February 7, 2023

Via Electronic Mail

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: James P. Sheesley, Assistant Executive Secretary

Re: 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–AF86

Ladies and Gentlemen:

Hancock Whitney appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's ("**FDIC**") proposed rulemaking and issuance of guidelines for guidelines establishing standards for corporate governance and risk management for covered institutions with total consolidated assets of $10 billion or more, published in the Federal Register on October 11, 2023 (the "**Proposed Guidelines**").

Hancock Whitney Corporation is a $36 billion full-service banking organization headquartered in Gulfport, Mississippi with financial centers in Mississippi, Alabama, Florida, Louisiana, and Texas. We offer comprehensive financial products and services, including traditional and online banking; commercial and small business banking; private banking; trust and investment services; healthcare banking; and mortgage services. Since the late 1800s, Hancock Whitney has embodied core values of Honor & Integrity, Strength & Stability, Commitment to Service, Teamwork, and Personal Responsibility.

Hancock Whitney is committed to strong corporate governance and supports the FDIC's efforts to ensure strong and reliable corporate governance practices in the institutions it supervises and to provide guidance as to those practices. We believe it is important, however, that any guidance adopted by the FDIC is consistent with existing prudential banking regulations and state corporate and banking law and to that end we respectfully submit for consideration the following comments to the Proposed Guidelines.

To ensure FDIC supervised institutions are not put at a regulatory disadvantage, the FDIC should align its standards more closely with those of the Federal Reserve Board ("FRB") and Office of the Comptroller of the Currency ("OCC").

The Proposed Guidelines include highly prescriptive requirements for boards of directors that differ in important aspects from standards previously adopted by the FRB[1] and OCC.[2] Examples of heightened burdens that would apply to FDIC supervised institutions under the Proposed Guidelines include:

— stricter independence standards under a subjective "limited or no additional business operations" standard that may limit the overlapping boards at the bank and holding company levels;[3]

[1] *Supervisory Guidance on Board of Directors' Effectiveness*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 26, 2021), https://www.federalreserve.gov/supervisionreg/srletters/SR2103a1.pdf ("**FRB Guidance**").

[2] OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches, 79 Fed. Reg. 54518 (Sep. 11, 2014) ("**OCC Guidelines**").

[3] *Compare, e.g., id.* at 54589 ("To promote effective, independent oversight of the covered bank's management, at least two members of the board of directors [should be independent].")

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— requirement to establish processes to document and self-report all violations of law – no matter how technical or immaterial;[4]

— quarterly reviews of risk appetite statements, compared to annual or periodic reviews as provided under the OCC Guidelines and FRB Guidance, respectively;[5]

— required board approval of [all] banking policies, which is at odds with and substantially more burdensome than the OCC Guidelines; [6]

— requirements for the board's involvement in the appointment of all executive officers and imposing specific criteria that could potentially subject banks and their boards to hindsight based enforcement actions or litigation;[7] and

— an annual assessment of whether the board has met the prescriptive requirements of the Proposed Guidelines.

Additionally, the Proposed Guidelines have a significantly lower asset threshold ($10 billion) for applicability than the OCC Guidelines ($50 billion). These heightened burdens and a lower threshold would disadvantage FDIC supervised institutions and likely make it more difficult for them to attract director talent than their OCC and FRB supervised counterparts. Rather than creating a third set of standards, we believe the FDIC should consider an interagency release with the OCC and the Federal Reserve that takes into consideration state banking and corporate law to ensure a consistent regulatory structure that does not conflict with or preempt existing law.

The FDIC should ensure its corporate governance guidance aligns with existing fiduciary duties under state law.

The Proposed Guidelines state that a bank board "should consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public." Mississippi, like many other states, has adopted a permissive structure under which our directors *may*, in their discretion, take into consideration the interests of stakeholders other than their shareholders.[8] The use of the word "should" rather than "may" in the Proposed Guidelines appears to preempt Mississippi state law by requiring, rather than permitting, directors to consider non-shareholder constituencies. This change would be an expansion of the fiduciary obligations of bank directors beyond those established under Mississippi law (among other states) and could introduce substantial uncertainty into board fiduciary duties.

Whether and how this proposed standard would be interpreted or enforced by various parties could lead to confusion and related litigation risk such as shareholder derivative actions. The OCC states in its Director's Book that the corporate governance provisions discussed in the book are not intended to, nor do they, exceed applicable state law requirements.[9] The FDIC should adopt a similar standard and at most make consideration of

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[4] There is no equivalent requirement in the OCC Guidelines or FRB Guidelines, rather compliance with laws and regulations is implicit in a bank's safety and soundness.

[5] *Compare, e.g., id.* at 54548 ("Review and approval of the risk appetite statement by the board of directors or the board's risk committee at least annually or more frequently, as necessary, based on the size and volatility of risks and any material changes in the covered bank's business model, strategy, risk profile, or market conditions.")

[6] *See, e.g., id.* at 54526 ("The OCC believes that board or risk committee approval of material policies under the Framework would be burdensome, and that these policies should be approved by management instead.").

[7] *Compare, e.g., id.* at 54547, which limits appointment of executives to the Chief Executive Officer, Chief Audit Executive, and one or more Chief Risk Executives.

[8] Mississippi Code § 79-4-8.30(f).

[9] Office of the Comptroller of the Currency, Director's Book: Role of Directors for National Banks and Federal Savings Associations 2 (2020). https://www.occ.gov/publications-and-resources/publications/banker-education/files/directors-book.html.

non-shareholder constituencies permissive rather than mandatory to complement, rather than expand upon, state law and avoid imposing unnecessarily increased litigation risk on the banks it supervises.

The FDIC should clearly distinguish the oversight role of bank boards from management responsibilities.

The Proposed Guidelines repeatedly require that boards "ensure" or "confirm" certain events or outcomes are achieved or avoided. For instance, the Proposed Guidelines impose a duty on each director to "confirm that the covered institution operates in a safe and sound manner, in compliance with all laws and regulations."[10] As written, this text suggests that directors must not only oversee, but also independently validate, the work of independent risk management, compliance, and audit functions. The expansive use of these terms conflicts with the long-established oversight role of boards.

We believe the combination of the highly prescriptive requirements for boards discussed above and the use of terms like "ensure" and "confirm" throughout the Proposed Guidelines would result in an expansion of the role of the board beyond oversight and into the management function. This expanded role would appear to require involvement in day-to-day bank operations, blurring the distinction between the roles of directors and officers. Not only are boards not positioned to undertake day-to-day management functions, to the extent that boards are required to do so, the potential exists to create an appearance of impaired independence from management.

We would recommend that any guidelines adopted by the FDIC follow the approach of the OCC Guidelines and FRB Guidance, which limit use of terms like "ensure" and "confirm" and more accurately reflect the oversight function and fiduciary obligations of boards under state law.

Hancock Whitney appreciates the opportunity to comment on the Proposed Guidelines If you have any questions, please contact the undersigned at joy.phillips@hancockwhitney.com or michael.otero@hancockwhitney.com.

Respectfully submitted,

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[10] Proposed Guidelines, para. II.A., 88 Fed. Reg. 70404.