UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BUILDERS BANK Plaintiff, v. THE FEDERAL DEPOSIT INSURANCE CORPORATION Defendant	Civil Case No. 15-cv-6033 Honorable Sharon Johnson Coleman Magistrate Judge Mary M. Rowland
BUILDERS BANK Plaintiff, v. THE FEDERAL DEPOSIT INSURANCE CORPORATION Defendant	Civil Case No. 16-cv-9940 Honorable Sharon Johnson Coleman Magistrate Judge Mary M. Rowland

<u>*AMICI CURIAE* SUBMISSION OF THE CLEARING HOUSE ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, AND THE INDEPENDENT COMMUNITY BANKERS OF AMERICA IN SUPPORT OF NEITHER PARTY</u>

The Clearing House Association L.L.C. ("The Clearing House"), the American Bankers Association ("ABA"), and the Independent Community Bankers of America ("ICBA") submit this brief as *amici curiae* to address an argument made by the Federal Deposit Insurance Corporation ("FDIC") in its motion to dismiss of July 7, 2017 (the "Motion to Dismiss").[1] Specifically, the FDIC argues that the assignment of CAMELS ratings is committed to agency discretion by law, and that the sources of law governing the assignment of CAMELS ratings do not provide meaningful standards for judicial review of such ratings.[2] *See* Motion to Dismiss at 21. The FDIC suggests that, as a result, courts do not and cannot review the CAMELS ratings assigned to federally regulated banks. *Id*. at 23-24.

Amici take no position on the facts of this case or the appropriate disposition of the case as a whole. They file this brief to make a single argument: that CAMELS ratings are not exempt from judicial review. A ruling that does exempt such ratings from review would be broader than necessary to decide this dispute, and could undermine the ability of other banks to obtain appropriate judicial review.

CAMELS ratings, which are regulatory ratings assigned by bank supervisors like the FDIC, are of critical importance to the nation's 5,856 federally-insured banks and, thus, to the U.S. financial system as a whole. No statute expressly precludes judicial review of CAMELS ratings, and regulations and guidance developed by the federal banking agencies can be applied by courts to review the appropriateness of CAMELS ratings in individual cases. Federal courts also have the power to review CAMELS ratings for factual or computational errors as well as for violation of some separate legislative or regulatory mandate. In addition, Supreme Court precedent strongly indicates that courts can review claims that CAMELS ratings are based on a

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[1] *Amici* affirm that no party or counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed any money to fund its preparation or submission. Descriptions of *amici* appear in the Appendix to this brief. None of the *amici* is a subsidiary or affiliate of any publicly-owned corporation.

[2] "CAMELS" refers to the six components of the CAMELS rating system: Capital Adequacy, Asset Quality, Management, Earnings, Liquidity, and Sensitivity to Market Risk.

constitutionally impermissible ground or are so irrational as to operate as a "sport of chance." Accordingly, this Court should not rule that CAMELS ratings are insulated from judicial review.

I. Statement of Interest

Amici are associations of federally-insured and regulated financial institutions. Their members each receive CAMELS ratings from one of the three federal prudential bank regulators: the Federal Reserve Board ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC"). Such ratings are assigned pursuant to the same statutory and regulatory framework, and the same specific interagency guidance, that are at issue in this case.[3]

CAMELS ratings constitute a cornerstone of the bank regulatory process and are incorporated into a range of banking rules and policies with significant legal and practical consequences for banks. As a result, they are of fundamental importance to banks of all types and sizes, and to the financial system as a whole. The members of *amici* have a strong interest in ensuring that this critical aspect of the government's oversight of their businesses is not inappropriately insulated from judicial review.

II. CAMELS Ratings and the Uniform Financial Institutions Rating System Have Important Consequences for Financial Institutions

<u>CAMELS Ratings Are a Cornerstone of Bank Regulation</u>. CAMELS ratings are used by, among others, the three federal prudential bank regulators—the FDIC, the Federal Reserve, and the OCC—to evaluate bank safety and soundness "in a comprehensive and uniform manner."[4] Examiners assign a rating for each of the six CAMELS components,[5] and then an overall rating, all on a scale of 1 to 5, with 1 being the most favorable rating. The ratings are determined in

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3 *See* Uniform Financial Institutions Rating System, 61 Fed. Reg. 67021 (Dec. 19, 1996).
4 *Id.* at 67025.
5 *See supra* note 2.

accordance with criteria set out in the Uniform Financial Institutions Rating System ("UFIRS"),[6] which was established by the Federal Financial Institutions Examination Council ("FFIEC") pursuant to the Financial Institutions Regulatory and Interest Rate Control Act of 1978.[7] That statute empowers the FFIEC to "prescribe uniform principles and standards for the federal examination of financial institutions by" the FDIC and other agencies,[8] and it provides that such "uniform principles and standards . . . *shall be applied* by the Federal financial institutions regulatory agencies" (*i.e.*, including the FDIC).[9]

The FFIEC originally adopted the UFIRS in 1979, and updated the system through the notice-and-comment process in 1996.[10] For each component of the CAMELS rating, the UFIRS sets out: "(1) [a]n introductory paragraph discussing the areas to be considered when rating each component; (2) a bullet-style listing of the evaluation factors to be considered when assigning component ratings; and (3) a brief, qualitative description of the five rating grades that can be assigned to a particular component"[11] (*i.e.*, 1-5).[12] The factors listed in the UFIRS are granular and specific. For example, one factor that examiners consider in assessing a bank's liquidity rating is the "availability of assets readily convertible to cash without undue loss."[13] Similarly, a factor to be considered as part of the earnings rating is the "adequacy of provisions to maintain

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[6] 61 Fed. Reg. 67021, *supra* note 3. The FDIC has published a manual for examiners that, among other things, directs examiners to employ the factors highlighted in the UFIRS when conducting a bank's risk management examination. *See* FDIC, Risk Management Manual of Examination Policies, https://www.fdic.gov/regulations/safety/manual/ (last visited Aug. 10, 2017) [hereinafter FDIC Manual].

[7] Public Law 95-630.

[8] 12 U.S.C. §§ 3301.

[9] 12 U.S.C. §§ 3305(a) (emphasis added).

[10] 61 Fed. Reg. 67021, 67022, *supra* note 3.

[11] For example, in the liquidity component, the qualitative description of a liquidity rating "of 1 indicates strong liquidity levels and well-developed funds management practices. The institution has reliable access to sufficient sources of funds on favorable terms to meet present and anticipated liquidity needs." *Id*. at 67029. By contrast, a "rating of 5 indicates liquidity levels or funds management practices so critically deficient that the continued viability of the institution is threatened. Institutions rated 5 require immediate external financial assistance to meet maturing obligations or other liquidity needs." *Id*.

[12] *Id*. at 67022.

[13] *Id*. at 67028-29.

the allowance for loan and lease losses."[14] While examiners are not precluded from considering factors other than those listed in the UFIRS, the UFIRS component ratings must be "based upon" the listed factors.[15] The FDIC and other federal banking regulators have promulgated detailed rules and guidance that bear on the proper interpretation and application of several of these factors.[16]

When the FDIC and other federal banking agencies conduct an examination of a bank, they provide the bank with a Report of Examination that includes a CAMELS rating, individual component ratings, and detailed explanations for each of those ratings that implicitly or expressly cross-reference relevant UFIRS component factors.[17] Under FDIC policies, examiners must provide "progressively more detailed" explanations justifying poor ratings against "pertinent factors," and must "ensure the [report's] narrative describes the underlying conditions or practices" that gave rise to the FDIC's concerns.[18]

Banks are permitted to pursue an administrative appeal of their component and composite ratings within the agency.[19] In the FDIC's case, appeals must be filed with non-independent managerial staff and may subsequently be brought to a committee consisting of more senior

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14 *Id*.

15 The introduction to each list of component factors in the UFIRS states that the component "is rated based upon, but not limited to, an assessment of the following evaluation factors." *Id*. at 67026-29. In explaining the revisions made to the UFIRS in 1996, the FFIEC stated that it had sought to "better structure and identify the factors that examiners traditionally consider as part of their assessment of a component area. This allows examiners and bankers to have a better understanding of what is being assessed under each component." *Id*. at 67023.

16 *See, e.g.*, 12 C.F.R. § 329.20 (defining "high-quality liquid assets" that are deemed to be easily convertible into cash); Interagency Policy Statement on the Allowance for Loan and Lease Losses, FDIC Financial Institution Letter No. FIL-105-2006 (December 13, 2006).

17 *See* Federal Deposit Insurance Corporation, RMS Manual of Examination Policies, § 16.1, at 11-12, https://www.fdic.gov/regulations/safety/manual/section16-1.pdf ("Each CAMELS component must be addressed . . . . The narrative for each component must include an assessment of pertinent factors and support the assigned rating . . . . The length of comments and level of detail should be consistent with assigned ratings. Generally, comments should be brief for 1- and 2-rated components and progressively more detailed for 3-, 4-, and 5-rated components. When comments are critical, ensure the narrative describes the underlying conditions or practices that led to the criticism.").

18 *Id*.

19 *See* 12 U.S.C. § 4806(a).

managerial staff.[20] Banks generally do not pursue such intra-agency appeals, in part because of widespread concerns about the efficacy of the appeals processes.[21] The filing of appeals does not automatically delay the effectiveness of the rating or any of the consequences of the rating.[22] In disposing of appeals, the FDIC's appeals committee applies the UFIRS as well as other specific laws, regulations, and policies that govern the findings in the examination report and support the underlying rating.[23]

Importance of CAMELS Ratings to Regulated Banks. CAMELS ratings are integrated into multiple aspects of the FDIC's regulations and the regulations of other federal banking agencies. By way of example, a poor CAMELS rating—*i.e.*, a composite rating of 3, 4 or 5—will result in an FDIC-regulated bank being deemed not "well-managed."[24] This means, among other things, that the bank's affiliates may not be able to engage in certain financial and other activities, including underwriting activities, investment advisory activities, and insurance activities.[25] The practical effect of such a restriction can be significant. Many U.S. financial institutions operate deposit-taking banks alongside other non-banking financial businesses. If a bank owned by one of these institutions were to receive a "3" rating, the financial institution would: (i) receive a notice pursuant to 12 U.S.C. § 1843(m) advising the institution that it is not

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20 *See* Guidelines for Appeals of Material Supervisory Determinations, 82 Fed. Reg. 34522 (July 25, 2017).

21 *See* Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. U. L. Rev. 1101, 1143-1148, 1165-1167 (2015) (noting that there are "few [intra-agency] appeals" by banks, that banks "rarely win" FDIC appeals, and that use of financial institution intra-agency appeals processes is limited by the fact that "[s]ome financial institutions believe that appealing is futile [and] [o]thers fear retaliation").

22 82 Fed. Reg. at 34528, *supra* note 20.

23 *See*, *e.g.*, SARC Case No. 2014-01 at 5-6 (FDIC Jun. 19, 2014) (citing the UFIRS as the basis for evaluating whether examiners had reached an appropriate conclusion as to the Management component of the CAMELS rating), https://www.fdic.gov/regulations/laws/sarc/sarcappeals/sarc201401.pdf; SARC Case No. 2010-03 at 9, 12-13, 17, 19 (FDIC Aug. 17, 2010) (relying on UFIRS guidance in connection with the review of multiple CAMELS component ratings), https://www.fdic.gov/regulations/laws/sarc/sarcappeals/sarc201003.pdf.

24 *See* 12 C.F.R. § 362.17(e).

25 *See* 12 U.S.C. §§ 1841(o)(9), 1843(l)(1); 12 C.F.R. §§ 362.4(c), 362.18.

in compliance with applicable regulatory requirements; (ii) be required, within 45 days of receiving such notice, to execute an agreement with the Federal Reserve to correct these deficiencies; (iii) immediately be subject to the imposition of "limitations on [its] conduct or activities" or the conduct or activities of "any [of its] affiliate[s]"; and, (iv) if the deficiencies are not corrected within a further 180 days, potentially face an order requiring it to divest itself of one or more of its business units.[26]

CAMELS ratings also have a range of other automatic and discretionary consequences under applicable law and the regulations of the FDIC and other federal banking agencies, which can have a significant impact on banks' businesses and activities. For example, together with asset size, a bank's CAMELS rating determines the premium it must pay into the FDIC's deposit insurance fund.[27] Poor CAMELS ratings also make FDIC-regulated banks subject to higher capital requirements[28] and more frequent examinations.[29] Under the rules of the other federal banking agencies that assign CAMELS ratings pursuant to the UFIRS guidance, a poor CAMELS rating can hinder a bank's ability to engage in mergers and acquisitions and to make basic changes to its business, such as opening new branches or moving existing branches,[30] and appointing new directors and senior executive officers.[31]

III. CAMELS Ratings Are Subject to Judicial Review in Appropriate Circumstances

The availability of judicial review serves important purposes, by providing assurance that agencies do not exceed the limits of their statutory authority and treat parties fairly, consistently, and rationally. *See, e.g., Motor Vehicle Mfrs Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43-44 (1983). For this reason, the FDIC must overcome a "strong

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26 *See* 12 U.S.C. § 1843(l)(1), (m).
27 *See* 12 C.F.R. § 327.9.
28 *See* 12 C.F.R. § 325.3.
29 *See* 12 C.F.R. § 337.12(b)(3).
30 *See* 12 C.F.R. §§ 5.3(g)(2), 5.30(f)(6).
31 *See* 12 C.F.R. §§ 5.51(c)(6), (d)(1)

presumption" that agency action, of which CAMELS ratings are an example, is subject to judicial review. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 (1986). This strong presumption in favor of judicial review can be overcome only if: (1) a statute precludes judicial review; or (2) the agency's action is committed to its discretion by law.[32] Neither of these criteria are met here.

<u>Congress Has Not Expressly Precluded Judicial Review of CAMELS Ratings</u>. The Federal Deposit Insurance Act,[33] which is the source of the FDIC's examination authority, is silent as to whether supervisory determinations are subject to judicial review.[34] Contrary to the FDIC's suggestion—which it grounds in a single sentence from a statement of a banking executive who testified before a subcommittee of the House Committee on Government Operations—section 309(a) of the Riegle Community and Regulatory Improvement Act of 1994[35] does not preclude judicial review. *Cf.* Motion to Dismiss at 22 & 5 n. 13. The sole purpose and effect of this provision is to make "available" an intra-agency appellate process;[36] intra-agency appeals routinely co-exist with judicial review.[37]

<u>The Assignment of CAMELS Ratings Also Has Not Been Committed to Agency Discretion By Law</u>. The Supreme Court has said that the "committed to agency discretion" exception to judicial review is "very narrow," and applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Agency regulations and informal guidance may provide "law to apply" even if the relevant statute, standing alone, does not. *See Salazar v. King*, 822 F.3d 61,

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32 *See* 5 U.S.C. § 701(a).

33 12 U.S.C. § 1811 *et seq.*

34 *See* 12 U.S.C. § 1820(b) (discussing the powers of examiners appointed by the FDIC).

35 Pub. L. No. 103-225.

36 *See* 12 U.S.C. § 4806(a).

37 Indeed, other FDIC supervisory determinations are also subject to both intra-agency appeals and judicial review. *See Dorris v. FDIC*, No. CIV.A. 93-1659 (RCL), 1994 WL 774535 (D.D.C. Oct. 27, 1994) (engaging in judicial review, following an intra-agency appeal, of the FDIC's disapproval of an application to serve as a director and senior executive officer of an FDIC-supervised bank).

76 (2d Cir. 2016); *see also Cornell Vill. Tower Condo. v. Dep't of Hous. & Urban Dev.*, 750 F. Supp. 909, 917 (N.D. Ill. 1990) (holding that an informal internal HUD manual provided "law to apply" under section 701(a)(2)). The key question is simply whether there is a source of authority that restricts the range of permissible behavior by the agency and provides "judicially manageable standards" for a reviewing court. *Chaney*, 470 U.S. at 830; *cf. U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (an agency "policy statement" is a rule if the agency treats it as binding).

Courts in the Seventh Circuit recognize that, when an agency publishes factors that guide its decision-making process, such factors can suffice to enable judicial review. *See Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1550 (7th Cir. 1985) (Commodity Futures Trading Commission regulation that "set[] forth five specific factors that the agency *may* consider in its determination" provided "meaningful standards to review the relevant CFTC actions") (emphasis added); *see also Cornell Vill.*, 750 F. Supp. at 917 (where HUD checklist described certain factors to be considered in evaluating neighborhood development projects, such as "compatibility with neighborhood structures," such "factors limit[ed] the concept of 'neighborhood development' and accordingly . . . provid[ed] guidelines for judicial evaluation"). Moreover, an articulation by an agency of its standard practices will often suffice to bind the agency. *See S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (Army Corps of Engineers internal manual was binding on the agency insofar as it described "what 'is' done or 'will' be done" under agency practice).

Under the above authorities, CAMELS ratings can be reviewed for consistency with the UFIRS. Through the UFIRS, the FFIEC established specific criteria that bank examiners "traditionally consider" in assigning CAMELS ratings to regulated banks.[38] These factors bind the examiners that assign CAMELS ratings: while component ratings may also take into account

[38] *See* 61 Fed. Reg. 67021, *supra* note 3, at 67023; *see also supra* note 15 and accompanying text.

pertinent non-traditional factors not listed in the UFIRS, the rating is ultimately "based upon" the listed factors.[39] Moreover, as noted, the FDIC's own internal appeals process treats the UFIRS as a constraint on examiner discretion.[40] The UFIRS thus qualifies as agency guidance that binds the FDIC in assigning CAMELS ratings to FDIC-regulated banks.

Other FDIC regulations also create standards that are sufficient to permit judicial review of CAMELS ratings in specific cases: the FDIC may not assign a component rating in a manner that runs contrary to the FDIC's rules governing that component. *See Miami Nation of Indians of Indiana, Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001) (stating that the Administrative Procedure Act ("APA") "require[s] agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations"); *see also* 5 U.S.C. § 706(2)(A) (a court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law"). For example, as the name suggests, one important factor that drives a bank's liquidity component rating is whether it holds an adequate amount of assets that are liquid (*i.e.*, easily convertible to cash).[41] The FDIC has promulgated a rule that deems certain types of assets to be easily convertible "high quality liquid assets."[42] Where a Report of Examination reveals that a bank received a poor liquidity component rating because an examiner ignored or refused to apply the FDIC's own definition of "high quality liquid assets," the bank should be able to challenge the agency's failure to apply its own standards. By way of further example, a bank should not receive a poor earnings rating on the basis that it has improperly managed its allowances for loan and lease losses ("ALLL") in circumstances where its ALLL practices are in full compliance with the FDIC-endorsed Interagency Policy Statement

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39 61 Fed. Reg. at 67026, *supra* note 3.

40 *See supra* note 23 and accompanying text; SARC Case No. 2014-01 at 5-6 (FDIC Jun. 19, 2014), https://www.fdic.gov/regulations/laws/sarc/sarcappeals/sarc201401.pdf; SARC Case No. 2010-03 at 9, 12-13, 17, 19 (FDIC Aug. 17, 2010), https://www.fdic.gov/regulations/laws/sarc/sarcappeals/sarc201003.pdf.

41 61 Fed. Reg. at 67029-30.

42 *See* 12 C.F.R. § 329.20 (defining "high-quality liquid assets" that are deemed to be easily convertible into cash).

on the Allowance for Loan and Lease Losses.[43] Other examples abound of specific guidance that may bind the FDIC in individual cases.[44]

Even If Aspects of CAMELS Ratings Were Committed to Agency Discretion, Judicial Review Would Not Be Precluded Absolutely. As the Seventh Circuit recognized in this case, even if certain CAMELS components are committed to agency discretion, other components may be judicially reviewable—and, in fact, the substance of non-capital CAMELS components has been reviewed in the past:

> That's what happened in *Frontier State Bank*, which in the course of reviewing a cease-and-desist order reviewed management, liquidity, and interest-rate-sensitivity issues while concluding that capital adequacy is unreviewable. The sort of issues reviewed in *Frontier State Bank* affect CAMELS ratings. If those subjects could be reviewed there, notwithstanding the Tenth Circuit's conclusion that capital adequacy is within the FDIC's discretion, they can be reviewed in this litigation as well.

See Builders Bank v. Fed. Deposit Ins. Corp., 846 F.3d 272, 276 (7th Cir. 2017) (citing *Frontier State Bank v. Fed. Deposit Ins. Corp.*, 702 F.3d 588, 597-605 (10th Cir. 2012)) (internal citation omitted).

The Seventh Circuit also made clear that, even if parts of the process by which an agency arrived at a component rating are unreviewable, it does not necessarily follow that other parts of the process, or the component rating as a whole, must be entirely insulated from judicial review. *Id*. Thus, while the Seventh Circuit "assume[d]" for the sake of its analysis that each federal banking agency had the discretionary authority to establish the requisite minimum levels of capital for its regulated institutions,[45] it refused to conclude that the capital component rating

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[43] FDIC Financial Institution Letter No. FIL-105-2006, *supra* note 16.

[44] *See, e.g.*, 12 C.F.R. pt. 364, App. A–II (setting out certain "operational and managerial standards" of relevance to a bank's management, asset and earnings ratings). The UFIRS and other regulations promulgated by the Federal Reserve and the OCC, respectively, create standards that are sufficient to permit judicial review of CAMELS and similar supervisory ratings assigned by those agencies in specific cases.

[45] It is important to note the Seventh Circuit did not accept the FDIC's position that the capital component of the CAMELS rating is not reviewable. The court stated only that it would "assume that the

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was unreviewable in full. *Id*. To the contrary, it emphasized that "it would be possible for a court to review the capital rating itself without transgressing" the agency's assumed discretion. *Id*. For example, a court would be entitled to correct computational errors or errors in the categorization of capital assets and liabilities. *Id*.

Judicial review of CAMELS ratings must also be available where, for instance, a bank can show that its rating reflects a constitutionally impermissible motive, such as retaliation by the agency for the bank's exercise of its First Amendment right to criticize FDIC policies and personnel. *See Webster v. Doe*, 486 U.S. 592 (1988) (even where decision was committed to agency discretion by statute, judicial review was still available for a constitutional challenge to the action). Similarly, review should also be available where a bank can show that its rating was assigned in violation of applicable procedural statutes and regulations[46]—for example, the statutory requirement that the FDIC accord banks an "independent" intra-agency review of their ratings[47] or the FDIC regulations that prohibit "any retaliation, abuse, or retribution by . . . FDIC personnel against an institution."[48] And, finally, review may be available where a bank can show that its rating results from a process that was arbitrary and capricious to such a degree that the agency's process was irrational. *See Judulang v. Holder*, 565 U.S. 42, 58–59 (2011) (even where agencies are accorded wide discretion, the "APA's 'arbitrary and capricious' standard is designed to thwart" agency decision-making that operates as a "sport of chance").

<u>The Authorities Relied on by the FDIC are Unavailing</u>. The FDIC states that a Florida court has previously determined that CAMELS ratings are unreviewable. *See* Motion to Dismiss at 24. But the Florida court did no such thing; it instead determined that 12 U.S.C. § 1831i does not provide any definition of the term "troubled condition" that could provide a meaningful

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agency's discretion is […] unconfined" with respect to establishing the "minimum level of capital for a banking institution" because "the Bank does not ask us to disagree." *Builders Bank*, 846 F.3d at 276.

46 *See* 5 U.S.C. § 706(2)(C).

47 *See* 12 U.S.C. § 4806(a), (f)(2).

48 82 Fed. Reg. at 34528, *supra* note 20.

standard for judicial review, and that a rule adopted by the OCC also clearly reserved the agency's discretion in determining whether a bank is in "troubled condition."[49] See *Net First Nat'l Bank v. Hawke*, No. 01-8521-CIV, 2001 WL 37115194, at *3 (S.D. Fla. Nov. 2, 2001) ("The language of 12 C.F.R. § 5.51 (6)(iii) specifically delegates to the OCC the unqualified authority to define 'troubled condition.' The regulation states that a national bank is in 'troubled condition' if it is 'informed in writing by the OCC that as a result of an examination it has been designated [as being] in 'troubled condition.''"). Any suggestion that the non-reviewability of CAMELS ratings is settled law should be rejected: the FDIC has itself adopted the litigation position that supervisory ratings assigned by other federal banking agencies under the UFIRS are subject to judicial review, and that position was accepted and relied on by the Fourth Circuit.[50]

The FDIC also cites the Depression-era case of *Adams v. Nagle*, 303 U.S. 532, 544 (1938) as authority for the proposition that bank examiner decisions should be treated "as final and conclusive." *See* Motion to Dismiss at 22. *Adams* predates the development of modern administrative law and, in any event, it left open the possibility that, after complying with a discretionary order of the Comptroller of the Currency, an affected party could still proceed to challenge that order as "erroneous as a matter of law." *Adams*, 303 U.S. at 544.

Relying on inapposite case law,[51] the FDIC suggests that the complex nature of bank regulation may preclude judicial review of its CAMELS ratings. *See* Motion to Dismiss at 20-21. The FDIC's reading of the cases it relies on is flawed—the cases consider specific and

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49 A bank in "troubled condition" is required to provide its federal banking regulator with advance notice of the appointment of board members and senior executive officers, and is also restricted from making certain types of payments to employees. *See* 12 U.S.C. § 1831i; 12 C.F.R. § 359.1(f).

50 In *Doolin Sec. Sav. Bank, F.S.B. v. Federal Deposit Ins. Corp.*, 53 F.3d 1395 (4th Cir. 1995), the Fourth Circuit relied on representations made by counsel for the FDIC to determine that banks regulated by the Office of Thrift Supervision ("OTS") are afforded an "opportunity for direct administrative and judicial review of [their] OTS composite rating." *Id*. at 1405 & n.17. The OTS was, until July 21, 2011, the primary federal regulator for savings banks, savings and loan associations, and their holding companies. *See* 12 U.S.C. § 5411-5413 (providing for the transfer of OTS powers and duties to the Federal Reserve, the OCC and the FDIC).

51 *See Your Home Visiting Nurse Svcs., Inc. v. Shalala*, 525 U.S. 449 (1999); *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). *See also infra* note 53.

narrow traditional exceptions to judicial review, none of which is applicable here. For instance, *Your Home Visiting Nurse Services v. Shalala*, 525 U.S. 449 (1999), applies the "traditional rule of administrative law"—inapplicable in this case—that "an agency's refusal to reopen a closed case is generally 'committed to agency discretion by law' and therefore exempt from judicial review." *Id*. at 457. *Lincoln v. Vigil*, 508 U.S. 182 (1993), applies the "traditional[]" rule that "[t]he allocation of funds from a lump-sum appropriation" is not subject to judicial review "[a]s long as the agency allocates the funds to meet permissible statutory objectives." *Id*. at 192-193. And *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), precluded APA review of milk market orders, but it did so only because the Court determined that "Congress had created a different scheme for judicial review of [agricultural] marketing orders" and did not intend for the particular type of plaintiffs who brought the case to be permitted to sue in federal court—in other words, *Block* did not deal with an attempt by an agency to entirely insulate its actions from judicial review. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399 (7th Cir. 2000) (interpreting *Block*); *Block*, 467 U.S. at 346-48.[52]

The FDIC also suggests that judicial review would be impractical because the agency issues a large number of CAMELS ratings. Motion to Dismiss at 17. But that is not a basis for denying regulated institutions access to the courts. The Social Security Administration makes millions of disability determinations every year, but those determinations are not immune from judicial review simply because they are numerous.[53] Furthermore, there is no reason to think

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52 The FDIC also cites five Seventh Circuit decisions (at pages 24-26 of its Motion to Dismiss), but it does not explain why it believes these decisions should be applied in this case. Nor is their relevance immediately apparent. The first deals with the grant of a discretionary immigration waiver (*Singh v. Moyer*, 867 F.2d 1035 (7th Cir. 1989)), the second applies the traditional rule that the public may not seek to compel an agency to pursue an enforcement action (*Arnow v. U.S. Nuclear Regulatory Commission*, 868 F. 223 (7th Cir. 1989)), the third holds that a prisoner cannot compel the Bureau of Prisons to support his request for compassionate release (*DeLuca v. Lariva*, 586 Fed. Appx. 239 (7th Cir. 2014)), the fourth applies the rule that "for more than a hundred years courts have treated visa decisions as discretionary" (*Morfin v. Tillerson*, 851 F.3d 710, 711 (2017)), and the fifth—the only one dealing with financial regulation—found that the agency's action *was* reviewable. *See Cardoza*, 768 F.2d 1542.

53 Admin. Office of the U.S. Courts, U.S. District Courts—Civil Cases Filed by Jurisdiction, Nature of Suit, and District—During the 12-Month Periods Ending September 30, 2015 and 2016,

(continued…)

that this case will unleash a flood of litigation over CAMELS ratings.[54] Even though there is no precedent supporting the view that CAMELS ratings are unreviewable—and even though there is authority, discussed above, supportive of the contrary view—judicial challenges to CAMELS ratings remain exceedingly rare.[55]

Finally, the FDIC's observation that examinations are not intended to "benefit the bank, but to safeguard the banking system" is not relevant to the issue of reviewability. *Cf*. Motion to Dismiss at 22. The objective of the Clean Water Act is to benefit "the Nation's waters" and to protect its fish populations.[56] Yet, landowners, who may be affected by Clean Water Act compliance orders just as banks are affected by CAMELS ratings, are entitled to challenge such compliance orders pursuant to the APA. *See Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012). Regardless of the intended beneficiaries of federal banking laws, the availability of judicial review provides an important safety valve with respect to a cornerstone aspect of government regulation of the financial system.

* * *

While financial institutions do not routinely challenge their CAMELS ratings, *amici*'s members believe it is critical—given the importance of such ratings to each of the nation's 5,856 federally-insured banks—that they retain the option of seeking judicial review in the exceptional case where such review is necessary and appropriate. At a minimum, given the complexity of the CAMELS rating system and the consequences of CAMELS ratings, this court should not

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http://www.uscourts.gov/statistics/table/c-3/judicial-business/2016/09/30 (last visited Aug. 10, 2017) (18,716 social security appeals filed in the 12-month period ending September 30, 2016).

[54] As noted, banks do not even routinely challenge their CAMELS ratings though the intra-agency process. According to information published on the FDIC's website, in the five years between 2011 and 2016, the FDIC's SARC issued only five decisions relating to CAMELS ratings. *See* Fed. Deposit Ins. Corp., Appeals of Supervisory Determinations: Guidelines & Decisions (last visited Aug. 10), https://www.fdic.gov/regulations/laws/sarc/sarcappeals.html.

[55] A search of Westlaw for terms including "CAMEL," "CAMELS" and "UFIRS" did not disclose any judicial challenges to CAMELS ratings beyond those discussed in this brief.

[56] 33 U.S.C. § 1251.

issue a ruling that is broader than necessary to decide this dispute and that may undermine the ability of other banks to obtain judicial review.

Dated: August 14, 2017

Respectfully submitted,

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Appendix

The Clearing House, established in 1853, is the oldest banking association and payments company in the United States. Its members include the world's largest commercial banks; they hold more than half of all U.S. deposits and employ over one million people in the U.S. and over two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides safe and efficient payment, clearing, and settlement services to financial institutions, and clears almost $2 trillion every day.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA, whose members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all forms of consumer financial services, often appears as *amicus curiae* in litigation that affects the banking industry.

The Independent Community Bankers of America® ("ICBA") is the nation's voice for more than 5,800 community banks of all sizes and charter types serving local communities throughout the United States. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership by monitoring, and advocating on, federal issues that affect thousands of community banks and their customers. With 52,000 locations nationwide, community banks employ 760,000 Americans, hold $4.7 trillion in assets, $3.7 trillion in deposits, and $3.2 trillion in loans to consumers, small businesses, and the agricultural community.