



February 9, 2024

Via Electronic Submission:
FDIC: Federal Register Publications

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

Re: Comments to the Proposed Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of \$10 Billion or More (RIN 3064–AF94)

Dear Mr. Sheesley:

On behalf of Texas Capital Bank (“TCB”), Dallas, Texas, we appreciate the opportunity to submit this letter in response to the request of the Federal Deposit Insurance Corporation (“FDIC”) for comment on its notice of proposed rulemaking and issuance of 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 (“Proposed Guidelines”).

We write to express our support of the comment letters sent to you by the Mid-Size Bank Coalition of America (“MBCA”) on February 1, 2024, the Texas Department of Banking (“TDB”) on February 8, 2024, and the American Bankers Association (“ABA”) on February 9, 2024. TCB is aligned with the recommendations of the MBCA, TDB, and ABA.

More specifically, we wanted to highlight the following:

The Proposed Guidelines would impose several very detailed and highly prescriptive governance requirements on banks and in doing so, would blur the line between board and management responsibilities.¹

¹ Additionally, the Proposed Guidelines would seek to impose an enforceable federal overlay on state fiduciary duty standards, which would extend beyond the scope of the Office of the Comptroller of the Currency’s (OCC) governance guidelines and of the Federal Reserve Board’s (FRB) governance guidance.

- **New Duties for Directors Conflicts with State Law.**

- The Proposed Guidelines state that Directors should consider “the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public”, as opposed to the traditional fiduciary duty focus on shareholder value.
 - This may conflict with state law depending on whether the State of Company’s incorporation mandates a fiduciary duty focus on shareholder value.

- **New Board Responsibilities Blur the Line with Management Responsibilities and Boards Do Not and Should Not Have Management Responsibilities.**

- Under the Proposed Guidelines, Boards are required to “ensure” that management corrects deficiencies that auditors or examiners identify in a timely manner.
- The Proposed Guidelines also state that the board “should establish a corporate culture and work environment that promotes responsible, ethical behavior.”
- The board must select and appoint executive officers who are qualified to administer the FDIC Covered Institution’s affairs effectively and soundly. The selection criteria should include integrity, technical competence, character, and experience in financial services.
- The board under the Proposed Guidelines is required to approve a broad swath of policies on an annual basis relating to the safety and soundness of the Bank.
 - Examples include policies and procedures addressing loan and credit policy, internal controls, guides for assets and liabilities, consumer protection laws, CRA, Bank Secrecy Act, and codes of ethics.
- The Proposed Guidelines obligate the board to be involved in every risk limit breach, not just material, significant or persistent breaches.

- **Majority Independent Directors Will Affect Board Composition and Create Confusion and Uncertainty with an Overlapping Bank Board and Holding Company Board.**

- The Proposed Guidelines would require [REDACTED] propose, an independent director of the bank’s holding [REDACTED] independent director of the bank, contrary to the commonly used model of total overlap between directors of a holding company and a state non-member bank.
 - In order for a director of the bank’s holding company to count as an independent director of the bank, the holding company must conduct *limited or no additional* business operations outside of the bank. It is unclear how the FDIC would define “limited or no additional”.

- **A Board Should Not be Influenced by a “Dominant Policymaker” which Broadens the Scope.**
 - The Proposed Guidelines contain a caution about a board being influenced by a “dominant policymaker,” whether this is management, a shareholder, or a director. The dominant-policymaker concept is unique to the FDIC.
 - The FDIC has previously addressed the concept of a “dominant official” in its RMS Manual of Examination Policies – Management, where it describes “the risks associated with institutions controlled by an official that has material influence over virtually all decisions involving the bank’s policies and operations”. It is unclear whether the FDIC intends to broaden the scope with “policymaker”.

Enforcement of Proposed Requirements through the Proposed Guidelines Chill a Healthy Governance Framework.

- *Guidance* does not create enforceable, binding legal obligations; however, The Proposed Guidelines issued under Section 39 of the Federal Deposit Insurance Act *are* enforceable by the agency. As such, the FDIC has chosen to propose guidelines that “would be enforceable under Section 39”. This technique contrasts with the Federal Reserve Board’s approach of adopting principles-based guidance. It also contrasts with the OCC which has chosen the path of enforceable guidelines, but carefully calibrated its corporate governance guidelines to be general principles. The FDIC’s combination of enforceable guidelines, very detailed and highly prescriptive requirements and an obligation for a board to assess, on a yearly basis, whether it is meeting the guidelines, risks imposing burdens on boards that do not further the spirit of seeking to encourage and to facilitate robust, dynamic and healthy governance.
 - If an institution does not meet the guidelines promulgated under Section 39, the FDIC has the option of requiring a plan (a Section 39 Plan) to do so. If an institution fails to submit a timely, acceptable plan, the agency can issue a “safety and soundness order”. This is the legal equivalent of a cease-and-desist order, i.e., it is public and legally enforceable, including through the assessment of civil monetary penalties.

Accordingly, a board may become more focused on a che [REDACTED] than the more important work of robust, dynamic, and healthy gov [REDACTED]

A robust regulatory framework already exists to address the FDIC’s concerns and the Proposed Guidelines will not prevent bank failures.

Each of the Federal Reserve and the OCC reserved the right to apply their heightened standards to an institution under the \$50 billion asset threshold under certain limited circumstances. Specifically, the OCC can apply its heightened standards to a bank under the \$50 billion asset threshold only if it determines that the bank’s operations

are highly complex or otherwise present a heightened risk. The OCC expected to utilize this reserved right only if a bank's operations were highly complex relative to its risk-management capabilities and noted that "[t]his is a high threshold that only will be crossed in extraordinary circumstances". In his address to the American Bankers Association Risk Management Forum on April 10, 2014, Comptroller of the Currency, Thomas Curry, when addressing the OCC's authority to apply the heightened standards to banks below the \$50 billion threshold, stated that "some ... bankers may be reading that language as a loophole that we will use to impose onerous new requirements on [smaller] banks. I want to assure you that this is not the case and not our intent." The FDIC is now attempting to impose the Proposed Guidelines on banks with assets between \$10 billion and \$50 billion, effectively eliminating the "high threshold".

In his statement dissenting to approval of the Proposed Guidelines, FDIC Vice Chairman Travis Hill argued that the lesson to be learned from the bank failures mentioned by the FDIC is that bank supervisors should "focus more on core risks to safety and soundness, and relatively less on process-related governance". We agree with his argument, especially as to our operations and those of similarly situated banks regardless of asset size. The FDIC is proposing to apply the Proposed Guidelines to banks like us based solely on asset size without any risk-based analysis or justification. As of December 31, 2023, we had total consolidated assets of approximately \$28.36 billion,

Lowering the threshold is also entirely unnecessary given the existing examination measures the FDIC can utilize to determine which banks are highly complex or otherwise present a heightened risk. One would need only to review recent bank failures to recognize that the FDIC has no actuarially-based justification to vary from the "well understood" \$50 billion asset threshold. From January 1, 2010, through November 3, 2023, the FDIC's data reflects the following:

- o In 2010, 157 banks failed. Only one bank exceeded \$10 billion (Westernbank Puerto Rico, Mayaguez, PR at \$11.9 billion);
- o In 2011, 92 banks failed. None exceeded \$10 billion;
- o In 2012, 51 banks failed. None exceeded \$10 billion;
- o In 2013, 24 banks failed. None exceeded \$10 billion;
- o In 2014, 18 banks failed. None exceeded \$10 billion;
- o In 2015, eight banks failed. None exceeded \$10 billion;
- o In 2016, five banks failed. None exceeded \$10 billion. In fact, none exceeded \$104 million;
- o In 2017, eight banks failed. None exceeded [REDACTED];
- o In 2018, no banks failed;
- o In 2019, four banks failed. None exceeded \$10 billion. In fact, none exceeded \$121 million;
- o In 2020, four banks failed. None exceeded \$10 billion. In fact, none exceeded \$153 million;
- o In 2021, no banks failed;
- o In 2022; no banks failed; and
- o As of November 3, 2023, five banks have failed in 2023. None had assets between \$10 billion and \$50 billion. The two most recent failures involved banks with assets of only \$139 million and \$66 million. Each of the other three failed banks had well over \$100 billion of assets (\$110.4 billion,

\$209 billion, and \$229.1 billion).

Of the 376 bank failures since 2009, only one bank had assets between \$10 billion and \$50 billion, and it had assets of only \$11.9 billion. It was located in the U.S. territory of Puerto Rico. The vast majority of failures involved banks with assets of less than \$1 billion. Only 37 or 9.8% of the banks had assets that exceeded \$1 billion. Only four or 1 % of the failed banks had assets that exceeded \$10 billion. And, of those four banks, three exceeded \$100 billion. Two of those three exceeded \$200 billion. Even if we include the 165 failures that occurred during the Great Recession of 2008 and 2009, only seven or 4.2% of the banks had assets between \$10 billion and \$50 billion.

We recognize that, as of June 30, 2023, only 113 banks had assets between \$10 billion and \$50 billion. But assuming this number has stayed relatively consistent since 2009, less than 1% of these banks have failed over a 14-year period. In comparison, of the 33 banks in excess of \$100 billion, 3 or 9% have failed in 2023 alone. Based on these statistics, there is no actuarially-justifiable reason for the FDIC to reduce the "well understood threshold" to under \$50 billion.

We are subject to regulation by the Texas Department of Banking, the Board of Governors of the Federal Reserve System, and the Consumer Financial Protection Bureau. Our parent company, Texas Capital Bancshares, Inc., is under the jurisdiction of the Securities and Exchange Commission ("SEC") and is subject to the corporate governance and other restrictions and requirements of the SEC under the Securities Exchange Act of 1934, as amended. Based on the processes and programs in place, the FDIC already has the tools necessary to determine the complexity of products and services, risk profile, or scope of operations of individual banks. The FDIC's approach will serve only to increase compliance expenses for smaller banks like ours without increasing the likelihood of preventing bank failures. Enacting and applying the Proposed Guidelines is not appropriate or consistent with other Federal banking regulatory agencies and is not any more likely to prevent bank failures than the FDIC's existing processes and programs.

Respectfully submitted,


Anna Alvarado

Chief Legal Officer & Corporate Secretary

Texas Capital Bank