STATEMENT OF

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THE TANGLED WEB OF GLOBAL GOVERNANCE: HOW THE BIDEN ADMINISTRATION IS CEDING AUTHORITY OVER AMERICAN FINANCIAL REGULATION

Biographical Statement

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Introduction

Chairman Barr, Ranking Member Foster, and members of the Subcommittee on Financial Institutions and Monetary Policy, thank you for asking me to discuss the recent regulatory proposals by the U.S. bank regulators—the Federal Reserve, the OCC and the FDIC. In the past few months, these regulators have proposed a thicket of new rules for banks that will have far-reaching, but impossible to fully predict, costs and unintended consequences for the U.S. economy and financial market structure. On their face, the bulk of these newly proposed rules and supervisory approaches purport to honor commitments that have been made among the bank regulators and their foreign counterparts in international financial regulatory groups, including the Basel Committee for Banking Supervision ("Basel").

My testimony focuses on Basel's purpose and process and makes two main points. First, Basel establishes standards for international regulatory and supervisory cooperation, but from a U.S. law perspective these standards are no more than informal recommendations and U.S. regulators are not bound to implement them as they come. Any rules to implement the Basel standards or effectuate their spirit must be grounded in U.S. statutory law. Second, in overseeing these agencies' participation in the Basel process, Congress should bear in mind that although Basel provides a valuable forum for cross-border regulatory and supervisory coordination, the process inherently incorporates a wide range of foreign interests that reflect the myriad domestic priorities of the Committee's multinational membership. As such, the standards that emerge from Basel may not always serve the best interests of the U.S. economy and banking sector (or be consistent with U.S. law).

I. Authority to Implement the Basel 'Endgame'

Basel was established in 1972 to deal with gaps in the supervision of large, internationally active banks. Its membership consists of central bankers and other bank supervisors. Properly understood, Basel is an incubator and cross-pollinator of ideas for how best to coordinate national supervision and regulation of internationally active banks. The heftiest of the Basel Committee's work lies in the members' agreements regarding minimum standards for capital adequacy in these large, global banks. Over the years, the U.S. banking agencies have participated in Basel and implemented Basel's various "accords."

After the Global Financial Crisis of 2008, the Basel Committee agreed to the Third Basel Accord in 2010, known as "Basel III."[1] That set of standards recommended substantial increases in capital requirements for large, internationally active banks most of which are referred to as the globally systemically important banks, the G-SIBs; now, these are also referred to as Category I firms in U.S. regulatory parlance.[2] Basel III also proposed myriad other measures to attempt to reduce systemic risk, including capital buffers and surcharges on top of the capital minimums, a countercyclical capital buffer to turn on at regulators' discretion to cool down an overheating credit market, leverage restrictions, standards regarding liquidity maintenance, and rules about the

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[1] Basel Comm. Bank. Supervision, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS (Dec. 2010), https://www.bis.org/publ/bcbs189.pdf.

[2] *See* Fed. Deposit Ins. Corp., *Fact Sheet: Tailoring Capital and Liquidity Rule for Domestic and Foreign Banking Organizations*, https://www.fdic.gov/news/fact-sheets/foreignbank.pdf.

stability of a bank's funding.[3] It also introduced new standards for supervisory stress testing, something that did not exist before the crisis.[4]

The U.S. regulators implemented this suite of Basel III standards by 2013.[5] Importantly, however, by then Congress had already passed sweeping post-crisis financial regulation legislation in the Dodd-Frank Act of 2010.[6] Various provisions of the Dodd-Frank Act supported and coincided with the vision outlined in Basel III—that is, for heightened prudential standards. Accordingly, although regulators described the rule to the public as implementing Basel III,[7] the actual authority to develop those standards into U.S. law was grounded in Dodd-Frank.

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

The APA also effectively requires that agency rules are not "arbitrary" or "capricious."[8] This means that, at a minimum, the agency must be acting within the bounds of its statutory authority to promulgate a rule and must produce sound evidence to support it. As noted, the Dodd-Frank Act supplied the statutory basis for the 2013 Basel implementation rule. Further, the reforms ushered in by that Basel III rule were, for the most part, indicated by the source of weakness among U.S. banks that had led to and exacerbated the 2008 financial crisis. In other words, the 2013 rulemaking was supported by concrete evidence that prior to that crisis, large, internationally active banks in the United States had been inadequately capitalized and inattentive to their liquidity and funding risk.

Accordingly, in the following decade, large banks in the United States grew much stronger and more stable and thus reduced their systemic risk. Tellingly, U.S. banks weathered the next major economic shock relatively well, during the 2020 covid pandemic and accompanying lockdowns. Indeed, the Fed Vice Chair for Supervision, Michael Barr, noted in his 2022

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[3] *Supra* note 1, at 7.

[4] *Id.* at 5.

[5] Bd. of Governors of the Fed. Rsrv. Sys., Press Release, Federal Reserve Board Approves Final Rule to Help Ensure Banks Maintain Strong Capital Positions, Jul. 2, 2013, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20130702a.htm. (The US implements Basel II in 2006).

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, (2010) (codified as amended 42 U.S.C. § 5365 (2012)).

[7] Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Riskweighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 Fed. Reg. 62018 (Oct. 11, 2013), https://www.govinfo.gov/content/pkg/FR-2013-10-11/pdf/2013-21653.pdf

[8] Administrative Procedure Act, 5 U.S.C. § 706 (2012).

confirmation hearing that "capital and liquidity in the system is very strong. The rules that Congress put in place after the financial crisis make it much less likely that such a financial firm could get itself into trouble and in a way that would cause problems for the broader economy."[9] At year end 2022, all of the U.S. G-SIBs were well above the minimum capital adequacy requirements in Basel III.[10]

Now, Basel has come back. In July 2023, the Fed, OCC, and FDIC jointly proposed a rule that purports to finalize Basel III.[11] This is referred to as the 'Basel endgame.' The proposed rule has been described as responding to the Basel Committee's 2017 framework for reducing variation between banks' calculations of their respective capital requirements. In that 2017 Basel document, the Basel Committee cited, as support for their refined approach, the fact that unnamed "academics, analysts and market participants [had] lost faith in banks' reported risk-weighted capital ratios" during the crisis.[12] The endgame is designed to fix that.[13]

Where is the U.S. law basis for the endgame rule? It strains credulity to assume that the Dodd-Frank Act continues to supply a statutory basis for implementing—or fine-tuning—Basel III, thirteen years on.[14] This current rulemaking effort thus begs the question whether bank regulators are acting in response to their commitments to Basel's regime but moving outside and beyond U.S. law.

Notably, the Basel committee requires that its members, including the Federal Reserve, the OCC, and the FDIC commit to implementing and enforcing its rules. Specifically, pursuant to Article 5 of the Basel Committee Charter, members agree to (1) "implement and apply BSBC standards in their domestic jurisdictions within the pre-defined timeframe established by the Committee," (2) "undergo and participate in BCBS reviews to assess the consistency and effectiveness of domestic rules and supervisory practices in relations to BCBS standards;" and (3) "promote the interests of global financial stability and not solely national interests, while participating in BCBS work and decisionmaking."[15] Formally, such a commitment made by U.S. bank supervisors to foreign bank supervisors cannot tie the hands of Congress. But historically it

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[9] Nominations of Michael S. Barr, Jaime E. Lizarraga & Mark Toshiro Uyeda, *Hearing before the Committee on Banking, Housing, and Urban Affairs*, United States Senate, 117th Cong. 2nd Sess. (May 12, 2022).

[10] Dr. Peter Ryan & Dr. Guowei Zhang, *How the Basel III "Endgame" Reforms Will Transform US Capital Requirements,* SIFMA, Feb. 27, 2023, *https*://www.sifma.org/resources/news/how-the-basel-iii-endgame-reforms-will-transform-us-capital-requirements/.

[11] It bears emphasis that this brief summary only highlights some of the key aspects of the rule, which is over 1,000 pages long.

[12] BASEL COMM. BANK. SUPERVISION, BASEL III: FINALISING POST-CRISIS REFORMS 5 (Dec. 2017), https://www.bis.org/bcbs/publ/d424.pdf.

[13] As the bank regulators have described it, the proposed rule aims to implement "enhanced regulatory capital requirements that align with the [Basel Endgame package] issued by the Basel Committee on Banking Supervision . . . ." Bd. of Governors of the Fed. Rsrv. Sys., Press Release, Agencies Reaffirm Commitment to Basel III Standards, Sept. 9, 2022, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20220909a.htm.

[14] Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity, 88 Fed. Reg. 64028, 64034 (Sept. 18, 2023) (noting that "The proposal would build on these initial reforms by making additional changes developed in response to the 2007–09 financial crisis and informed by experience since the crisis").

[15] Basel Committee on Banking Supervision, Charter, Art. 5., https://www.bis.org/bcbs/charter.htm.

has been the case that the Basel standards set sticky domestic defaults that usually find their way into binding U.S. law.[16]

There is good reason to question whether the proposed endgame rule serves the U.S. interests. Overall, the rule will significantly increase capital requirements for all four categories of large U.S. banks.[17] All banks with over $100 billion in assets will have to transition to an "Expanded Risk-Based Approach"—that methodology is designed to be more risk-sensitive than current models by accounting for more possible sources of credit risk among a variety of credit exposure types.[18] This will increase capital requirements most for the largest banks.

These banks will also have to adopt new methods for calculating market and operational risk. Among other things, the new market risk method will require banks to stress their trading book for potential losses arising from market shocks and volatility. This new method is known as the Fundamental Review of the Trading Book ("FRTB"). It is, however, redundant with the Global Market Shock that is currently used in the United States to calculate the stress capital buffer capital charge.[19] As such, this change will dramatically increase capital requirements for market risk where it applies.[20] Capital requirement add-ons to account for operational risk will also become standardized, which will introduce a new capital component for regional banks.[21]

The rule also changes the inputs to the capital adequacy ratio. It revises what qualifies as eligible capital in the numerator of the capital-to-RWA ratio. Among other things, the changes will make regulatory capital levels more sensitive to unrealized losses for certain categories of banks.[22] Finally, the rule proposes adjustments to the calculation of how assets are weighted according to their risk (the denominator in the ratio) by adjusting the risk weights that apply to certain asset

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[16] The U.S. banking regulators have also implemented Basel I, introduced in 1988, and Basel II, introduced in June 2004. Congress does have the power to overturn rules before they take effect with a joint resolution of disapproval. *See* Congressional Review Act, 5 U.S.C. §§ 801-808. But that power has not been commonly used.

[17] Notably, the Basel Committee had expressed desire for the endgame to be "capital neutral," that is, while it would change methodologies for capital calculations it would not increase the amount of capital required. *Supra* note 12, at 1. The U.S. rule is not capital neutral as currently proposed.

[18] *See* Bd. of Governors of the Fed. Rsrv. Sys., Proposals that Would Amend Capital Requirements for Large Banking Organizations in Line with the Basel III Accord and Modify Risk-Based Capital Surcharges Applicable to U.S. GSIBs (July 18, 2023).

[19] Bd. of Governors of the Fed. Rsrv. Sys., Press Release, Statement by Governor Christopher J. Waller, Jul. 27, 2023, https://www.federalreserve.gov/newsevents/pressreleases/waller-statement-20230727.htm (pointing out that the increase in capital "would be in large part driven by an increase in the capital required for operational and market risks—risks that [the Federal Reserve has] already been capturing in [its] stress testing for the past decade.").

[20] *See* Luigi L. De Ghenghi et al., *U.S. Basel III Endgame Proposed Rule*, DAVIS POLK & WARDWELL (Sept. 14, 2023), at 148, https://www.davispolk.com/sites/default/files/2023-09/us-basel-iii-endgame-proposed-rule.pdf (estimating that the Proposed Rule would increase RWAs associated with trading activity by 67% for Category I through IV banking organizations).

[21] *See id.* at 135.

[22] "Category III or IV capital standards would be subject to the same treatment of accumulated other comprehensive income (AOCI), capital deductions, and rules for minority interest as banking organizations subject to Category I or II capital standards." *See* Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity, 88 Federal Register 179 (Sept. 18, 2023), https://www.govinfo.gov/content/pkg/FR-2023-09-18/pdf/2023-19200.pdf.

categories.[23] Inherently, altering these risk weights reflects a value judgment about certain types of bank investments, and it also inevitably skews a bank's behavior—a higher risk weight disincentivizes investment in that asset.

In a separate rule, the Fed proposes to change the methodology for calculating the capital surcharge that applies to the G-SIBs.[24] The surcharge also flows from a Basel III standard. In their rationale for the rule, the Fed has explained that "[t]he proposed changes include revisions consistent with the framework used by the Basel Committee on Banking Supervision (Basel Committee) to identify GSIBs and assess their systemic importance."[25] Like the endgame proposal, the G-SIB surcharge is also focused on reducing variability among banks and, in this case, across jurisdictions. As the regulators state: "Additionally, many of the amendments would improve measurement and reporting consistency across jurisdictions, by aligning with changes to the international GSIB surcharge standard published by the Basel Committee on Banking Supervision."[26] But the U.S. G-SIBs have not been a source of financial instability since 2010; they did not falter during the covid pandemic or the regional banking turmoil in March 2023. So, the Basel rationale alone does not seem to hold when applied to the U.S. case.

There are likely to be costs and unintended consequences that follow from these rules. Increased capital requirements will no doubt hamper many banks' ability and appetite to led and are thus likely to drive up the cost of bank-supplied credit, incentivize consolidation among banks and erode the three-tier model, and more broadly speaking empower regulators' hands within these banks.

Yet the regulators have not offered a compelling rationale to justify these expected costs. Although the rule acknowledges that it "would have the effect of modestly increasing capital requirements for lending activity" and that "a slight reduction in bank lending could result from the increase in capital requirements," it also concludes that "the economic cost of this reduction would be more than offset by the expected economic benefits associated with the increased resiliency of the financial system."[27] That is impossible to know. No one can predict the source

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[23] The FDIC has estimated that the proposal will increase risk-weighted assets by 20 percent in aggregate across affected banking organizations at the holding company level. *See* FDIC, Regulatory Capital Rule: Amendments Applicable to Large Banking Organizations and to Banking Organizations with Significant Trading Activity (July 27, 2023), https://www.fdic.gov/news/board-matters/2023/board-meeting-072723-open.html. *See also* Michael S. Barr, Vice Chair, Bd. Gov. Fed. Rsrv. Bank Sys., Remarks at the Bipartisan Policy Center (Jul. 10, 2023), https://www.federalreserve.gov/newsevents/speech/barr20230710a.htm

[24] Regulatory Capital Rule: Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 88 Fed. Reg. 60385 (Aug. 1, 2023).

[25] *Id.*

[26] *Id.* at 60397. Notably a third rule would require large banks to have long-term debt – ostensibly to improve their resolvability and resiliency. *See* Bd. of Governors of the Fed. Rsrv. Sys., Press Release, Agencies Request Comment on Proposed Rule to Require Large Banks to Maintain Long-Term debt to Improve Financial Stability and Resolution, Aug. 29, 2023, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20230829a.htm. This rule would not affect the G-SIBs, only the banks with $100 billion or more in assets, which we commonly think of as the regional banks. *Supra* note 21.

[27] Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity, 88 Fed. Reg. 64028 (Sept. 18, 2023).

of the next financial crisis; likely, it will not stem from bank balance sheets like the 2008 financial crisis but rather, some other "unknowable unknown" event.[28]

Someone has lost the plot. The shaky legal and factual basis for implementing the Basel III endgame begs the question, why? Are the U.S. banking regulators being pulled along with Basel's tide, despite the lack of clear U.S. authorizing law and no U.S.-specific factual basis in support? Or are the regulators using the Basel superstructure as cover to accomplish something more than what its minimums require? Either way, it is important for Congress to interrogate the nature of the Basel bargain and ensure any related regulation is anchored in U.S. law. and consistent with U.S. interests.

II. Oversight of the Basel Process

The U.S. Constitution compels this kind of oversight. Article I gives Congress the *exclusive* legislative authority. This means that Congress may delegate some responsibility to U.S. administrative agencies, like the banking regulators, to "fill in the details" of a statute so that it can be properly enforced.[29] But Congress cannot abdicate its legislative power by excessive open-ended delegation. That risk is already high in respect of the banking regulators given their broadly worded mandates.[30] The risk is then heightened in respect of the regulators' work at Basel because it is difficult for Congress to learn how the various interests of that organization's membership come together to shape the standards, principles, and guidelines that emerge.

Basel is part of a "regime complex."[31] The Basel Committee itself consists of central banks and other bank supervisory organizations. The Committee reports up to an oversight committee, comprised of the Group of Governors and Heads of Supervision.[32] The entire organization sits within the Bank for International Settlements, the "BIS," which is owned and governed by the world's leading central banks.[33]

The work that goes on at Basel is not transparent. The principals of the Basel Committee delegate and sub-delegate to deputies and staff. Between the Committee's four annual meetings, sub-groups meet to "discuss proposals and lay the groundwork for issues to be discussed at the main group."[34] The chairs of these groups are various senior level officers or staff from the members' central banks or supervisory authorities. These groups are in turn supported by "working groups" comprised of "technical experts" from the members; their membership is not publicly

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

[29] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

[30] *See* Christina P. Skinner, *Central Bank Activism,* 71 DUKE L.J. 247 (2021).

[31] *See* Karen J. Atler & Kal Raustiala, *The Rise of International Regime Complexity,* 14 ANN. REV. L. & SOC. SCI. 329 (2018) ("A regime complex is an array of partially overlapping and nonhierarchical institutions that includes more than one international agreement or authority.")

[32] *See* Basel Committee Organisation and Governance, https://www.bis.org/bcbs/organ_and_gov.htm?m=81.

[33] *See* Bank for Int'l Settlements, Charter, Art. 4., 27, https://www.bis.org/about/statutes-en.pdf.

[34] Daniel K. Tarullo, Governor, Bd. of Governors of the Fed. Rsrv. Sys., *International Cooperation to Modernize Financial Regulation,* Testimony before the Subcommittee on Security and International Trade and Finance, Committee on Banking, Housing, and Urban Affairs, Washington, D.C. (Sept. 30, 2009), https://www.federalreserve.gov/newsevents/testimony/tarullo20090930a.htm.

disclosed. It is presumably within this constellation of groups and working groups that the contours of the Basel standards develop.

Basel's taskforces, meanwhile, study issues that are important to the Committee in anticipation of future standards or guidelines on the topic. Formally, they "provide specific and expert assistance within a determined time frame where needed."[35] Here, the Committee advances what can only be described as special interests. Many of these interests inevitably will reflect the national priorities and domestic law of some consortium of members. But they may not always be compatible with U.S. law, and this can present some tension.

Presently, for example, Basel has constituted a Task Force on Climate-Related Financial Risk.[36] The work of this task force includes taking stock of how well or poorly member jurisdictions are working to address climate change through their banks, and how effectively members' bank supervisory policies are geared toward addressing climate risk.[37] This scoping-type work aims toward the eventual development of more concrete requirements for the member jurisdictions. In the case of climate, the taskforce intends to "investigate the extent to which climate-related financial risks can be addressed within the existing Basel Framework, identify potential gaps in the current framework and consider possible measures to address them."[38] Given the extent to which the Fed's statutory mandate limits its range of movement to address climate change, this could force the U.S. bank supervisors into an awkward position within Basel or in respect of Congress.[39] How will they choose?

It bears mention that the Basel Committee is also interlinked with other similarly focused international regulatory groups. One of these is the Financial Stability Board ("FSB"), which, like Basel, is a nonbinding soft law institution that promulgates a variety of best practices for reducing systemic risk.[40] The FSB is also funded by the BIS. Technically, it sits beneath the G20, but extends its membership beyond the G20 and claims to form its own 'independent views.'[41] The relationship flows two ways. Basel is a member of the FSB and the FSB has, for its part, adopted the implementation of Basel III as "one of the priority areas for implementation monitoring."[42] In other words, the FSB helps to enforce—through peer review and 'name and shame'—how well the Basel Committee's members have implemented its 'nonbinding' rules.

Big picture, this arrangement obscures what goes on at Basel. The Basel Committee operates by consensus.[43] What is that power dynamic like? Is the U.S. representative(s) at Basel

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[35] Bank for Int'l Settlements, Policy Development and Implementation Review, BIS (Apr. 14, 2018), https://www.bis.org/bcbs/review_process.htm.

[36] *See* Bank for Int'l Settlements, *The Basel Committee's Initiatives on Climate-Related Financial Risks,* BIS, https://www.bis.org/speeches/sp201014.htm (Oct. 14, 2020).

[37] Here, the U.S. is represented by a co-chair who is a senior staff member at the Federal Reserve Bank of New York. *Id.*

[38] Bank for Int'l Settlements, Press Release, Basel Committee Publishes Analytical Reports on Climate-Related Financial Risks, Aug. 14,2021, https://www.bis.org/press/p210414.htm.

[39] *See* Christina Parajon Skinner, *Central Banks and Climate Change*, 75 VANDERBILT L. REV. 1301 (2021).

[40] Financial Stability Board, About the FSB (Nov. 16, 2020), https://www.fsb.org/about/#mandate.

[41] Financial Stability Board, Work of the FSB (Mar. 30, 2023), https://www.fsb.org/work-of-the-fsb.

[42] FINANCIAL STABILITY BOARD, BASEL III – IMPLEMENTATION (Oct. 2023), https://www.fsb.org/work-of-the-fsb/implementation-monitoring/monitoring-of-priority-areas/basel-iii/.

[43] *Supra* note 34.

operating on a level playing field with other members? How can Congress disaggregate what interests from foreign bank supervisors (and other public or private institutions) have shaped the metes and bounds of the various Accords? Without the ability to answer these questions Congress cannot exercise meaningful oversight of the agencies' work to implement what comes out of Basel.

III. International Principles for Climate Supervision

In tandem to the Basel endgame, U.S. bank agencies are more subtly attempting to tackle climate change. The question whether bank regulators and supervisors should use their tools to drive banks away from 'brown' assets and toward 'green' ones has been fraught in the United States. Because these agencies lack a statutory mandate to make the financial system greener, or propel the country toward a green transition, their attempts to interpret terms like "safety and soundness" and "financial stability" to justify such action is rightfully suspect. After all, the Supreme Court has recently clarified that a structural shift of the economy of that magnitude is a "major question" that Congress must make clear that it wants administrative agencies to address.[44] Further, decisions about capital allocation—picking economic winners and losers—require fiscal policy choices with subjective value judgments that should be made by democratically responsive institutions, like Congress, not unelected banking experts.

Abroad, however, the viewpoint has been quite different. Both the European Union and the United Kingdom have welcomed, for the most part, interventions on the part of their central banks and bank supervisors to push banks to address their climate risk or otherwise channel capital toward green rather than brown ends.[45] This mood has been captured both at Basel, which has promulgated climate-related principles as just discussed, and also in a new organization known as the Network for Greening the Financial System ("NGFS").[46] The NGFS was founded in 2017, and exists under the auspices of the Banque de France. Its mission is to pool knowledge among central banks for how to "develop[] . . . environment and climate risk management in the financial sector and mobilize mainstream finance to support the transition toward a sustainable economy."[47] Although Basel does not formally adopt the ideas promoted by the NGFS, it is impossible to know the extent to which the NGFS' orientation and outlook filters into the Basel Committee's work given the substantial overlap in membership and strong connection through the central banks.

Moreover, the banking agencies—and the Fed in particular—have been inching closer to aligning with international methods for supervising banks for climate risk. In January 2023, the Fed piloted a new climate supervisory stress test.[48] Although the pilot is voluntary and characterized as exploratory and thus divorced from capital charges, it is reasonable to be concerned that this is the first step in taking climate regulation further—to, for example, adjusting

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[44] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[45] *See, e.g.*, BANK OF ENGLAND, BANK OF ENGLAND REPORT ON CLIMATE-RELATED RISKS AND THE REGULATORY CAPITAL FRAMEWORKS (Mar. 13, 2023), https://www.bankofengland.co.uk/prudential-regulation/publication/2023/report-on-climate-related-risks-and-the-regulatory-capital-frameworks.

[46] *Supra* note 37.

[47] Network for Greening the Financial System, https://www.ngfs.net/en.

[48] Bd. of Governors of the Fed. Rsrv. Sys, *Pilot Climate Scenario Analysis (CSA) Exercise: Participant Instructions,* FED. RSRV. (Jan. 19, 2023), https://www.federalreserve.gov/publications/climate-scenario-analysis-exercise-instructions.htm

the Basel risk-weights that apply to certain ‘brown’ or ‘dirty’ assets. Indeed, although the Fed’s Chair has acknowledged the limits in its mandate to address climate with monetary policy tools, he has also conceded that supervision could be fair game.[49] Meanwhile, the Biden Administration continues to push the banking agencies to address climate change through their supervisory tools—particularly through the FSOC.[50] Overall then, Congress should also be mindful of the extent to which these international organizations influence bank regulators’ supervisory practices and ultimately result in an end-run around the legislative process.

Conclusion

International cooperation is not an end in of itself. Congress should require these agencies to demonstrate sound domestic law basis for implementing soft-law regulatory standards and it should similarly have a good line of sight into their process. Additionally, the banking agencies should continuously evaluate whether their participation is serving U.S. interests more than undermining them.

As this ecosystem expands, restraint might be appropriate. It is worth noting that prior to 1994, although the Fed was an “active and continuing” participant in various meetings held under the BIS’ auspices, it chose not to be represented on the BIS board. Initially this decision was rationalized on the ground that the U.S. was not a party to German reparations.[51] In the 1950s and 1960s, it abstained in light of the degree to which European interests dominated the organization.[52] At the same time, it was concerned about the BIS’ role in assisting apartheid South Africa with certain of its gold transactions.[53]

Eventually, in 1994, the U.S. took up its voting rights. Apparently, it felt that the United States’ absence at the BIS was becoming increasingly conspicuous, especially in light of its participation in other international organizations.[54] The Federal Reserve leadership must have concluded that the benefits to this manner of international regulatory cooperation outweighed any remaining political friction and optical costs. This brief history serves merely to highlight that historically, the Fed has chosen whether to engage with particular soft-law institutions if and only if the organization’s self-declared mandate and functions did not work at cross-purposes with otherwise demonstrable congressional intent.

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[49] Jerome H. Powell, Chair, Bd. of Governors of the Fed. Rsrv. Sys., *Central Bank Independence and the Mandate—Evolving Views,* Panel at the Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, Sweden (Jan. 10, 2023), https://www.federalreserve.gov/newsevents/speech/powell20230110a.htm.

[50] U.S. Department of the Treasury, Press Release, Financial Stability Oversight Council Releases Factsheet on Climate-Related Financial Risk Efforts, July 28, 2022, https://home.treasury.gov/news/press-releases/jy0894; Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (“Executive Order on Tackling the Climate Crisis at Home and Abroad”).

[51] The BIS was originally established to settle German War Reparations. Charles J. Siegman, *The Bank for International Settlements and the Federal Reserve,* FED. RSRV. BULLETIN (Oct. 1994), https://fraser.stlouisfed.org/files/docs/publications/FRB/pages/1990-1994/33473_1990-1994.pdf.

[52] *Id.*

[53] *Id.*

[54] *Id.*

By extension, unless Congress decides to reshape the U.S. financial and banking structure to weaken banks, to remodel them as public utilities, to cede ground to foreign banks, and to use the financial system to combat climate change, the Fed, OCC, and FDIC should critically examine the nature of their participation in these organizations—at the very least, they should demonstrate to Congress that the U.S. implementation of its standards will serve U.S.-specific ends.