BANK POLICY INSTITUTE

May 6, 2024

*Via Electronic Mail*

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

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

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

Re: Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Federal Reserve Docket No. OP–1828; FDIC RIN 3064–ZA39; Docket ID OCC–2023–0016)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the first of four joint notices of regulatory review pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA") issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (the "Agencies").[2] In line with the aims of the EGRPRA review, this letter recommends changes to address "outdated or otherwise

[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

[2] *See* OCC, FRB, FDIC, *Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996*, 89 FR 8084 (Feb. 06, 2024).

unnecessary regulatory requirements"[3] within the categories of regulations currently under review. More broadly, we also identify overarching regulatory and supervisory trends that impose unnecessary burdens and detract from both regulators' and banks' ability to focus on material risks to the safety and soundness of the U.S. banking system. As the Agencies consider revising unnecessary regulatory requirements, we urge you to ensure the supervisory and regulatory regime focuses on material issues affecting the safety and soundness of individual institutions and the financial system more broadly.

Furthermore, the scope of the EGRPRA review should be expanded. Increasingly, regulatory agencies are expanding their rulemaking to new areas, occasionally stretching beyond the limits initially contemplated by statute. This expansion often results in overlapping or duplicative regulatory requirements, complicating compliance efforts and hindering operational efficiency.[4] For example, the Consumer Financial Protection Bureau and the Securities and Exchange Commission have both issued rules or proposals that cover banking activities covered or impacted by regulations already imposed by the prudential regulators.[5] Including these agencies in the EGRPRA review process could aid in identifying and eliminating redundant regulations. The National Credit Union Administration has set a commendable precedent by voluntarily participating in the EGRPRA review. Other key regulatory agencies, specifically the CFPB, SEC, and Financial Crimes Enforcement Network, should consider following suit. To ensure the proper scope of EGRPRA reviews over time, Congress should revise the statute to formally include the CFPB, SEC, FinCEN, and any other relevant regulatory agency in the review process. Such an amendment would promote a more efficient, coherent, and less burdensome regulatory environment.

## I. The Agencies should address several overarching trends that unnecessarily increase the regulatory burden on insured depository institutions and their holding companies without a corresponding safety and soundness benefit.

Compliance requirements disproportionate to material risk, overly demanding reporting obligations, complicated regulatory overlap, and barriers to competition and innovation all place needless burdens on banks operating in the U.S. without commensurate benefits to safety and soundness, consumers or the U.S. economy. Thus, in addition to focusing on streamlining existing regulations consistent with the goals of EGRPRA, the Agencies should confront the ever-increasing regulatory and

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[3] *Id.* at 8085.

[4] Multiple agencies may also initiate simultaneous enforcement actions, which can significantly burden banks with high costs and little added value to the overall safety and soundness of the banking system or the individual institution, as these actions often address the same underlying issues. Most typically, interagency coordination has related to important process issues regarding how parallel investigations are conducted, as well as the timing of when actions are brought. We continue to encourage enhancement of interagency coordination with the aim of ensuring a fair and just overall result (i.e., not merely in terms of conducting parallel investigations and timing of when actions are brought).

[5] *See, e.g.,* CFPB, *Overdraft Lending: Very Large Financial Institutions*, 89 FR 13852 (Feb. 23, 2024) (proposal to apply Regulation Z to overdraft credit provided by very large institutions unless credit is provided at or below costs and losses as a true courtesy to consumers); *Credit Card Penalty Fees (Regulation Z)*, 89 FR 19128 (March 15, 2024) (final rule imposes a smaller safe harbor for late fees); SEC, *Safeguarding Advisory Client Assets*, 88 FR 14672 (May 8, 2023) (proposing many new regulatory requirements for bank custodians, including provisions that would require custodians to segregate client deposits and assume greater liability for investment adviser decisions). *See also*, Tabitha Edgens, *The Lone Ranger in a Town Full of Sheriffs: How the SEC's Aggressive Agenda Interferes with the Business of Banking*, BPI (Sep. 12, 2023), https://bpi.com/the-lone-ranger-in-a-town-full-of-sheriffs-how-the-secs-aggressive-agenda-interferes-with-the-business-of-banking/.

supervisory burdens that are distracting both supervisors and banks from prioritizing the management of banks' most significant financial risks.

### A. The Agencies require a disproportionate amount of time and resources to be spent on immaterial matters, which ultimately distracts both regulators and bank management from addressing truly material risks.

Though the compliance burden the Agencies impose on banks has observably intensified since the last EGRPRA review, these additional demands failed to address the material risks that led to the failure of several banks in the spring of 2023. The supervisory and regulatory approach leading up to the collapse of Silicon Valley Bank illustrates the current distortion in the Agencies' priorities. Multiple government reports revealed that examiners did not prioritize crucial risks to SVB.[6] SVB had a unique set of risks and may have been idiosyncratically vulnerable: it was a firm that grew very quickly,[7] faced significant interest rate risk from its government securities portfolio,[8] relied heavily on large uninsured deposits from a single industry for funding,[9] and lacked a solid liquidity plan or contingency funding plan, including the ability to quickly access the Federal Reserve discount window. One would expect that Federal Reserve examiners would have identified these concerns as critical threats to SVB's solvency and insisted on actions to address rapid growth, mitigate interest rate risk, improve liquidity, and diversify funding. Instead, supervisors were primarily focused on nonfinancial risks, such as governance and compliance processes, even though these had a limited direct impact on SVB's financial stability.[10] Notably, none of the seven MRIAs or nine MRAs

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[6] *See, e.g.*, GAO, *Bank Supervision: More Timely Escalation of Supervisory Action Needed*, 5 (March 6, 2024), https://www.gao.gov/assets/d24106974.pdf ("In the 5 years before 2023, regulators identified liquidity and risk-management deficiencies at SVB and Signature Bank. However, both banks were slow to mitigate problems regulators identified and regulators did not escalate supervisory actions in a timely fashion, which could have helped to prevent the failures"); FRB, *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank*, 1 (April 28, 2023), https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf (examiners failed to recognize SVB's failure to manage for interest rate risk).

[7] Rapid growth is a risk indicator for bank failures. *See, e.g.,* GAO, *Preliminary Review of Agency Actions Related to March 2023 Bank Failures* 11, 12 (April 28, 2023) https://www.gao.gov/assets/gao-23-106736.pdf ("The total assets of SVB and Signature Bank grew by 198 percent and 134 percent, respectively. In contrast, the median total assets for the group of peer banks increased by 33 percent in the same period […] Rapid growth can be an indicator of risk in a bank's business. Regulators are concerned with whether a bank's risk-management practices can maintain pace with rapid growth. According to FRBSF and FDIC examination documents we reviewed, regulators identified issues related to SVB and Signature Bank's rapid growth and risk-management practices. In prior work, we identified aggressive growth strategies using nontraditional, riskier funding as a factor in bank failures.")

[8] The failure of First Republic Bank was also caused in part by interest rate risk, in that case from its loan portfolio. *See* Office of Inspector General, Material Loss Review of First Republic Bank, FDIC 4 (Nov. 2023), https://www.fdicoig.gov/sites/default/files/reports/2023-11/EVAL-24-03.pdf.

[9] *See* FRB, *Material Loss Review of Silicon Valley Bank*, 9 (Sep. 25, 2023), https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf ("As of year-end 2022, over 94 percent of SVB's total deposits were uninsured.")

[10] *See, e.g.,* Jeremy Newell and Pat Parkinson, *A Failure of (Self-) Examination: A Thorough Review of SVB's Exam Reports Yields Conclusions Very Different From Those in the Fed's Self* Assessment (May 8, 2023), https://bpi.com/a-failure-of-self-examination-a-thorough-review-of-svbs-exam-reports-yields-conclusions-very-different-from-those-in-the-feds-self-assessment/. Additionally, though SVB failed due to the bank's mismanagement of interest rate risk, FRB Vice Chair of Supervision Michael Barr has tried to publicly link the proposed capital rules as helping to address SVB's

issued in 2022 and 2023 related to SVB's liquidity.[11]

Rather than refocusing to prioritize key material risks, the Agencies' tendency still seems to be the further multiplication of compliance demands.[12] Supervisory teams frequently impose their own interpretations of rules on banks, interpretations that may not align with the regulations' original intent. This practice leads to the imposition of excessive documentation and processing requirements that do little to enhance the safety and soundness of the banking sector. Moreover, these requirements divert examiners' and bank staff's valuable time and resources from more critical tasks, such as identifying and mitigating genuine financial risks. We make specific suggestions in Section II of this letter to streamline the Agencies' regulations and processes. Along with implementing these specific suggestions, the Agencies should engage in a holistic review of their overall demands on regulated financial institutions, regardless of whether those demands are imposed by regulation, guidance, or supervision, and evaluate whether such demands enhance safety and soundness in practice.

Even with a more appropriately calibrated set of regulatory and supervisory requirements, individual examiners will sometimes err in their application of those requirements. However, when supervisors make mistakes or step outside their remit, there is no effective and fair process to challenge them. The current process for appealing supervisory decisions is deeply flawed. Supervisory teams often embody the roles of judge, jury, and executioner, offering banks minimal opportunities to contest decisions that may stem from incorrect rule interpretations or a misunderstanding of underlying factual matters. This situation creates a risk-averse atmosphere, discouraging banks from innovating due to fear of regulatory repercussions. To address this issue, it is essential for the Agencies to establish more effective appeal procedures with greater due process protections. Such procedures would allow banks to challenge

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failure. *See* FRB Vice Chair for Supervision Michael Barr, "Holistic Capital Review," Speech at the Bipartisan Policy Center, (July 10, 2023), https://www.federalreserve.gov/newsevents/speech/barr20230710a.htm. However, the capital proposal addresses a separate suite of risks (credit, operational, market, and credit valuation adjustment risks). *See BPI and ABA Comment on Basel Endgame Proposal*, BPI (Jan. 16, 2024), https://bpi.com/bpi-and-aba-comment-on-basel-endgame-proposal/. FRB Chair Jerome Powell observed in testimony, "The Basel III rules […] are not the thing that is directly related to Silicon Valley Bank." *See* Jerome Powell, *Testimony before the Senate Banking, Housing, and Urban Affairs Committee*, 01:41:27 (March 7, 2024), https://www.c-span.org/video/?533955-1/federal-reserve-chair-testifies-monetary-policy-economy.

[11] *See* Greg Baer, *Something Missing: Omissions and Surprises in the Federal Reserve's SVB Report*, BPI (May 5, 2023), https://bpi.com/something-missing-omissions-and-surprises-in-the-federal-reserves-svb-report/. *See also* BPI and Association of American Bank Directors, *Notice of Proposed Rulemaking and Issuance of Guidelines: Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More (RIN 3064-AF94)* (Feb. 9, 2024), https://bpi.com/to-promote-bank-safety-and-effective-governance-bank-directors-must-be-able-to-do-their-jobs/ (noting the multiplication of requirements for bank boards that is inconsistent with guidance from other regulators and ignore the need to tailor governance practices to the size, complexity, risk profile, and business model of the bank).

[12] FRB Governor Michelle Bowman recently stated, though "[t]he 2023 bank failures and circumstances leading up to those failures continue to warrant review, self-reflection, and appropriately targeted changes to identified issues or failures in regulation and supervision," there is "concern[] that the broad-based and insufficiently focused reform agenda has become a growing source of risk to the banking system, particularly due to the rushed nature of these reform efforts and the lack of research and understanding of the intended and unintended consequences of these proposals." FRB Governor Michelle Bowman, "Bank Mergers and Acquisitions, and De Novo Bank Formation: Implications for the Future of the Banking System," Speech at the Future of Banking at the Federal Reserve Bank of Kansas City, (April 2, 2024), https://www.federalreserve.gov/newsevents/speech/bowman20240402a.htm.

regulatory decisions in a more timely and equitable manner, which would better ensure that supervisory teams are accountable for their demands and decisions. The establishment of a more equitable and effective appeals process is crucial for maintaining a balanced regulatory environment and will be discussed further in our response to a subsequent EGRPRA notice.

**B. "Report creep" in regulatory reporting demands that banks provide the Agencies with ever more information, much of which does not directly address safety and soundness.**

The Agencies have imposed ever-increasing reporting requirements in the decade since the last EGRPRA review. The call report has increased in length, with the Agencies requiring banks to report more information, and much of the information collected exceeds what is necessary to effectively monitor banks' safety and soundness. Reporting exercises demanded of institutions are further complicated by individual firms' responsibility to reconcile definitions that overlap or conflict within the Agencies' regulations, guidance, or other materials. Beyond making the targeted changes suggested in Section II, the Agencies should conduct a general review of the reporting regime and minimize and reduce reporting requirements that are not essential to assess and monitor banks' safety and soundness.

**C. Multiple agencies, state and federal, regulate the same activity in different, often conflicting ways.**

Banks are subject to many different and, at times, conflicting laws and rules for the same activities, products, and services. State and international requirements may overlap with federal policy, or federal policy may internally overlap, with multiple agencies imposing their own requirements on the same topic. For example, multiple agencies have adopted or proposed cyber and operational resilience regimes. In addition to the Agencies' comprehensive rules and guidance,[13] the SEC has adopted its own Security Incident Reporting Rule,[14] and at the state level, the California Privacy Protection Agency also plans to release a cyber audit proposal.[15]

Perhaps the most remarkable area of overlap is consumer protection. Congress has clearly indicated that a single federal agency should govern large banks with respect to consumer protection: the CFPB. The Dodd-Frank Act transferred to the CFPB "exclusive authority to require reports and conduct

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[13] *See, e.g.*, FRB, OCC, FDIC, *Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers*, 86 Fed. Reg. 66,424 (Nov. 23, 2021) ("Computer-Security Incident Notification Requirements"); FRB, OCC, FDIC, *Interagency Guidance on Third-Party Relationships: Risk Management*, 88 Fed. Reg. 37,920 (June 6, 2023) ("Interagency Guidance on Third-Party Relationships"); FRB, OCC, FDIC, *Interagency Guidelines Establishing Standards for Safety and Soundness*, 12 C.F.R. § 208, Appendix D-1; FRB, OCC, FDIC, *Interagency Guidelines Establishing Information Security Standards*, 12 C.F.R. § 30, Appendix B; FRB, OCC, FDIC, *Interagency Paper on Sound Practices to Strengthen Operational Resilience* (November 2, 2020); FFIEC, *Business Continuity Management*, FFIEC IT Examination Handbook (November 14, 2019). *See also*, Acting Comptroller of the Currency Michael J. Hsu, "Thoughts on Operational Resilience," Speech at the Institute of International Bankers, (March 12, 2024), https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-23.pdf.

[14] SEC, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, 88 Fed. Reg. 51,896 (Aug. 4, 2023).

[15] CPPA, *Proposed Rulemaking Draft: Cybersecurity Audit Regulations* (Dec. 2023), https://cppa.ca.gov/meetings/materials/20231208_agenda_item2a_cybersecurity_audit_regulations_redline.pdf (companies would have to retroactively provide descriptions of any incident notifications made in any jurisdiction and associated remediation steps.)

examinations on a periodic basis" in order to "assess[] compliance with the requirements of Federal consumer financial laws" for insured depository institutions with total assets of more than $10 billion.[16] Dodd-Frank transferred all "consumer financial protection functions" from the federal banking agencies to the CFPB, including "*all* authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law."[17] These provisions divest the Agencies of authority to regulate and examine banks with total assets of more than $10 billion with respect to federal consumer financial law. Despite the lack of statutory authority, by all accounts, the Agencies have *increased* their consumer compliance activity, subjecting banks to entirely duplicative regimes with questionable legal basis.

This redundant and, at times, conflicting patchwork of rules, guidance, and supervisory practices makes it harder for banks to do business, drives up firms' costs, and ultimately hurts consumers and the broader economy. To the greatest extent possible, the Agencies should work together with other state and federal regulatory agencies to minimize duplicative and conflicting regulations and oversight.

**D. The Agencies have established unnecessary hurdles that prevent competition and innovation.**

Unnecessary regulatory burdens can deter competition and innovation that enhance industry resilience and the provision of banking services, including to underserved consumers and communities. Governor Bowman has emphasized the importance of addressing needless Agency hurdles to combination transactions. She recently observed, "In the absence of a viable M&A framework, we increase the potential for additional risks including limited opportunities for succession planning, especially in smaller or rural communities and zombie banks that continue to exist but have no competitive viability or exit strategy."[18] Governor Bowman also highlighted that regulatory delays for these kinds of transactions can lead to several adverse outcomes, including operational and reputational risks, increased expenses due to contract delays, and staff attrition. [19] Finally, barriers to effective competition and innovation make it difficult for banks to compete with non-bank entities. As Governor Bowman notes, "When we 'raise the bar' for banks to engage in certain activities in a way that is disproportionate to the risk of those activities, we create incentives for those activities to migrate to non-banks outside of the regulatory perimeter."[20] This uneven playing field pushes activity into sectors that may lack comparable oversight or internal controls.

Yet, despite this call for the need to reduce regulatory burdens in connection with proposed mergers, the OCC and FDIC are considering policy statements that would further complicate and delay bank mergers and acquisitions.[21] These proposals threaten to make even straightforward internal reorganizations more cumbersome and time-consuming. This approach poses a risk of deterring the kind of

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[16] 12 U.S.C. § 5515(b)(1).

[17] 12 U.S.C. § 5581(a)–(b) (emphasis added).

[18] Bowman, *supra* note 12.

[19] FRB Governor Michelle Bowman, "Reflections on the Economy and Bank Regulation," Speech at the Florida Bankers Association Leadership Luncheon, (Feb. 27, 2024), https://www.federalreserve.gov/newsevents/speech/bowman20240227a.htm.

[20] Bowman, *supra* note 12.

[21] OCC, *Business Combinations Under the Bank Merger Act*, 89 Fed. Reg. 10,010; FDIC, *FDIC Seeks Public Comment on Proposed Revisions to its Statement of Policy on Bank Merger Transactions* (March 21, 2024), https://www.fdic.gov/news/press-releases/2024/pr24017.html.

prudent restructurings that can enhance a firm's resilience and operational effectiveness, which are beneficial not just for consumers but for the financial system's safety and soundness as well. The Agencies should instead adopt a more streamlined approach to evaluating proposed transactions with clear timelines for review and agency action.

Additionally, the Agencies generally impose a lengthy consultation process (or, in the case of the Federal Reserve, a supervisory non-objection process) that fails to facilitate banks' timely adoption of new technologies to use in connection with traditional banking activities, such as distributed ledger technology, even in those cases in which banks have demonstrated they are able to safely manage the technology. Instead, the Agencies should provide greater support in their regulations, guidance, and supervisory activity for banks' broad authority to engage in activities in a technology-neutral manner and enhance the efficiency of any consultation process regarding banks' use of new technology. Finally, the Agencies should recalibrate their risk assessments, increase their expertise, and foster public-private partnerships to promote innovation that increases firms' efficiency and security.[22]

## II. The Agencies should make targeted changes to the categories of regulations currently under review to streamline the regulatory framework and refocus on critical risks to safety and soundness.

### A. Applications and Reporting: Bank Merger Act; Change in Bank Control; Notice of Addition or Change of Directors; Reduced Reporting for Covered Depository Institutions; National Bank and Federal Savings Association Rules, Policies, and Procedures for Corporate Activities; Call Reports and Other Forms, Instructions and Reports; Deposit Insurance Filing Procedures

*Expedited review*

Despite the fact that the Agencies' regulations contain expedited review procedures for various proposals and acquisitions, in practice, the Agencies rarely expedite the review of banks' applications.[23] To ensure these provisions are operative in practice, the Agencies should amend their regulations to permit institutions in satisfactory financial condition to qualify for streamlined review of internal reorganizations. As noted, the OCC and FDIC are currently reviewing policies that would potentially eliminate the ability for institutions to benefit from such streamlined review, contrary to the goal of enhancing the efficiency of the application review process. Additionally, limits should be imposed on the number of times the Agencies can ask for updated information and thereby delay the start of the time period for agency review, a common practice that undermines the effectiveness and efficiency of the review process, which can harm applicants, as described by Governor Bowman.[24]

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[22] *See generally,* Paige Pidano Paridon and Joshua Smith, *Distributed Ledger Technology: A Case Study of The Regulatory Approach to Banks' Use of New Technology* (Feb. 1, 2024), https://bpi.com/distributed-ledger-technology-a-case-study-of-the-regulatory-approach-to-banks-use-of-new-technology/; Paige Pidano Paridon and Joshua Smith, *Distributed Ledger Technology: Enhancing the Current Regulatory Approach* (Feb. 9, 2024), https://bpi.com/distributed-ledger-technology-enhancing-the-current-regulatory-approach/.

[23] *See, e.g.*, 12 C.F.R. 5.33(j); 12 C.F.R. 225.23; 12 C.F.R. 303.64(a).

[24] *See, e.g.,* 12 C.F.R. 225.16(f); 12 C.F.R. 5.50(f)(3); 12 C.F.R. 5.51(e). *See* Bowman, *supra* notes 12 and 19. Further, Agencies should provide clarity for when the record on an application is considered "complete." As is current practice, the completeness of the record is a subjective determination made by the Agencies with little transparency.

*Filing requirements*

The Agencies should remove any filing requirements for non-controlling equity investments by banks engaging in bank-permissible activities or for permissible activities by operating subsidiaries.[25]

*CSI for combination transactions*

Institutions that have entered into formal negotiations regarding a combination transaction should be permitted to share confidential supervisory information with the proposed counterparty and its advisors on a "need to know" basis, subject to an appropriate confidentiality agreement that prohibits sharing the CSI with other outside parties. Alternatively, the CSI could be shared with the prior permission of the relevant agency so long as such permission is readily obtainable through an established, uniform, and expeditious process.[26]

*"Well-managed" status and operating subsidiaries*

Congress intended the "well managed" standard in the Gramm-Leach-Bliley Act to assess whether national banks and federal savings associations could qualify to engage in new, non-traditional activities through financial subsidiaries, not whether they could continue to engage in traditional core banking activities.[27] Therefore, in the context of *operating subsidiaries*, "well managed" status should not require a rating of 2 for management under the Uniform Financial Institutions Rating System.[28]

*Outdated publication requirements*

Existing application requirements are outdated and should be updated to account for digital communication. For example, several regulations require a public notice to be published in a local newspaper.[29] Even when a newspaper notice is a statutory requirement, it remains an outdated approach. Therefore, the Agencies should utilize their interpretive authority to authorize additional forms of public notice, beyond newspaper publication, such as notices on an institution's website or social media. The Agencies should also endorse an amendment to the Bank Merger Act that permits alternative forms of public notice.

*Inconsistent definitions*

Inconsistent definitions across the Agencies' rules, guidance, and other materials unnecessarily increase the burden of reporting compliance. Therefore, the Agencies should conduct a comprehensive review to provide more uniform definitions. For example, the term "financial institution" is defined differently in the FFIEC 009/0098, FRY-15 and FRY-9C, and in 12 C.F.R. 217.2. Some definitions of the term specify the inclusion of certain types of firms, while in other instances, the definitions are silent with

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[25] *See, e.g.,* 12 C.F.R. 5.34; 12 C.F.R. 5.36.

[26] 12 C.F.R. 4.36; 12 C.F.R. 261.20; 12 C.F.R. 309.6

[27] 12 U.S.C. § 1843(l)(1).

[28] 12 C.F.R. 5.3; 12 C.F.R. 225.2(s); 12 C.F.R. 362.17(e)

[29] *See, e.g.,* 12 C.F.R. 211.5.; 12 C.F.R. 225.16; 12 C.F.R. 225.42; 12 C.F.R. 262.3.

respect to those same types of firms. In many cases, the definitions themselves rely on undefined terms.[30] Other examples of overlapping and inconsistent definitions include "senior officers,"[31] as well as "acting in concert" and "immediate family."[32]

*Clear and precise reporting requirements that prioritize safety and soundness*

The Agencies should review reporting requirements to ensure clear and precise instructions that prioritize information related to core safety and soundness considerations. For example, the granular level of detail required in the loans, securities, and deposit schedules on call reports and the reporting of insurance revenue could be reduced without compromising the Agencies' capacity to monitor financial condition. Additionally, the Agencies should allow institutions to submit information that does not go to the core of safety and soundness (such as a web page URL) at a later date than they are required to submit more important information (such as financial data). The Agencies could also help create efficiency and reduce the cost of regulatory compliance by working to standardize the data collected in regulatory reporting, including by using global standards like ISO 20022 or CPMI-IOSCO critical data elements.[33]

*Reporting of digital assets*

The SEC's Staff Accounting Bulletin No. 121 has posed challenges for U.S. banking organizations since it was issued on March 31, 2022.[34] The foremost concern is how the on-balance sheet requirement of SAB 121 negatively impacts U.S. banking and investors due to the associated prudential implications coupled with the overly broad definition of "crypto-asset" in SAB 121.[35] These aspects have had a chilling effect on banking organizations' ability to develop responsible use cases for distributed ledger technology more broadly. To help mitigate these challenges, Schedule RC-T of the call report should not require a bank to put a crypto-asset it holds in custody as a liability on its balance sheet and record a corresponding asset.[36] The Agencies should also encourage the SEC to clarify that the definition of "crypto-assets" in SAB 121 excludes traditional financial assets recorded or transferred using blockchain networks which do not pose the same risks as cryptocurrencies.

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[30] *See generally,* Wells Fargo, *Comment letter re Proposed Agency Information Collection Activities: Banking Organization Systemic Risk* (Oct. 18, 2017), https://www.federalreserve.gov/SECRS/2017/December/20171211/ICP-201723/ICP-201723_101817_131866_516361518606_1.pdf

[31] *See, e.g.,* 12 C.F.R. 5.51; 12 C.F.R. 225.31; 12 C.F.R. 225.71; 12 C.F.R. 303.101; 12 C.F.R. 238.72.

[32] *See, e.g.,* 12 C.F.R. 5.50; 12 C.F.R. 225.41; 12 C.F.R. 238.31; 12 C.F.R. 303.81.

[33] *See generally,* BPI, *Comment letter re National Bank and Federal Savings Association Digital Activities* (Aug. 3, 2020), https://bpi.com/wp-content/uploads/2020/08/BPI-Digital-Activities-ANPR-Comment-Letter-2020.08.03.pdf.

[34] *See* SEC, *Staff Accounting Bulletin No. 121* (March 32, 2022), https://www.sec.gov/oca/staff-accounting-bulletin-121.

[35] SAB 121 defines a "crypto-asset" as "a digital asset that is issued and/or transferred using distributed ledger or blockchain technology using cryptographic techniques." *Id.*

[36] *See* BPI, ABA, SIFMA, *Comment letter re Staff Accounting Bulletin No. 121* (June 23, 2022), https://www.sifma.org/wp-content/uploads/2022/06/ABA-BPI-and-SIFMA-SAB-121-Letter-6.23.22.pdf.

**B. Powers and Activities: National Bank Electronic Activities; National Bank Fiduciary Activities**

*Use of new technologies to conduct traditional activities*

The OCC's regulations governing "National Bank Electronic Activities" provide that a national bank may conduct electronically any activity that it is "otherwise authorized" to conduct.[37] The OCC correctly recognizes banks' authority to use new technology to carry out the business of banking, and the agency should strengthen the regulation through several amendments that would help promote competitive parity with non-banks and ensure that banks offer secure and effective services.[38]

- 12 C.F.R. 7.5007 should be amended to permit banks to offer correspondent services to any third party, not just affiliates and financial institutions.

- 12 C.F.R. 7.5006 should clarify that banks may process and transmit data of any type, provided that such services are incidental to an otherwise bank-permissible activity.

- 12 C.F.R. 7.5001(d)(3) should be expanded to include additional examples of permissible digital activities, including (i) offering online safe deposit box-like products, which may hold and share financial and non-financial information; (ii) selling advertising space on the bank's digital footprint; (iii) using biometric data for the purpose of authenticating a customer's identity; (iv) offering digital ID products and services; (v) building a bank-owned cloud for the storage of data; and (vi) using tokenized accounts and distributed ledger technology.

- 12 C.F.R. 7.5007 should be amended to update and clarify banks' authority over software. First, the regulation should permit banks to sell software regardless of the distribution model of that software. A bank should have the authority to license or sell software through a software-as-a-service model in which the software is hosted and made available to customers over the Internet, including through subscription pricing. Second, the regulation should clarify that banks have authority over *any* technology solution used by the bank that is part of or incidental to the business of banking beyond software, including, for example, application programming interfaces as required by the CFPB's 1033 proposal.[39] Third, the OCC should consider whether banks' software authorities should be limited to economic and financial software, or whether these authorities should cover software used for broader examples, such as to provide management consulting on any issue.

Building on the National Bank Electronic Activities rule and the suggested amendments, all three of the Agencies should promulgate regulations that clearly and straightforwardly describe banks' broad

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[37] 12 C.F.R. 7.5002(a).

[38] *See* BPI, *Comment letter re National Bank and Federal Saving Association Digital Activities* (Aug. 3, 2020), https://bpi.com/wp-content/uploads/2020/08/BPI-Digital-Activities-ANPR-Comment-Letter-2020.08.03.pdf.

[39] CFPB, *Required Rulemaking on Personal Financial Data Rights*, 88 Fed. Reg. 74,796.

authority to engage in digital activities—without regard to the characterization of the particular digital asset in question—so long as such activities fall within core or incidental banking activities.[40] The Agencies should strive to foster a level playing field by applying the same standards to all institutions within their jurisdiction and promoting the application of comparable standards for banks and non-banks.

The Agencies also should refine their supervisory approach to banks' use of new technology.[41] First, Agencies should eliminate their unnecessarily burdensome pre-approval and non-objection processes for banks to engage in (the misleadingly named) "crypto-related activities," including the use of DLT.[42] Second, risk assessments should include fair consideration of the risk that a bank that fails to adopt new technology will not have adequate defenses to counter emerging threats, such as countering criminal actors using AI for fraud or foreign adversaries deploying quantum computing to decrypt sensitive financial data. Third, the Agencies should streamline the process for lower-risk activities where banks have already demonstrated they can operate safely and soundly, such as for private-permissioned blockchain, in line with technology-neutral and principles-based regulation. Fourth, the Agencies should enhance their expertise in novel technology in order to effectively assess risks and tailor regulations. Finally, the Agencies should engage in public-private partnerships with banks to encourage safe innovation.

*Materiality principle for and periodic review of board of directors requirements*

Absent special circumstances, materiality standards should be applicable to any audit reports or related information required to be presented to a board of directors under the Agencies' regulations or guidance. Mandatory board review of audit reports identifying any and all findings, process issues or weaknesses, without respect to the significance of the identified issues or weaknesses, could unnecessarily divert board attention from its critical core functions. The Agencies' regulations and guidance must also be consistent with well-accepted corporate law principles and practices, including the important distinction between the respective roles of the board and that of management and that, while board minutes reflect board discussions at meetings, they are not intended to be a transcript of proceedings or to serve as lists of information or findings, such as audit findings, provided to the board or a committee.

Accordingly, the prescriptive requirement in 12 C.F.R. 9.9 requiring that audit results of fiduciary activities conducted pursuant to Part 9, including significant actions taken as a result of the audit, be noted in national bank board minutes should be eliminated. This requirement is unwarranted because it misconstrues the nature and purpose of board minutes, inappropriately encroaches on the distinction between oversight and management, and imposes an unnecessary burden on banking organizations.

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[40] Pursuant to the National Bank Act, a national bank shall have the power to exercise "*all such incidental powers as shall be necessary to carry on the business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . ." 12 U.S.C. § 24 (emphasis added). FDIC-insured state banks may not generally engage as principal in activity that is not permissible for a national bank. *See* 12 U.S.C. § 1831a(a)(1). *See also,* BPI, CBA, *Comment letter re Request for Information and Comment on Digital Assets* (July 16, 2021), https://bpi.com/wp-content/uploads/2021/07/BPI-CBA-Comment-Letter-FDIC-RFI-on-Digital-Assets-July-16.pdf.

[41] *See* BPI, CBA, *Comment letter re Request for Information and Comment on Digital Assets* (July 16, 2021), https://bpi.com/wp-content/uploads/2021/07/BPI-CBA-Comment-Letter-FDIC-RFI-on-Digital-Assets-July-16.pdf.

[42] *See generally,* Paridon, *supra* note 22.

Therefore, both the board minutes-related requirements of 12 C.F.R 9.9(a) for annual audits and 12. C.F.R 9.9(b) for continuous audit systems should be revoked.[43]

Finally, the Agencies should conduct periodic reviews of the regulations and guidance impacting boards of directors to ensure they retain their relevance and reflect core board functions and sound governance practices.

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The Bank Policy Institute appreciates the opportunity to comment as part of the EGRPRA review. If you have any questions, please contact me by phone at (202) 589-2534 or by email at joshua.smith@bpi.com.

Respectfully submitted,

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[43] *See generally* BPI, *Comment letter re OCC Review of Information Collections Required by 12 C.F.R. Part 9* (January 14, 2019), https://bpi.com/wp-content/uploads/2019/01/BPI-Comment-Letter-on-OCC-Part-9-OCC-1557-0140-1-14-19.pdf.