TexasBankers Association
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Submitted via Electronic Delivery
at comments@fdic.gov

June 3, 2022

James P. Sheesley
Assistant Executive Secretary
Attention: Comments—RIN 3064–ZA32
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

RE: Principles for Climate-Related Financial Risk Management (RIN 3064–ZA32)

Dear Sir:

The Texas Bankers Association (TBA) is the oldest and largest state banking association in the nation consisting of approximately 400 federally insured depository institutions headquartered or conducting business in the State of Texas. We take this opportunity to submit comments and express process concerns in response to the Notice of Proposed Policy Statement published in the *Federal Register* of April 4, 2022.[1]

By way of prefatory comment, on February 1, 2022, TBA's Board of Directors adopted the following resolution: ***Resolved,*** that the TBA Board of Directors urges the Federal Deposit Insurance Corporation (FDIC) Board of Directors not to make any official policy decisions until bipartisan representation is returned to the Board.

In several recent decisions, the Supreme Court has pointed out that multimember administrative agencies, as opposed to single directorships, are accorded independent authority due to several organizational features including, most notably, a board composition consisting of members not being "from the same political party."[2] In doing so, the Court further observed that "the Board was designed to be 'non-partisan' and 'act with entire impartiality' and to also avoid a 'complete change' in leadership 'at any one time.'"[3]

[1] 87 *Fed. Reg.* 19508.

[2] *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), citing *Humphrey's Executor* v. *United States*, 55 S. Ct. 869 (1935); 295 U.S. 602 (1935).

[3] *Humphrey's Executor*, *Id.* at 619-624.

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At the time of the adoption of the Proposed Policy Statement, the membership of the FDIC's Board of Directors contained none of these essential conditions.

The Proposed Policy Statement would for the first time seek to establish, monitor, and presumably enforce risk-management policies purportedly aimed at addressing "harm to people and property arising from acute, climate-related events, such as hurricanes, wildfires, floods, and heatwaves, and chronic shifts in climate, including higher average temperatures, changes in precipitation patterns, sea level rise, and ocean acidification."[4]

In addition to leading into yet another costly regulatory paradigm for banks, this is an extraordinary leap into environmental policy that is well-removed from the FDIC's self-stated mission of examining and supervising financial institutions for "safety and soundness and consumer protection."[5] The Proposed Policy Statement requests input on 14 separate issues but fails to commence, as it must, with the specific statutory basis within the Federal Deposit Insurance Act for exercising agency powers premised on global climate factors.

Here again, in overturning a COVID-related regulation, the Supreme Court has just admonished that it expects Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'"[6] Since its creation in 1933, no FDIC regulation, policy statement, or other action has ever approached the size or scope of the proposal under discussion herein.

The controlling statute lists the following areas as the prescribed standards for the "safety and soundness" of insured depository institutions: (A) internal controls, information systems, and internal audit systems; (B) loan documentation; (C) credit underwriting; (D) interest rate exposure; (E) asset growth; and (F) compensation, fees, and benefits.[7] Nowhere on this list is there any inference to broader climate issues beyond those already being addresses as directly related to the performance of credit transactions such as collateral protection, flood insurance, etc.

It is well-established under principles under the Administrative Procedure Act (APA) that agencies are required to provide the "essential facts upon which the administrative decision was based" and explain what justifies their determinations with actual evidence beyond a "conclusory statement."[8] In terms of factual support, the Proposed Policy Statement cites only to the Financial Stability Oversight Council (FSOC) *Report on Climate-Related Financial Risk* (2021) and the Financial Stability Board report entitled the *Implications of Climate Change for Financial Stability* (2020).

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[4] 87 *Fed. Reg.* 19508.

[5] https://www.fdic.gov/resources/bankers

[6] *Alabama Assn of Realtors et al. v. Dept. of Health & Human Services*, No. 22A23s (Aug. 26, 2021).

[7] 12 U.S.C. § 1831p-1.

[8] *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).

The 2021 FSOC report admits while "significant data related to climate change already exists, there remain gaps in connecting the science of climate change to financial risk assessments and real-world economic impacts."[9]

In this regard, it is difficult to distinguish the Proposed Climate Policy Statement from previous efforts to limit credit to politically disfavored industries. Often referred to as "Operation Choke Point," those initiatives were appropriately withdrawn in the face of due process and other legal concerns.

In Texas, we consider oil and gas to be an essential American industry which, last year alone, contributed $411.6 billion to the state economy.

Estimates by Texas regulators further indicate the oil and gas industry comprises 35% of the Texas economy and much of this activity involves small to medium-sized Texas banks and scores of family-owned small businesses and service companies that underpin the energy sector. The Proposed Policy Statement on Climate fails to encompass any small business impact analysis section by which we specifically mean to include not just smaller banks but also the adverse impact of this proposal on small business borrowers.

Moreover, energy destabilization resulting from the Russia-Ukraine conflict, along with its consequences, have demonstrated that domestic oil and gas production remain critical for America's economic and national security.

The Proposed Policy Statement specifies that it is directed at FDIC-regulated financial institutions with more than $100 billion in total consolidated assets. In practice, however, and as amply demonstrated throughout the implementation of the Basel III bank capital rules, there is an inevitable downhill flow to agency regulations and examination policies regardless of the purported asset-size limitations. Moreover, the documents accompanying the release of the proposal itself indicate that the small bank exemption may only exist for an unspecified period of time.

Lastly, we request your attention to the disparities which exist between the FDIC 's climate proposal and those published by other federal and state agencies. In particular, we would point to the FDIC requirement that insured banks "should also seek to reduce or mitigate the impact" of climate risks on the economy in general.[10] We are not aware of any other form of such an unprecedented mandate such as this in the comparable proposals of the other federal banking regulators and the Securities Exchange Commission.

As the principal federal regulator of state-chartered banks, the FDIC should also be aware that the Proposed Policy Statement may also be in conflict with state law, such as Chapter 809, Texas Government Code, which prohibits Texas state agencies from investing their public funds in any company that penalizes or limits commercial relations with fossil fuel-based companies. Texas is not the only state where this may be the case. Therefore, the complicating effects of incongruent state and federal policies on state-chartered institutions must be considered.

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[9] *Id.* at p. 23.

[10] 87 *Fed. Reg.* at 19509.

The lack of FDIC independence, the assumption of authorities not granted, and the scope of the proposed Policy Statement without complete assessment of its economic, regulatory, and community impacts are significant proposal defects. Thank you for taking these views into consideration.

Most Gratefully,

[redacted]

Chris Furlow
President & Chief Executive Officer