banking_regulators_special.pdf.

[16] In 2017, the New York State Department of Financial Services suddenly and unusually used its power to release information that it deemed to be in the public interest to make public its otherwise confidential ratings of the Bank of Tokyo-Mitsubishi UFJ. *See* Letter from Shirin Emami, Executive Deputy Superintendent-Banking, N. Y. State Dept. of Fin. Servs., to Marva V. Cummings, Director for District Licensing, OCC (Nov. 13, 2017), https://www.wsj.com/public/resources/documents/NYDFSLetterToOCC11-13-2017.pdf. The timing of that release was at the moment that the bank was converting into an OCC licensee, not a moment driven by financial problems at the bank or a public risk of contagion.

[17] *See* Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr. & Peter W. Low, Criminal Law, at 51 (4th ed. 2015); N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

- **How can supervision be consistent and fair?** More work needs to be done to make supervision more effective, fair, and consistent across banks. The agencies have made efforts in this direction through increased use of horizontal exams, which review a specific business or function at multiple institutions, and – in theory, at least – provide feedback on identified best practices among the examined banks. These horizontal reviews can be helpful, but suffer from the same concerns that apply to traditional exams, such as lack of transparency, and as a function of their design can push banks towards a mono-model view of best in class without taking into account the significant differences among banks. The pursuit of efficient, effective, fair, consistent, and transparent supervision is not, as some have suggested, based on a view that, because supervisors are government actors, the full suite of Administrative Procedure Act requirements should apply to supervisory activities.[18] Supervisors and banks both value the confidential communications and the opportunity for dialogue in the current supervisory process and recognize that an APA process would impede that. It is precisely for that reason, however, that supervision should operate under a framework that anchors supervisory expectations to an understanding of the tailored business and risk models of each individual bank, and preserves banks' rights to understand the basis for examiner criticisms and effectively challenge them when necessary without fear of retaliation or threats of criminal punishment for unauthorized disclosures of confidential supervisory information. Tailoring as a concept in supervision is one way to be more efficient, effective, and fair within a framework of consistency within each business model.

- **Why are there so few appeals and so few wins in appeals?** As Treasury Secretary Bessent recently noted, the appeal process is more theoretical than real.[19] For example, from January 2007 to 2020 at the FDIC, 50 appeals were filed out of 111,516 exams.[20] And there are very few wins. In 2024, banks in total, went a combined 1-for-17 in the final supervisory appeal decisions published for the year.[21] The checks and balances in the appeals process are weak.[22]

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[18] See Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 Vand. L. Rev. 951, 961-62 (2021).

[19] *See* Secretary of the Treasury Scott Bessent, *Treasury Secretary Scott Bessent Remarks before the American Bankers Association* (Apr. 9, 2025), https://home.treasury.gov/news/press-releases/sb0078 (hereinafter "Bessent ABA Remarks"). Two decades after the Congressional mandate that each federal financial institution regulator establish an independent intra-agency appellate process, Julie A. Hill in her review of the appeals processes of the FDIC, Federal Reserve, OCC, and NCUA concluded that the appeals process is hardly ever used and the regulators "differ significantly in the access they provide to the appeals process as well as the standards they use to evaluate appeals." Hill determined that "the existing [material supervisory determination] appeals processes do not provide a meaningful avenue for correcting uneven regulatory treatment." A decade has passed since Hill's article and yet these same concerns continue to plague the appeals processes at the federal banking regulators. *See* Julie A. Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. U. L. Rev. 1101, 1184 (2015).

[20] *See* FDIC Chairman Jelena McWilliams, *Statement on the Request for Comment on Charges to Supervisory Appeals Process* (Aug. 21, 2020), https://www.fdic.gov/news/speeches/2020/spaug2120.html.

[21] Bank Insists It Experienced a Run in March 2022 (Dec. 30, 2024), Bank Reg Blog, https://bankregblog.substack.com/p/bank-insists-it-experienced-a-run. The 1 represents a partial win by a bank in an SARC appeal decision in which the FDIC upgraded its composite rating from "4" to "3." Decision of the Supervision Appeals Review Committee, Case No. 2024-05 (Dec. 9, 2024), https://www.fdic.gov/laws-and-regulations/sarc-2024-05-1292024.

[22] The FDIC has gone back and forth on the reform of its appeals process in recent years, moving from less to more to less independence by the reviewing staff. *See* FDIC Chairman Jelena McWilliams, *Statement on the Request for Comment on Charges to Supervisory Appeals Process* (Aug. 21, 2020), https://www.fdic.gov/news/speeches/2020/spaug2120.html; FDIC Chairman Jelena McWilliams, *Changes to Supervisory Appeals Process* (Jan. 19, 2021), https://www.fdic.gov/news/speeches/2021/spjan1921.html; FDIC, *Amendments to Guidelines for Appeals of Material Supervisory Determinations* (May 17, 2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22022.html.

- **How are they trained?** A lot more information should be made available about the training of examination staff. The federal agency websites describe training as long-term, rigorous, and ongoing[23] while providing limited information on the curriculum and virtually nothing on the commissioning examinations. No federal agency publishes the pass rates of examiners in the commissioning examination, continuing education requirements, or compliance with any such requirements. We do know that completion of training has recently been a problem for the FDIC.[24] Less information is available about these exams in content and the related training and continuing education requirements, than for other professions, such as doctors, lawyers, CPAs, and even barbers and manicurists. Two questions we do not know the answer to are, in recent years, what has been the training on interest rate risk and, in an era where many banks have low ratings on governance and controls, what has been the training in those areas. There should be more transparency on the curriculum, the pass rates, and the content of the examinations, including the extent to which training is classroom or screen-based, or taught by the direct manager or by an experienced teacher.

- **How are examiners and their managers accountable?** Examiners, and their management today, wield extraordinary discretion and secret power. Some of it is wielded for the good but some of it is unfettered discretionary power with little to no public accountability. Very little information is available about how supervisory staff is organized and managed.[25] Many lessons have been drawn from the reports delivered after the March 2023 Turmoil but there is little new information since those reports on how the weaknesses in supervision and the management of supervision have been corrected.[26] To be fair to line supervisory staff, we should ask whether they are well managed. Do they operate in an environment where management provides them the tools, direction, and autonomy to do their jobs well or are they stuck in a politicized environment? Are line supervisors stuck in the morass of checklists because of conflicting signals from the top of the house? On the one hand, they are told not to manage banks and yet, on the other hand, they take the heat when a bank fails. It seems like those further up the chain should be held accountable.

- **Does the current overlapping structure of supervision make sense?** There are multiple overlaps in federal bank supervision as it has changed over time.[27] As Peter Conti-Brown and Sean H. Vanatta lay out in their soon to be published and long awaited

[23] *See* FDIC, Impactful Careers – Join the FDIC Bank Examiner Program, https://www.fdic.gov/careers/impactful-careers-join-fdic-bank-examiner-program (including quotes by examiners describing the FDIC's "robust training programs" and "opportunities to develop new skills or specialize in complex topics while working for the FDIC"); OCC, Career Development, https://careers.occ.gov/pay-and-benefits/career-development/index-career-development.html (stating that the OCC "encourages all employees to develop continuously throughout their career" with "formal and informal training opportunities"); Federal Reserve Board, Examiner Training and Commissioning, https://www.federalreserve.gov/supervisionreg/topics/examiner_training.htm ("The examiner training program . . . primarily strives to ensure that examiners receive the knowledge required to keep pace with recent and expected changes in the banking industry.").

[24] *See* Office of Inspector General, *Top Management and Performance Challenges Facing the Federal Deposit Insurance Corporation*, (February 2024), at 1-4, https://www.fdicoig.gov/sites/default/files/reports/2024-05/TMPC-Final-Feb24%20508%20Compliant.pdf.

[25] The OCC is the only agency that identifies its examiners in charge of the largest banks. *See* OCC, Large Bank Supervision Locations, https://www2.occ.gov/about/who-we-are/locations/large-bank-supervision/index-large-bank-supervision.html.

[26] The Federal Reserve's OIG report suggested reforms to supervision which were agreed to by the Director of the Federal Reserve's Division of Supervision and Regulation. *See* OIG SVB Report. Eighteen months later, no evidence of these reforms for regional banks has entered the public domain.

[27] Conti-Brown and Vanatta have coined the term "institutional layering" to describe this structure.

book on the history of supervision, "We can think, then, of bank supervision as the evolutionary outgrowth of a series of unrelated decisions made by politicians, bankers, legislators, policymakers, citizens, and many other stakeholders, eventually creating a system that creaks and groans as unmatched parts, crafted at different times for different purposes, grind against one another, all while still serving useful and well-adapted purposes."[28] Surely, using the powers of the FSOC and the FFIEC, along with the good sense of many involved there is a way to simplify the federal supervisory system so that banks are not responding to multiple overlapping inquiries.[29] There is a way for federal supervisors to sing from the same song book.[30]

There have been discussions about modernizing and reforming supervision for many years. There are lots of good ideas being discussed right now, including by the Treasury Secretary, the nominee for Vice Chair for Supervision at the Federal Reserve, the Acting Chair of the FDIC, this Committee, and other experienced observers. Here is a list of their ideas which, if implemented, could make a major difference for the better:

- Focus supervision on material financial risk and not process checklists.[31] As Secretary Bessent recently said "[K]eep the main thing the main thing."[32]
    - Define "unsafe and unsound" on a material financial risk basis,[33] as the courts have repeatedly done but which has been ignored by the agencies[34]
- Tailor supervision to risk and complexity, particularly providing relief to mid-size and community banks[35]
- Rethink emphasis on process, controls, and risk management, especially when not related to material financial risks[36]
- Where appropriate use supervisory observations as suggestions not the higher level commands of MRAs and MRIAs

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[28] Peter Conti-Brown and Sean H. Vanatta, Private Finance, Public Power: A History of Bank Supervision in America, at 7-8 (forthcoming 2025).

[29] My focus is solely on the overlaps in the federal system and not a critique of the dual banking system, which continues to work well as a check and balance on the federal system.

[30] *See* Secretary of the Treasury Scott Bessent, *Treasury Secretary Scott Bessent Remarks at the Economic Club of New York* (Mar. 6, 2025), https://home.treasury.gov/news/press-releases/sb0045 ("We need our financial regulators singing in unison from the same song sheet.").

[31] *See* Federal Reserve Governor Michelle Bowman, *Brief Remarks on the Economy and Accountability in Supervision, Applications, and Regulation* (Feb. 17, 2025), https://www.federalreserve.gov/newsevents/speech/files/bowman20250217a.pdf; FDIC Vice Chair Travis Hill, *Charting a New Course: Preliminary Thoughts on FDIC Policy Issues* (Jan. 10, 2025), https://www.fdic.gov/speech-vice-chairman-travis-hill-preliminary-thoughts-fdic-policy-issues-1-10-2025pdf (hereinafter "Hill Policy Remarks"). We should not underestimate how the focus on process and checklists distracts both examiners and staff within the banks, creating internal bureaucracies and multiple checking of the checkers in both the private and public sector. It also increases expenses in both the public and private sector.

[32] Bessent ABA Remarks.

[33] Bessent ABA Remarks.

[34] One change to the Federal Reserve's LFI rating system could be that a low rating on highly subjective governance and controls alone should not be sufficient to lower the overall composite rating.

[35] *See* Bessent ABA Remarks. *See also* Federal Reserve Governor Michelle Bowman, *Reflections on 2024: Monetary Policy, Economic Performance, and Lessons for Banking Regulation* (Jan. 9, 2025), https://www.federalreserve.gov/newsevents/speech/files/bowman20250109a.pdf.

[36] *See* Hill Policy Remarks. *See also* Federal Reserve Governor Michelle Bowman, *Brief Remarks on the Economy and Accountability in Supervision, Applications, and Regulation* (Feb. 17, 2025), https://www.federalreserve.gov/newsevents/speech/files/bowman20250217a.pdf.

- Modernize and make training more transparent
- Modernize exam manuals
- Put much more aggregate data into the public domain[37]
- Stop regulation by supervision or enforcement
- Modernize supervisory technology[38]
- Put in place a meaningful and independent appeals process
- Reform the CAMELS rating process[39]
- Remove reputational and strategic risks from exams[40]
- Simplify or remove model risk guidance[41]
- Simplify third party vendor guidelines
- Make it clear that examiners should not threaten to retaliate or otherwise discourage lending to legal businesses or banking to certain kinds of persons based on political or other considerations not related to financial risk, removing social and political viewpoints from the field

The Committee has a number of bills before it today which would encourage or require many of these reforms. The executive branch and the agencies should not wait for Congress to act but should start their own process of reform working closely together. The three banking agencies have all of the power they need to cooperate together with the authority granted in the FFIEC statute and to FSOC to make these reforms.

There are two topics that are not on the agenda of the current principals which I submit ought to be. They are the scope of examiner discretion and the regulatory assertion of criminality for disclosure of confidential supervisory information.

- **First, what should be the scope of examiner subjective discretion?** There is case law about the broad scope of examiner discretion, which is used in the ALJ process to assert that the ALJ or those being pursued must be bound by examiner discretion. In *Sunshine State Bank v. FDIC*, the court held that the FDIC's loan classifications, made by

[37] This is one of the provisions in the Banking Regulator Accountability Act. *See* Banking Regulator Accountability Act (discussion draft).

[38] *See* Taking Account of Institutions with Low Operation Risk Act of 2025 (discussion draft).

[39] *See* CAMELS Rating Modernization Act of 2025 (discussion draft). *See also* Hill Policy Remarks; Greg Baer and Bill Nelson, *A Better M for CAMELS* (Feb. 13, 2025), https://bpi.com/a-better-m-for-camels/; Randall D. Guynn, *The Deposit Insurance Fund as an Early Resolution Tool*, at 78 (July 15, 2024), https://www.davispolk.com/insights/articles-books/deposit-insurance-fund-early-resolution-tool (recommending that the FDIC develop supervisory capital and liquidity projection models to facilitate earlier detection, remediation, and resolution of troubled banks to minimize the long-term costs to the Deposit Insurance Fund, as required by 12 U.S.C. 1823 note).

[40] This is one of the provisions in the FIRM Act. *See* H.R. 2702, Financial Integrity and Regulation Management Act.

[41] *See* Greg Baer and Greg Hopper, *The Most Damaging "Guidance" in Banking* (Apr. 14, 2025), https://bpi.com/the-most-damaging-guidance-in-banking/.

experienced bank examiners, are entitled to deference and should not be overturned unless they are shown to be arbitrary and capricious or outside a "zone of reasonableness."[42] The facts in that case involved asset classifications in the loan portfolio. As I have previously written, it is one thing to defer to examiners when they are making judgements central to their expertise, loan classifications and credit risk, around a quantitative core.[43] It is another to call for blanket discretion in areas far beyond their traditional expertise in areas such as governance, or in assessing management's judgement around operational risk or controls. There should be a review of how examiner discretion is asserted in the in-house ALJ enforcement process.

- **Second is the tenuous nature of the regulatory assertion that the disclosure of confidential supervisory information is a crime.** The banking regulators' authority to treat confidential supervisory information as property relies on a general federal statute relating to federal government property, which is stretched to form the basis for imposing criminal liability on unauthorized disclosures. As Stephen Gannon has shown, recent case law has shown that such disclosures can no longer support the threat of criminality by regulatory fiat.[44]

**Conclusion**

We are at a moment where appropriate reforms, made by the federal agencies working together for efficiency, transparency, and fairness, could create change for the better. Smart reform could unleash a renaissance in the banking sector by permitting banks to lower inefficient expenses and increase lending. The major outlines of how those changes might be made are clear: more transparency, more oversight, less politicized decision making, revamping of training, better management of line supervisors, a real appeals process and, most importantly, a refocus on material financial risks rather than process and checklists.

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[42] *See* Sunshine State Bank v. FDIC, 783 F.2d 1580 (11th Cir. 1986).

[43] Testimony of Margaret E. Tahyar Before the U.S. Senate Committee on Banking, Housing and Urban Affairs (Apr. 30, 2019), https://www.banking.senate.gov/imo/media/doc/Tahyar%20Testimony%204-30-19.pdf.

[44] *See* Gannon Testimony.