



February 8, 2024

Via Electronic Mail (comments@FDIC.gov)

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

Attention: Comments/Legal OES (RIN 3064-AF94)

Re: 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 TowneBank, we appreciate this opportunity to respond to the request of the Federal Deposit Insurance Corporation (the "FDIC") for comments 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 (the "Proposed Guidelines").

TowneBank is a Virginia chartered nonmember bank headquartered in Portsmouth, Virginia with approximately \$16.8 billion in total consolidated assets as of December 31, 2023. We do business primarily in the Greater Hampton Roads region in southeastern Virginia, the Richmond region in central Virginia, northeastern North Carolina, and the Raleigh, Charlotte, Greensboro, and Greenville metropolitan areas in North Carolina. TowneBank, which does not operate within a bank holding company framework, is a public company subject to the securities reporting requirements of the Securities Exchange Act of 1934 and related federal statutes and regulations. Our common stock is listed on Nasdaq ("TOWN"), and as a result we are subject to the corporate governance and other Nasdaq listing requirements.

We strongly support the more in-depth and compelling comment letters submitted by the Mid-Size Bank Coalition of America (the "MCBA") and the American Bankers Association (the "ABA"), two trade associations of which we are long standing members, that highlight many of the issues and concerns that are especially relevant to TowneBank and similarly sized institutions. We wish to highlight the following issues specific to TowneBank that are addressed in more detail in the comment letters from the MBCA and ABA and that we believe deserve special consideration from the FDIC as it evaluates whether and how the Proposed Guidelines will be revised prior to implementation.

1. The asset threshold for applicability of the Proposed Guidelines should be at least \$50 billion.

Compliance Costs and Customer Impact. As a state nonmember bank with greater than \$10 billion but significantly less than \$50 billion of total assets, TowneBank will be disproportionately impacted by the burden of complying with the Proposed Guidelines relative to larger institutions that are better able to defray these compliance costs across their broader business platforms.

Competitive Effects. TowneBank will be at a competitive disadvantage compared to similarly sized national banks and state member banks that are not covered by the Proposed Guidelines and do not meet the asset threshold for the standards adopted by the Office of the Comptroller of the Currency¹ (the “OCC”) and the Board of Governors of the Federal Reserve System² (the “Federal Reserve”), which apply at asset thresholds of \$50 billion and \$100 billion, respectively.

Lack of Tailoring. The Proposed Guidelines are largely prescriptive and uniform in nature and abandon the fundamental principle that effective risk management should be tailored to the size of the institution and the nature, scope, and inherent risk of its activities. Thus, the Proposed Guidelines would apply evenly to all covered institutions regardless of their inherent risk profiles, which is especially problematic when combined with the lower \$10 billion asset threshold.

We strongly urge the FDIC to raise the asset threshold to a level that at least equals the \$50 billion threshold set by the OCC.

2. The FDIC should adopt principles-based risk management standards that are more closely aligned with OCC and Federal Reserve standards.

The Proposed Guidelines are highly prescriptive as compared to the standards adopted by the OCC and Federal Reserve with respect to board composition and involvement of directors in policymaking and certain other operational matters. As a smaller, community-focused bank,

¹ 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).

² Supervisory Guidance for Boards of Directors of Domestic Bank and Savings and Loan Holding Companies with Total Consolidated Assets of \$100 Billion or More (Excluding Intermediate Holding Companies of Foreign Banking Organizations Established Pursuant to the Federal Reserve's Regulation YY) and Systemically Important Nonbank Financial Companies Designated by the Financial Stability Oversight Council for Supervision by the Federal Reserve, Bd. of Governors of the Fed. Rsrv. Sys. (Feb. 26, 2021), <https://www.federalreserve.gov/supervisionreg/srletters/SR2103a1.pdf>.

TowneBank's business model relies on the ability to be flexible and responsive to customer needs at the local level in our different and distinct geographic markets. While our board of directors oversees our overall corporate and risk management practices, we believe empowering local decision makers leads to better outcomes for TowneBank, our customers and the communities we serve. We urge the FDIC to carefully consider the concerns raised in the MBCA and ABA comment letters regarding how the Proposed Guidelines will conflate the roles of the board of directors and management and will likely lead to unintended and potentially detrimental consequences for covered banks and their customers.

We note that the FDIC's stated intention with the Proposed Guidelines is to harmonize its corporate governance and risk management requirements with the FRB and OCC guidelines. The Proposed Guidelines, however, create disharmony by setting a substantially lower asset threshold, creating enforceable guidelines and imposing highly prescriptive requirements that risk stifling robust and dynamic corporate governance.

3. The additional duties imposed on directors under the Proposed Guidelines should be subject to compliance with directors' fiduciary duties under state law.

The Proposed Guidelines conflict with existing fiduciary standards applicable to TowneBank directors under Virginia law. A director of a Virginia corporation must act "in accordance with his good faith business judgment of the best interests of the corporation."³ In applying this statutory standard, courts have focused on the extent to which the board of directors engaged in an informed decision making process.⁴ Directors must be well-informed and carefully consider the available alternatives with the best interests of the corporation in mind.

The Proposed Guidelines would require TowneBank directors to consider "the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public." Unlike some other states⁵, Virginia law does not expressly permit a director to consider the interests of stakeholders other than the corporation and its shareholders. Accordingly, directors of a Virginia corporation may be permitted to consider the interests of these other stakeholders, but only to the extent that such interests align with the best interests of the corporation.

This conflict could be problematic in a variety of situations but will be especially so in change-in-control transactions that frequently invite scrutiny and lawsuits challenging the actions

³ Va. Code Ann. § 13.1-690A.

⁴ WLR Foods, Inc. v. Tyson Foods, Inc., 857 F. Supp. 492 (W.D. Va 1994).

⁵ See, e.g., Ind. Code Ann. § 23-1-35-1(d) ("director may, in considering the best interests of a corporation, consider the effects of any action on shareholders, employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent").

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of boards of directors. For example, if TowneBank directors determined that combining with a larger institution would be in the best interests of the TowneBank and its shareholders, the Proposed Guidelines could require TowneBank directors to accept an acquisition proposal with a lower price if such proposal would be in the best interests of other stakeholders. In that scenario, TowneBank directors would be forced to weigh the likelihood of breaching their fiduciary duties under Virginia law to comply with the Proposed Guidelines. The Proposed Guidelines should be revised to state that the interests of other stakeholders should be considered but only to the extent authorized by state law.

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We believe the Proposed Guidelines would significantly reshape risk management and corporate governance practices for covered institutions. We do not believe such profound changes are necessary to further the FDIC's objectives given the potential for extensive negative effects on covered institutions like TowneBank.

Thank you for your attention to the foregoing comments.

Sincerely,

A solid black rectangular redaction box covering the signature of George P. Whitley.

George P. Whitley
Senior Executive Vice President &
Chief Legal Officer