Independent Bankers Association of Texas

November 16, 2023

James P. Sheesley, Assistant Executive Secretary
Attention: Comments/Legal OES (RIN 3064–AF94)
Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429

Via Email to: comments.FDIC.gov

Re: Notice of Proposed Rulemaking, Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More, 88 Fed. Reg. 70391 (RIN: 3064-AF94) (October 11, 2023)

Ladies and Gentlemen,

The following comments are provided on behalf of the Independent Bankers Association of Texas ("IBAT"), a trade association that represents the independent community banks of Texas, to the above-referenced Notice of Proposed Rulemaking relating to Establishing Standards for Corporate Governance and Risk Management for Covered Institution (the "Guidelines"). IBAT member banks range in size from $27 million to $52 billion in assets, serving Texans in communities of every size.

The Federal Deposit Insurance Corporation ("FDIC") is seeking comment on proposed corporate governance and risk management guidelines that would apply to all insured state nonmember banks, state-licensed insured branches of foreign banks and insured state savings associations that are subject to Section 39 of the Federal Deposit Insurance Act (FDI Act), with total consolidated assets of $10 billion or more on or after the effective date of the final Guidelines.

The following statements represent our concerns with the proposed Guidelines:

- The Guidelines add another agency rulemaking to the list that potentially runs into the Supreme Court's newly strengthened and evolving major questions doctrine. While Congress has clearly authorized the prudential regulators to supervise banks and promulgate related standards, the evolving doctrine may reduce the degree of deference federal courts give to agency discretion, absent clear and specific congressional authorization. If the corporate governance of banks is classified as a major question of public policy, then federal banking authorities would need to point to clear congressional authorization for them to prescribe corporate governance mandates.

- The Guidelines are more prescriptive than descriptive. As proposed, the Guidelines would give the FDIC the authority to identify banks under the size threshold that "are highly complex or present a heightened risk that warrant the application" without any specificity as to when the FDIC would exercise that authority or how smaller banks could be swept up. The Guidelines are unreasonably vague on how any bank – large or small – could properly comply with the proposed requirements.

- The Guidelines apply only to state non-member banks and do not consider state laws. That could lead to inconsistencies between banks and unknown exposures to covered banks and boards.

- The Guidelines require a covered bank to timely report violations of said Guidelines to the agency with jurisdiction. The vagaries of the Guidelines make this particularly difficult as to what is reportable and when it must be reported. Additionally, this requirement would appear to be the first of its kind in federal banking law and does not have precedent in the historical approach of the FDIC or of the other federal banking agencies.

- The Guidelines do not provide for a transition period to achieve compliance with new enforceable requirements. If adopted as proposed, compliance would apparently be expected for covered institutions on the effective date of the final Guidelines, meaning a covered bank could be forced to immediately change their board composition and quickly find additional independent directors – for small community banks that could be drawn into this, that is particularly troublesome.

- Adoption of the Guidelines appears to make board members potentially liable to both consumers and the general public under the standard of simple negligence. This is a novel approach that could have a dramatic impact on banks and their ability to recruit and retain qualified directors. Bank boards have historically been charged with governing the bank and not directly managing the bank. These Guidelines appear to upend that precedent. We believe there ought to be a strong ongoing distinction between governance and management.

- The Guidelines require that bank boards approve "core policies" at least annually. While providing some examples of "core policies" that are essentially addressed in other regulations, the Guidelines don't go beyond that to define what is a "core policy." The Guidelines, as written, could inundate the board with policies that are best left to managers of the various business lines of the bank.

- The governance standards outlined in the Guidelines would require covered banks to establish and operate a complex, formal risk management framework. The financial cost and time required by the board and management to stand up such programs, build systems and sustain them would impose a significant burden on those covered banks. Even more significantly, many affected banks are located outside of major metropolitan areas, making it difficult to recruit and retain talent with the specialized experience needed to satisfy the agency's expectations.

- The Guidelines provide little direction as to when a covered bank's risk profile and that of its parent company would be "substantially similar" while also "easily distinguished and separate from" one another.

- Finally, additional costs associated with these Guidelines adds yet another "cost" to operating the bank that will inevitably be passed on to consumers via higher costs and to employees via decreased compensation and benefits.

Thank you for your consideration of our concerns.

Sincerely,

[redacted]

Christopher L. Williston, CAE
President and CEO