



February 9, 2024

[Via email:comments@fdic.gov](mailto:comments@fdic.gov)

Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, D.C. 20429  
Attention: James P. Sheesley, Assistant Executive Secretary

Re: Notice of Proposing Rule Making – Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of \$10 Billion or More (12 CFR Parts 308 and 364)

Ladies and Gentlemen:

We are writing in response to the request of the Federal Depository Insurance Corporation (“FDIC”) to comment on its notice of proposed rulemaking and issuance of guidelines establishing enforceable standards for corporate governance and risk management for covered institutions with total consolidated assets of \$10 million or more (the “Proposed Guidelines”) published in the Federal Register on October 11, 2023.

Israel Discount Bank of New York is a New York State chartered commercial bank with assets of approximately \$12.4 billion as of September 30, 2023.

We start by saying that we fully support the comment letter submitted on behalf of the Mid-Size Bank Coalition of America (“MBCA”), of which we are a member.

In addition, we wish to point out several strong concerns we have about the Guidelines, as follows:

1. The Proposed Guidelines state an intention to “harmonize [FDIC] corporate governance and risk management requirements for covered institutions that present a higher risk profile with those applicable to entities supervised by the other federal banking agencies.” However, the Proposed Guidelines set a significantly lower asset threshold than the Office of the Comptroller of the Currency (“OCC”) or the Federal Reserve Board (“FRB”) (\$10 billion under the Proposed Guidelines versus \$50 billion for the OCC and \$100 billion for the FRB). As a result, the Proposed Guidelines are applicable to significantly smaller institutions than those of the OCC or FRB. We believe the Proposed Guidelines should be consistent with the OCC Guidelines and only apply to institutions with \$50 billion or more in total consolidated assets, especially given the extra burdens imposed by the Proposed Guidelines.
2. The Proposed Guidelines, if adopted as drafted, would be effective immediately for covered institutions, with no transition period for such institutions to comply with the Proposed

Guidelines. Many institutions would, therefore, likely be immediately out of compliance.


3. Although entitled as “guidelines,” in fact the Proposed Guidelines are enforceable standards and not guidelines, with a bias towards compliance and enforcement.
4. The Proposed Guidelines add significant new duties for directors of covered institutions. (“The board, in supervising the covered institution, should consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public.”) Such duties would, in many cases, be in conflict with state fiduciary duty focusing on shareholder values and interests, leading to uncertainty and litigation risk. Further, such an expansion of fiduciary responsibility on directors, together with the enforcement bias noted above, would in all likelihood make it harder to attract and retain qualified directors.
5. The Proposed Guidelines require that “Each member of the board has a duty to safeguard ... the interests of the covered institution and to oversee *and confirm* that the covered institution operates in a safe and sound manner, in compliance with all laws and regulations.” This provision creates not only an expansion of the duties owed by directors, but also suggests that the board may not rely on the work of risk management and the audit function and must independently validate such work.
6. The Proposed Guidelines move back and forth from the board’s proper oversight role (“The board should *actively oversee*...,” “The board should *hold management accountable*...,” “The board is responsible for *overseeing compliance*”) to conflating the board’s role with management’s (“The board is responsible for *establishing*...,” “The board should *establish*...,” “The board must *select* and appoint executive officers...”). In some cases, the conflation takes place in the same provision (“The board should hold *management accountable* .... The Board ... should *ensure*...”). In many of these provisions, the responsibility lies with management, not the board. For example, the board selects the CEO, but the CEO is responsible for selecting other members of management (subject to board approval). Another provision states that the board should establish a written code of ethics. Establishing a code of ethics is the purview of management, subject to board approval. The Proposed Guidelines go on to state that “the board should *establish* ... effective programs for internal controls, risk management and audit.” Again, these are the purview of management, subject to board approval. The Proposed Guidelines repeatedly require the board to “*ensure*” and “*establish*,” which are inconsistent with established allocation of responsibilities between boards and management. Boards oversee, review and approve management actions. Boards, however, do not ensure or establish programs, they rather hold management accountable to do so. To require otherwise conflates the duties and responsibilities of the board with that of management.
7. The Proposed Guidelines add additional regulatory burdens on boards. They state that the “board should review and approve the risk appetite statement at least Quarterly, or more frequently, as necessary, ...” Risk appetite statements are approved by our Board on an annual basis (or more often, as necessary). While a quarterly review of compliance with the

risk appetite statements is done by our Board, the Board does not approve the risk appetite statement on a quarterly basis.

8. The Proposed Guidelines require the board to establish and approve all policies that govern and guide the operations of the covered institution, and such policies must be approved at least annually. In addition, the Proposed Guidelines require the board to conduct an annual self-assessment evaluating its effectiveness in meeting the standards of the Guidelines. The proposed provisions add significant regulatory burden on the board, and would require an annual and expansive compliance exercise.
9. The Proposed Guidelines are inconsistent with respect to the role of the board risk committee. They state the committee has, "*as its sole function*," responsibility for the risk management policies of the covered institution and oversight of the risk management framework. However, the same provision describes other functions of the risk committee, including clauses (f) ("document and maintain records of its proceedings, including risk management decisions") and (g) ("review and approve all decisions regarding the appointment or removal of the CRO, and ensure that the CROs compensation is consistent with providing an objective assessment of the risks taken by the covered institution.") Further, the Preamble to the Proposed Guidelines includes other roles and responsibilities of the committee.
10. The Proposed Guidelines include inconsistent wording throughout the document – including "must," "comply," "require," "ensure," "should ensure," "expect," and "should." Given the enforceable nature of the document, "should" is essentially the equivalent of "must." However, the large number of instances of "should" creates confusion, is inconsistent with the enforceable nature of the Proposed Guidelines and conflicts with the use of "must" and "require."
11. The Proposed Guidelines include vague wording. For example, they state that the risk committee must: "d. [I]nclude at least one member experienced in identifying, assessing, and managing risk exposures of large firms." Large is not defined. If "large" is defined as an institution with over \$50 billion in assets, finding a director with experience at large firms may prove problematic for a bank with approximately \$10 billion in assets.

Please do not hesitate to contact me at (212) 551-8917 if you have any questions.

Yours very truly,

  
Leslie K. Case  
Executive Vice President, General Counsel  
and Corporate Secretary

cc: Ziv Biron, CEO and President  
Dan Roberts, EVP, Chief Risk Officer