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

AMICUS CURIAE SUBMISSION OF THE NEW YORK LEAGUE OF INDEPENDENT BANKERS IN SUPPORT OF NEITHER PARTY

The New York League of Independent Bankers ("NYLIB") submits this brief as amicus curiae.[1] NYLIB does not take any position on the merits of Builders Bank's ("Builders'") challenge to its composite CAMELS rating of "4." Rather, NYLIB files this brief to address certain of the Federal Deposit Insurance Corporation's ("FDIC's") arguments in its July 7, 2017 motion to dismiss (the "Motion to Dismiss") that, if adopted, might place the FDIC's CAMELS ratings, as well as those of the other federal banking agencies, beyond judicial review.

NYLIB respectfully submits that the Court should reject the FDIC's arguments that CAMELS ratings are beyond the ability of the federal courts to review. It is important that the possibility of judicial review of CAMELS ratings remains available where the FDIC or other federal banking agencies engage in arbitrary or capricious decision-making.

STATEMENT OF INTEREST

NYLIB is a New York not-for-profit organization devoted to fostering the prosperity of banks in the greater New York metropolitan area. NYLIB's membership includes community banks in the greater New York metropolitan area, as well as the New York branches of foreign banks, and includes financial institutions that are supervised and examined by the FDIC and other federal agencies that assign CAMELS ratings.

Community banks are, as their name suggests, relatively small and often locally owned and operated organizations that pride themselves on strong relationships with their customers and communities. Across the nation, and in the greater New York metropolitan area, community banks are proud to play a vital economic role as the leading provider of credit to small

[1] NYLIB affirms that no party or counsel for a party authored this brief in whole or in part, that no person other than NYLIB and its counsel contributed any money to fund the brief's preparation or submission, and that NYLIB is not a subsidiary or affiliate of any corporation.

businesses,[2] which account for an outsized percentage of the nation's private sector output, employment, and net job growth.[3] While the number of community banks has declined dramatically in recent years, causing widespread concern,[4] there is a growing recognition across the political spectrum that, in contrast to too-big-to-fail institutions, the regulatory burdens on community banks should be reexamined and reduced.[5]

As an organization whose members include financial institutions supervised and examined by the FDIC and other federal banking agencies that issue CAMELS ratings, NYLIB has a strong interest in promoting reasoned agency decision-making and the rule of law with respect to CAMELS ratings and other of the federal banking agencies' material supervisory determinations.

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[2] Bd. of Governors of the Fed. Reserve Sys., *Supervisory Policy and Guidance Topics: Community Banking*, https://www.federalreserve.gov/supervisionreg/topics/community_banking.htm (last visited Aug. 29, 2017) ("Community banks . . . are the leading provider of credit to small businesses."); *see also* Janet L. Yellen, Chair, Bd. of Governors of the Fed. Reserve Sys., Speech at the "Fostering a Dynamic Global Recovery" Symposium Sponsored by the Fed. Reserve Bank of Kansas City, Jackson Hole, Wyoming: Financial Stability a Decade after the Onset of the Crisis (Aug. 25, 2017), https://www.federalreserve.gov/newsevents/speech/yellen20170825a.htm ("Smaller firms rely disproportionately on lending from smaller banks . . . .").

[3] *See* George A. Kahn et al., "The Role of Community Banks in the U.S. Economy," Fed. Reserve Bank of Kansas City Econ. Rev., Second Quarter 2003, 24, https://www.kansascityfed.org/Publicat/econrev/Pdf/2q03keet.pdf ("Community banks' role as small business lenders is important because small businesses account for a significant share of total output and employment growth.").

[4] *See, e.g.*, Roisin McCord et al., "Explaining the Decline in the Number of Banks since the Great Recession," Fed. Reserve Bank of Richmond, Econ. Brief 15-03, 1 (March 2015), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-03.pdf (noting that unprecedented "collapse in new bank entry . . . could have significant economic repercussions").

[5] *See, e.g.*, Yuka Hayashi, *Elizabeth Warren Calls for Targeted Deregulation of Community Banks: Rules for Big Banks, Consumer Protections Should Stay as They are, Democratic Senator Says*, Wall St. J., June 13, 2017, https://www.wsj.com/articles/elizabeth-warren-calls-for-targeted-deregulation-of-community-banks-1497387239; Janet L. Yellen, Chair, Bd. of Governors of the Fed. Reserve Sys., Speech at the "Fostering a Dynamic Global Recovery" Symposium Sponsored by the Fed. Reserve Bank of Kansas City, Jackson Hole, Wyoming: Financial Stability a Decade after the Onset of the Crisis (Aug. 25, 2017), https://www.federalreserve.gov/newsevents/speech/yellen20170825a.htm ("[T]he Federal Reserve has been taking steps and examining additional steps to reduce unnecessary complexity in regulations affecting smaller banks . . . .").

ARGUMENT

I. Banks Assigned Arbitrary CAMELS Ratings Are Adversely Affected or Aggrieved Within the Meaning of a Relevant Statute

Builders asks the Court to find that it is subject to a composite CAMELS rating of "4" that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the Administrative Procedure Act ("APA"). The FDIC, in turn, claims that Builders "has not alleged the violation of any statute" and "at most . . . is alleging a violation of" the Uniform Financial Institutions Rating System ("UFIRS"). Mot. to Dismiss 13.[6] If adopted, the FDIC's argument that Builders has not alleged a violation of a statute could forever shield UFIRS ratings, more commonly referred to as "CAMELS" ratings, from judicial review under the APA. NYLIB submits that the FDIC's argument should be rejected, primarily for two reasons.

First, a bank that is subject to an arbitrary and capricious CAMELS rating is indeed "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. To be "adversely affected or aggrieved by agency action within the meaning of a relevant statute" means that the injury complained of "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396-97 (1987)). This test, which is "not meant to be especially demanding," is met here. *Clarke*, 479 U.S. at 399. The UFIRS is the result of a congressional mandate that the FDIC and other federal banking agencies join together, in the form of a Federal Financial Institutions Examination Council ("FFIEC"), to "establish *uniform principles and standards* and report forms for the examination of financial institutions which *shall be applied* by the Federal financial institutions regulatory agencies." 12 U.S.C. § 3305(a) (emphasis

[6] *See* Uniform Financial Institutions Rating System, 61 Fed Reg. 67,021 (Dec. 19, 1996).

added); *see also* 12 U.S.C. § 3301 (purpose of FFIEC is to prescribe "uniform principles and standards" for examinations). The FDIC is also required to conduct examinations of its supervised financial institutions and to issue findings via a "full and detailed" report of examination. 12 U.S.C. § 1820(b)(6)(B), (d)(1). A financial institution that is examined by the FDIC and that is subjected to the arbitrary and capricious application of the FFIEC's uniform principles and standards is aggrieved within the meaning of these statutes because the institution falls within the "zone of interests" the statutes seek to protect – namely, the interest of banks and other financial institutions in the application of uniform principles and standards during examinations. *See Clarke*, 479 U.S. at 403 ("The interest respondent asserts has a plausible relationship to the policies underlying [the statute] . . . .").

Second, the FDIC's suggestion that 5 U.S.C. § 702 "requires a statutory violation," Mot. to Dismiss 13, is incorrect. *See, e.g.*, *Head Start Family Educ. Program, Inc. v. Coop. Educ. Serv. Agency 11*, 46 F.3d 629, 633 (7th Cir. 1995) ("An agency's failure to follow its own regulations has traditionally been recognized as reviewable under the APA."); *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 930 (9th Cir. 2015) ("Under the Administrative Procedure Act, an aggrieved person may challenge an agency's implementation of its own regulation."). Here, the UFIRS was adopted by the Board of Directors of the FDIC after notice and comment, was published in the Federal Register (both by the FFIEC and by the FDIC), and is "effective for examinations." Uniform Financial Institutions Rating System, 62 Fed. Reg. 752, 752 (Jan. 6, 1997). That is enough for a challenge under the APA based on an alleged FDIC failure to apply the UFIRS criteria and supporting FDIC policies and standards contained in FDIC examination manuals in a non-arbitrary fashion.

Any alternative ruling would risk significantly increasing the potential for arbitrary, capricious, and unjustified agency action by the FDIC, as well as the other federal banking agencies that issue CAMELS ratings.

II. A CAMELS Rating in a Report of Examination is a Final Agency Action

The FDIC argues that a CAMELS rating is not a "final agency action" as required for APA review under 5 U.S.C. § 704 because an appeal of a CAMELS rating via the FDIC's two-step intra-agency appeals process is required for a final agency action. *See* Mot. to Dismiss 9, 13-19.[7] NYLIB submits that a CAMELS rating assigned to a financial institution in an FDIC report of examination is a final agency action *regardless* of whether the institution has chosen to challenge the rating through the FDIC's optional intra-agency appeals process.

A. The FDIC's Attempt to Backdoor a Broad Exhaustion Requirement into the APA's Requirement for a "Final" Agency Action Should Be Rejected

The FDIC's argument that a CAMELS rating is not "final" absent an intra-agency appeal really is not an argument about finality, but about administrative exhaustion. But "the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). The Supreme Court has clearly held that the general, judicially-derived doctrine of exhaustion does not apply in cases governed by the APA:

> [W]ith respect to actions brought under the APA, Congress effectively codified the doctrine of exhaustion of administration remedies in § 10(c) [codified at 5 U.S.C. § 704]. Of course, the exhaustion doctrine continues to apply as a matter of judicial discretion *in cases not governed by the APA*. But where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial

[7] *See generally* Intra-Agency Appeal Process: Guidelines for Appeals of Material Supervisory Determinations and Guidelines for Appeals of Deposit Insurance Assessment Determinations, 77 Fed. Reg. 17,055 (Mar. 23, 2012) (detailing the FDIC's intra-agency appeal guidelines in place when Builders received its composite CAMELS rating of "4"); Guidelines for Appeals of Material Supervisory Determinations, 82 Fed. Reg. 34,522 (July 25, 2017) (detailing the FDIC's current intra-agency appeal guidelines).

> review *only* when [1] expressly required by statute or when an agency rule requires appeal before review and [2] the administrative action is made inoperative pending that review.

Darby, 509 U.S. at 154 (first emphasis added). Neither of these required conditions apply to CAMELS ratings assigned by the FDIC (or other of the FDIC's material supervisory determinations that may be challenged through its intra-agency appeals process, for that matter).

With respect to the first *Darby* requirement, no statute or FDIC rule expressly *requires* that a financial institution utilize the FDIC's intra-agency appeals process as a prerequisite to federal court review of an FDIC material supervisory determination, such as a CAMELS rating. It is true that Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (the "Riegle Act"), codified at 12 U.S.C. § 4806, required each of the federal financial regulatory agencies then in existence, including the FDIC, to "establish an independent intra-agency appellate process," and to make that process "available" to supervised financial institutions for the review of the agencies' "material supervisory determinations," which were defined to include "examination ratings." 12 U.S.C. § 4806(a), (f)(1)(A)(i). Nowhere in the Riegle Act, nor in any subsequently enacted statutes, however, did Congress *require* financial institutions aggrieved by material supervisory determinations to utilize the agencies' intra-agency appeals processes. Nor do the FDIC's intra-agency appeals process guidelines – in effect either when Builders received its composite rating of "4" or currently – purport to *require* financial institutions such as Builders to utilize the FDIC's intra-agency appeals process prior to seeking review of a material supervisory determination in federal court. *See* Intra-Agency Appeal Process, 77 Fed. Reg. at 17,057 ("An institution *may* appeal any material supervisory determination pursuant to the procedures set forth in these guidelines." (emphasis added)); *id.* ("An institution *may* file a request for review of a material supervisory determination with the

Division . . . that made the determination . . . .” (emphasis added)); Guidelines for Appeals of Material Supervisory Determinations, 82 Fed. Reg. at 34,526 (same).

Agencies do know how to make their intra-agency appeals processes clearly prerequisite to judicial review. *See Shawnee Trail Conservancy v. U.S. Dep’t of Agric*., 222 F.3d 383, 389 (7th Cir. 2000) (holding that agency regulation providing that judicial review was “premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part” explicitly required exhaustion as a prerequisite to judicial review). But the FDIC has chosen not to require that its intra-agency appeals process be utilized as a prerequisite to judicial review. While “[5 U.S.C. § 704] explicitly requires exhaustion of all intra-agency appeals *mandated* either by statute or by agency rule[,] it would be inconsistent with the plain language of [Section 704] for courts to require litigants to exhaust *optional* appeals as well.” *Darby*, 509 U.S. at 147 (emphasis added). Although the FDIC could easily choose to “avoid the finality of an initial decision” on a CAMELS rating in a report of examination “by adopting a rule that an agency appeal be taken before judicial review is available” (as well as by making its initial decision “inoperative” pending appeal, as discussed immediately below), the FDIC has declined to do so. *Id.* at 152.

Similarly, with respect to the second *Darby* requirement, the FDIC does not make material supervisory determinations such as CAMELS ratings “inoperative” pending an intra-agency appeal, as would be required for its intra-agency appeals process to be effective as a prerequisite to judicial review. *See id.* at 154. To the contrary, the FDIC explicitly specifies that its material supervisory determinations, including CAMELS ratings, *remain in effect* during the pendency of an intra-agency appeal. *See* Intra-Agency Appeal Process, 77 Fed. Reg. at 17,057 (“The use of the procedures set forth in these guidelines by any institution will not affect, delay,

or impede any formal or informal supervisory or enforcement action in progress or affect the FDIC's authority to take any supervisory or enforcement action against that institution."); Guidelines for Appeals of Material Supervisory Determinations, 82 Fed. Reg. at 34,528 (same).

The FDIC's exhaustion-based "finality" arguments thus run directly afoul of *Darby*, which limits the exhaustion-based arguments that the FDIC is permitted to make.[8]

B. A CAMELS Rating is a Final Agency Action

Contrary to the FDIC's arguments, NYLIB submits that a CAMELS rating in an FDIC report of examination is a final agency action – regardless of whether the financial institution choses to utilize the FDIC's optional intra-agency appeals process and receives an adverse decision, or choses to seek relief directly in federal court. As explained by the Supreme Court,

> [T]wo conditions must be satisfied for agency action to be "final": First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citing, *inter alia*, *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948)). The Supreme Court has instructed courts to take a "pragmatic" approach when analyzing whether an agency decision is final. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). Applying a pragmatic approach here results in the conclusion that a CAMELS rating in an FDIC report of examination is a final agency action under *Bennett*'s two-part test.

[8] Although a CAMELS rating or the facts underlying a CAMELS rating can be grounds for an enforcement action seeking an order to cease-and-desist from an "unsafe or unsound" practice, no statute or regulation requires the FDIC to upwardly revise a CAMELS rating if the FDIC fails to meet its burden of proving to an administrative law judge, by a preponderance of the evidence, that an unsafe or unsound practice exists. *See* 12 U.S.C. §§ 1818(b)(1), (8); *In the Matter of the Am. Bank of the S., Merritt Island, Fla. (Insured State Nonmember Bank)*, No. FDIC-92-17b, 1992 WL 813377, at *35 (Nov. 24, 1992) ("The FDIC's burden of proof in this proceeding [seeking a cease-and-desist order under Section 1818(b)(1)] i[s] one of a preponderance of the evidence.").

With respect to the first *Bennett* condition, a CAMELS rating is not "tentative" or "interlocutory." As long as a financial institution does not choose to initiate the FDIC's optional intra-agency appeals process, the rating remains in place, and represents the "consummation" of the agency's decision-making process. The situation presented is thus utterly unlike the case cited by *Bennett* for the "consummation" principle. *See Chicago & S. Air Lines*, 333 U.S. at 112-13. In that case, the challenged agency order was not the "consummation" of the agency's decision-making process because of a statutory provision, "unparalleled in the history of American administrative bodies," requiring presidential approval that rendered the agency's order no more than a "recommendation to the President." *Id*. at 109, 112-13. The FDIC's assertions in the Motion to Dismiss that review by its Supervision Appeals Review Committee ("SARC") constitutes the "final" or "consummat[e]" level of its decision-making process ignores the reality that – unlike in *Chicago & South Air Lines* – each step of the FDIC's two-step intra-agency appeals process can only be initiated at the option of the financial institution that is subject to the agency's action. *See* Mot. to Dismiss 14, 16.

Second, CAMELS ratings downgrades, once assigned via an FDIC report of examination, indisputably determine obligations of financial institutions that are supervised by the FDIC and result in legal consequences, such as higher FDIC deposit insurance premiums. *See, e.g.*, 12 C.F.R. § 327.9.

In short, "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under [5 U.S.C. § 704]" – as it has when the FDIC assigns a CAMELS rating to a financial institution in a report of examination and the financial institution does not opt to utilize the FDIC's voluntary intra-agency appeals process. *See Darby*, 509 U.S. at 154. It is instructive that in *Darby*, where the

issue of exhaustion in the APA context was litigated before the Supreme Court, the respondent Secretary of the Department of Housing and Urban Development ("HUD") *conceded* that HUD's action was "final" despite the petitioners' choice to complete the first, but not the second, level of the agency's intra-agency appeals process. *See id.* at 141-42, 144 ("[HUD] concedes that petitioners' claim is 'final' under [5 U.S.C. § 704], for neither the National Housing Act nor applicable HUD regulations require that a litigant pursue further administrative appeals prior to seeking judicial review."). The FDIC should have conceded the finality issue here as well.

C. The FDIC's Position that an Intra-Agency Appeal to the SARC is Required for Final Agency Action is Troubling Given the FDIC's Ability, Under Its Intra-Agency Appeals Guidelines, to Completely Eliminate an Institution's Ability to Utilize the FDIC's Intra-Agency Appeals Process

The FDIC's argument in the Motion to Dismiss that an intra-agency appeal to the SARC is required as a prerequisite to judicial review is troubling from a practical standpoint. This is because the FDIC also takes the position that an institution is without recourse to the FDIC's intra-agency appeals process with respect to "the determinations and the underlying facts and circumstances that form the basis of a recommended or pending enforcement action" whenever the FDIC "provides written notice to a bank indicating its intention to pursue formal enforcement remedies." *See* Intra-Agency Appeal Process, 77 Fed. Reg. at 17,057. The FDIC can thus prevent a financial institution from pursuing an intra-agency appeal merely by indicating an intention to pursue a formal enforcement action at some undisclosed, future point in time.[9]

[9] *See* Pinchus D. Raice & Meghan Dwyer, *Intra-Agency Appeals and Administrative Enforcement Actions*, 405 Banking Practice Portfolio Series A-14 (BNA 2014) ("[T]he FDIC guidelines allow the agency to so severely circumscribe the availability of the mandated appeal process as to functionally eviscerate it. By announcing an intent to possibly pursue a formal enforcement action at some undisclosed time in the future, the FDIC can deny institutions access to the intra-agency appeal process.").

Indeed, the FDIC took the position with respect to Builders that because the FDIC had notified Builders on June 3, 2015 of its "decision to pursue" a consent order,[10] "the underlying facts and circumstances that formed the basis of [that] enforcement action" – including "numerous sections throughout the [Report of Examination], *and our assigned ratings*" were "unappealable." *See* Email from David Van Vickle, Assistant Regional Director, FDIC, to Mitchell Saywitz, CEO, Builders Bank (June 22, 2015, 3:07 PM), *attached as* Exhibit A (emphasis added).[11] It was only *after* Builders filed a complaint in Case No. 15-cv-6033 seeking judicial review of its composite CAMELS rating of "4" that the FDIC reversed itself by stating that the Bank actually could appeal its CAMELS rating through the FDIC's intra-agency appeals process. *See* Mem. Op. and Order 5, Apr. 25, 2016, ECF No. 26, Case No. 15-cv-6033. Absent Builders' choice to file a complaint in federal court seeking judicial review of its composite CAMELS rating, it seems unlikely that the FDIC would have reversed its prior determination that its "assigned ratings" were "unappealable" – a reversal that, it just so happened, created an opportunity for the FDIC to argue to this Court that its composite CAMELS rating was non-final due to Builders' "failure" to utilize the FDIC's intra-agency appeals process.

While the FDIC's intra-agency appeals process guidelines allow the FDIC to close the door to the intra-agency appeals process by vaguely announcing a decision to pursue a formal enforcement action at an undisclosed future time, the FDIC may never actually pursue a formal enforcement action. Meanwhile, a financial institution's window to file an intra-agency appeal

[10] A consent order is a type of cease-and-desist order issued by the FDIC in which the institution stipulates not to appear at a hearing before an administrative law judge to contest the issuance of the order. *See* 12 U.S.C. § 1818(b)(1)-(2). An institution's stipulation to a consent order frees the FDIC from having to prove in a hearing before an administrative law judge that the requirements for the issuance of a cease-and-desist order exist. *See id.*

[11] This email was attached as Exhibit C to the Supplemental Record on Appeal, ECF No. 15-3, on the Seventh Circuit docket (Case No. 16-2852), and is identified on PACER as "Redacted Exhibit F to Appellee's Motion to Dismiss."

of a material supervisory determination in a report of examination will expire 60 calendar days after its receipt of the report. *See* Intra-Agency Appeal Process, 77 Fed. Reg. at 17,057 (providing that "[n]o appeal to the SARC will be allowed" absent a timely first-level appeal). The FDIC's intra-agency appeals guidelines thus purport to give it the power to indefinitely close the door to an intra-agency appeal due to the FDIC's announcement of an intention to pursue a formal enforcement action, while simultaneously causing the time period for an intra-agency appeal to expire.

III. The UFIRS and Associated FDIC Materials Provide Meaningful Standards to Review the FDIC's Assignment of CAMELS Ratings

NYLIB provides no comment on whether the composite CAMELS ratings of "4" assigned by the FDIC to Builders is arbitrary and capricious or otherwise unlawful. Instead, NYLIB writes to make a separate, but systematically important point – that the UFIRS and associated materials, such as FDIC examination manuals, provide meaningful standards by which to review the FDIC's assignment of CAMELS ratings.

The Motion to Dismiss does not explicitly state that the FDIC is arguing that CAMELS ratings can *never* be reviewed by the federal courts, even if the financial institution does choose to utilize the FDIC's optional intra-agency appeals process and does receive an adverse decision from the SARC. Yet the FDIC has recently made this position clear elsewhere:

> A commentator stated that the FDIC should clarify that SARC decisions [on material supervisory determinations such as CAMELS ratings] may be appealed to the federal courts of appeal. The FDIC notes that *because supervisory determinations are entrusted to agency discretion, SARC decisions are not appealable*.

Guidelines for Appeals of Material Supervisory Determinations, 82 Fed. Reg. at 34,525 (emphasis added). Thus, the FDIC's true position – which it seeks to advance through this case

– is that CAMELS ratings and other material supervisory determinations can *never* be reviewed by the federal courts, no matter how arbitrarily and capriciously the FDIC arrives at them.

This argument should be rejected. Despite the FDIC's contentions, it is clear that judicial review of CAMELS ratings *is* possible under the APA in appropriate circumstances. To consider one example, the UFIRS requires examiners to consider no less than eight factors, at minimum, in arriving at a component rating for capital adequacy (the "C" in "CAMELS"). Uniform Financial Institutions Rating System, 62 Fed. Reg. at 754 ("The capital adequacy of an institution is rated based upon, but not limited to, an assessment of the following [eight] evaluation factors . . . ."). If the FDIC were to consider zero of the eight mandatory factors in arriving at a component rating for capital adequacy, and instead were to assign a "5" rating based on an entirely irrelevant factor such as the height of the institution's CEO, it cannot seriously be debated that the UFIRS and the FDIC's examination manuals would provide the federal courts with meaningful standards to review the FDIC's component rating for capital adequacy, as well as any composite rating based on the capital adequacy component, and to determine those ratings to be arbitrary, capricious, and unlawful. *See, e.g.*, *Head Start Family Educ. Program, Inc.*, 46 F.3d at 632-33 (holding that meaningful standards for judicial review of agency's award of grant existed under 5 U.S.C. § 701(a)(2) based on, *inter alia*, relevant statutes and regulations, and explaining that review under 5 U.S.C. § 706(2)(A) requires determining "whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" (quotation marks and citation omitted)); *Builders Bank v. FDIC*, 846 F.3d 272, 276 (7th Cir. 2017) (explaining that even if the setting of minimum capital levels is wholly committed to agency discretion under 5 U.S.C. § 701(a)(2), "it [still] would be possible for a court to review the capital rating itself" because examiners cannot commit mathematical errors

and "[p]ut assets in the liability column"). Yet the FDIC's position, which it is seeking to advance through this litigation, is literally that even in the most egregious, arbitrary, and unfair of circumstances, where the FDIC has not considered *any* of the relevant factors and has instead considered *entirely* irrelevant factors in assigning CAMELS ratings, the federal courts would be unable to right the FDIC's wrong. *See* Guidelines for Appeals of Material Supervisory Determinations, 82 Fed. Reg. at 34,525 ("SARC decisions are not appealable").

The Court should not adopt the FDIC's argument that the federal courts cannot review the FDIC's material supervisory determinations, including CAMELS ratings, under any circumstances.

IV. Federal Court Review of CAMELS Ratings Under the Deferential Standards of the APA Would Not Render the Intra-Agency Appeals Process "Meaningless"

The FDIC argues that allowing financial institutions to obtain judicial review of CAMELS ratings without first engaging in the intra-agency appeals process would render that process "meaningless." Mot. to Dismiss 17.

Allowing judicial review of CAMELS ratings is not likely to lead to most, or even many, CAMELS ratings being challenged in federal court. Review of agency decision-making under the APA is not de novo, but rather is deferential to the agency. *See, e.g.*, *Head Start Family Educ. Program, Inc.*, 46 F.3d at 633 (explaining that review under 5 U.S.C. § 706(2)(A) is a "narrow standard of review, under which we may not substitute our judgment for that of the agency"). Financial institutions have little incentive to pay for frivolous federal lawsuits, and are likely only to bring the strongest cases in federal court. Participating in the FDIC's intra-agency appeals process is attractive in the first instance, moreover, as that process is decidedly more informal and significantly cheaper than a federal lawsuit. It also is nonpublic, which is attractive to financial institutions that may not wish to advertise their regulatory problems.

If anything, allowing financial institutions to appeal CAMELS ratings directly to the federal courts in cases involving arbitrary and capricious decision-making is likely to strengthen and render more meaningful the FDIC's intra-agency appeals process. At present, too many financial institutions do not utilize the federal banking agencies' intra-agency appeals processes to challenge arbitrary, capricious, or otherwise unlawful agency actions because they believe that appeal to the agencies would be futile or fear retaliation from the agencies' examiners. *See* Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. U. L. Rev. 1101, 1167 (2015) ("[T]he survey data suggest the appeal processes are not functioning properly. Some financial institutions believe that appealing is futile. Others fear retaliation."). Affirming that review to a federal court is possible is likely to, if anything, increase the number of intra-agency appeals by increasing financial institutions' confidence in the integrity of the intra-agency appeals process. It is also likely to improve the integrity of the FDIC's examinations by incentivizing FDIC examiners to take care to consider all relevant factors and to avoid arbitrary and capricious decision-making that could be subject to a judicial challenge.

CONCLUSION

For the foregoing reasons, NYLIB submits that the FDIC's position that CAMELS ratings are *never* reviewable by the federal courts, no matter how arbitrarily, capriciously, or otherwise unlawfully the FDIC has arrived at those ratings, should be rejected.

Dated: September 13, 2017

Respectfully submitted,

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