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February 1, 2024

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

*To be sent via email: [comments@FDIC.gov](mailto:comments@FDIC.gov) Subject: RIN 3064-AF94*

Dear Mr. Sheesley,

As the nation’s leading organization for director education and certification, the National Association of Corporate Directors (NACD) is pleased to comment on the FDIC’s proposed [Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of \\$10 Billion or More](#) (pp. 70403–70409). The proposed guidelines, applying to banks, would affect only a minority of our more than 23,000 members, who serve organizations ranging widely in industry and size.<sup>1</sup> However, we believe that these guidelines, if approved, could set a precedent of rulemaking that could affect other sectors. In this respect, we agree with the points made in the US Chamber of Commerce’s [December 8 comment](#) as well as the [December 14 comment](#) of the Society for Corporate Governance. Like NACD, these organizations serve a wide variety of corporate boards—not just bank boards—and have also expressed concerns about the regulatory overreach in this proposal.

NACD commends the FDIC for its effort to capture best practice material for corporate governance in a single document. Some of the guidance is consistent with what NACD has advised for voluntary adoption over the years. Indeed, the proposed guidance could be recast as an FDIC guidebook for effective bank governance, to be considered on a

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<sup>1</sup> The regulation does not include an estimate of the number of banks that it will affect. It does, however, state that “As of the quarter ending March 31, 2023, the FDIC supervised 3,012 depository institutions, of which 2,306 are considered ‘small.’” Of the remaining 700, that are not small, probably one in four are \$10 billion and over in asset size. Of the banks and S&Ls insured by the FDIC, at least 160 have \$10 billion or more in assets. (“[Largest US Banks by Asset Size \(2023\)](#),” based on FDIC data obtained and posted by the consultancy, MX.)



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voluntary basis by covered institutions. As a regulatory mandate, however, the proposal may have unintended consequences.

NACD questions seven aspects of the proposed guidelines, specifically their

- broad scope,
- blurring of the roles of management and the board,
- conflict with state and existing federal law,
- prescriptive nature,
- implications for D&O liability,
- low size threshold, and
- potential time and expense burden.

### **Broad Scope**

The proposed guidance would set standards for banks in corporate governance areas arguably outside the scope of the FDIC's [mission](#), stated as “insures deposits; examines and supervises financial institutions for safety, soundness, and consumer protection; makes large and complex financial institutions resolvable; and manages receiverships.” Many of the proposed prescriptive controls over corporate governance matters addressed in the proposal appear to be outside the scope of safety and soundness issues and therefore outside the scope of the FDIC's authority. For example, the adequacy of a bank's risk management program is within the realm of issues a supervisor should look at for safety and soundness concerns. However, requiring a board to “establish” certain defined elements of a risk management program would dictate a governance structure that should be left to the discretion of the board and management.

The proposed guidelines cover core banking areas such as requirements for banking operations, the bank's risk committee, the bank's risk management program, the internal audit unit, and the risk management units. In addition, the guidance covers the audit committee, bank strategy, ethics, management performance review, succession planning, director training, board self-assessment, compensation and performance management, charters for board committees, internal audit charter, and audit committee approval of audit services and the chief audit officer (CAO). These areas may arguably be outside the scope of the FDIC's authority to insure and supervise institutions and to help with their



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bankruptcy process. (See the appendix, which shows at a glance the very wide range and high number of topics covered in the release.)

***NACD recommendation:** Make a clear distinction between recommendations and requirements, focusing requirements on areas within the FDIC’s scope of authority. Make recommendations intended to strengthen bank governance, helping bank boards effectively confront growing market complexity and disruption. Some of our members who serve bank boards could provide good counsel in this regard.*

### **Blurring of Board vs. Management Role**

The proposal blurs the distinction between management and the board and sets a bar too high for both regarding risk mitigation. In asking the board to “ensure” numerous times, the FDIC proposal implies that board and/or management is responsible for delivering certain *outcomes* and, if not, would be in noncompliance with the guidelines. By contrast, existing state law (and related jurisprudence) asks whether managements and boards have established and are overseeing adequate *frameworks* to detect and mitigate risk.

The standard here is *In re Caremark Intern. Inc. Derivative Litigation*, 698 A.2d 959 (1996), in which Judge William T. Allen stated that “a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists.” In this same decision, Justice Allen made it clear that “there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.”

***NACD recommendation:** Revise the document to conform to the Caremark standard of framework oversight rather than outcome assurance.*

### **Conflict with State and Existing Federal Law**

The proposed guidelines represent an encroachment of federal standards into what has traditionally been in the domain of state corporation law, and for public companies, the Securities and Exchange Commission (SEC). The proposal states as follows: “The board, in supervising the covered institution, should consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public.”



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While NACD agrees that boards should consider stakeholder interests, the final standards should make it clear that under state law the director’s primary fiduciary duty is to owners. The proposal’s requirements for fealty to stakeholders and the general public conflicts with long-established state law supporting a primary fiduciary duty to owners. It also lies outside the scope of the SEC with its threefold [mission](#) (capital, ownership, and markets).

***NACD recommendation:*** Revise the guidelines to conform with state corporation law.

### **Prescriptive Nature**

As currently written, the proposed guidelines are extremely detailed and quite prescriptive, which can lull directors and managers into a false sense of security regarding the robustness of risk management. Those who focus on following the letter of the guidelines—those who “check the boxes”—may miss the wider risk environment for their organizations, especially in evolving risk environments and changing circumstances. This is certainly the case with the proposed standards on risk management programs, the internal audit unit, and risk management units. These sections of the proposed standards are unusually lengthy and detailed in their mandates, leaving little room to adapt to facts and circumstances of individual institutions. Boards should be able to use their independent judgment and discretion to determine the appropriate governance and risk management framework for the institution based on the size, complexity, and nature of the institution’s business lines.

Furthermore, in the interest of *monitoring enterprise-wide* risk management, bank boards should be able to appoint one or more directors to serve both the holding company and a subsidiary. The current proposal would restrict this practice in the name of “independence,” despite the fact that it is well within the scope of existing corporation law on director independence, which rightly assumes that a holding company’s interests are the same as the interests of any bank it holds.

***NACD Recommendation:*** To ensure a manageable workload for bank directors and to avoid discouraging qualified candidates from serving on bank boards,



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*consider issuing this proposal as voluntary guidance for adoption rather than as an absolute mandate.*

### **Implications for D&O Liability**

While some of the board-related standards are consistent with voluntary standards that NACD has advocated through our Blue Ribbon Commission reports and our Future of the American Board initiative, we note that the FDIC proposal as it stands would shift these to compulsory standards. The proposing release states, “The proposed Guidelines include preservation and reservation of the FDIC’s existing authority to address unsafe or unsound practices of all FDIC-supervised institutions. The Guidelines preserve the FDIC’s authority to bring any enforcement action available to it independently of, in conjunction with, or in addition to any action under Section 39 of the FDI Act.”<sup>2</sup>

This raises the specter of increased director liability exposure and, as also noted by other organizations, the proposed guidelines would “increase the potential liability of covered bank directors and officers beyond that for the directors of all other corporations.” (See the [November 8 comment letter](#) of a banking coalition.) Taken as a whole, the potential increased liability could dissuade qualified candidates from serving on larger bank boards and could increase premiums for D&O insurance.

***NACD recommendation:** With respect to any guidance set forth as a requirement, we would strongly urge the FDIC to issue these recommendations as guidance rather than as a mandate. For any mandates that the FDIC does issue (for example, a mandate within the scope of its authority), the FDIC should establish a safe harbor against FDIC enforcement for directors and officers who are acting in good faith. In this way, the final guidelines would be consistent with the judicial principle under state law known as the business judgment rule.*

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<sup>2</sup> See page 70394 of the [proposing release](#). The proposing release also states, in note 21 on page 70393: “Pursuant to Section 39, if the FDIC determines that an IDI fails to meet any standard prescribed in the guidelines issued under subsection (a) or (b) of Section 39, the FDIC may require the IDI to submit a plan that specifies the steps that the institution will take to correct the deficiency (such plan is referred to as a “Section 39 Plan”). Further, Section 39 provides that if an IDI fails to submit an acceptable Section 39 Plan or fails in any material respect to implement an acceptable Section 39 Plan, the FDIC, by order shall require the institution to correct the deficiency and may take additional enumerated actions, including growth restrictions, increased capital requirements, and restrictions on interest rates paid on deposits.”



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## Low Size Threshold

The \$10 billion size limit for this new set of guidelines may reach too far down the banking chain. The Office of the Comptroller of the Currency’s [Office of Midsize and Community Bank Supervision states](#) that “mid-sized” banks and trusts have assets between \$15 billion and \$115 billion. This raises the possibility that even small banks will be subject to the requirements—an expectation that could pose an undue burden on their boards, now expected to conform to a full set of requirements for their boards and committees, as well as detailed oversight of a vast risk management system with more specificity than previously. While the lower threshold for risk committees (requiring smaller banks to have them) could be valuable, requiring all the additional standards for smaller banks may be overly challenging.

The need to raise the threshold is particularly acute since the proposing release states that “The FDIC reserves the authority to apply the proposed Guidelines, in whole or in part, to institutions with less than \$10 billion in total consolidated assets if the FDIC determines that the institution’s operations are highly complex or present heightened risk.”

***NACD recommendation:** To reduce the regulatory burden on mid-sized regional banks, consider changing the threshold to \$50 billion, which would affect approximately 51 banks, rather than about 160 (based on the MX list). We note that the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 changed the \$10 billion limit to \$50 billion. It increased the asset thresholds for company-run stress tests from \$10 billion to \$250 billion and for a mandatory risk committee at publicly traded banks from \$10 billion to \$50 billion, as [noted by the Congressional Research Service](#). (Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018. 84 FR 59032, 59055 (Nov. 1, 2019)).*

## Time Burden and Expense

Compliance with this guidance, if adopted, will require a long transition period (years not months) and will be resource consuming. The proposed guidelines have a chart that shows all its provisions and estimates the amount of time compliance will require. The total number of hours shown on the chart is 91,375—the equivalent of 44 full-time workers (dividing by 2,087). This compliance—along with any additional auditing costs to provide assurance of same—clearly will add an operating expense for banks, which are





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already under pressure to set aside significant reserves to maintain their financial soundness. According to Zip Recruiter, the average annual salary for bank staff as of December 2023 was \$64,055. Multiplying this by 44 gives us an estimated financial burden of nearly \$2,818,420 on average per bank.

***NACD recommendation:** To reduce the additional time burden put on bank boards, consider the recommendations in this letter, as recapped in the conclusion below.*

In conclusion, by narrowing the scope of the guidelines; clearly distinguishing between board and management roles; aligning to compliance with existing state and federal law; issuing the guidelines as guidance rather than as mandates; and lowering the size threshold, the FDIC would be able to strengthen governance in the institutions it oversees without burdening or constricting their ability to make sound decisions on behalf of their owners and depositors.

We hope that these comments are useful and thank you again for the opportunity to comment.

Sincerely,  
Sue Cole, Chair  
Peter R. Gleason, President and CEO  
National Association of Corporate Directors

Appendix follows



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***APPENDIX - Topics Covered:***

***Audit Committee***

*Audit Committee, Review and Approval of the Internal Audit Unit's Charter - One-Time.*

*Audit Committee, Annual Review and Approval of the Internal Audit Unit's Charter - Ongoing*

***Strategy***

*Development of a Written Strategic Plan - One-Time.*

*Annual Evaluation and Approval of Strategic Plan - Ongoing.*

***Operations***

*Board, Establishment and Approval of Policies Governing Operations - One-Time.*

*Board, Annual Review of Policies Governing Operations - Ongoing.*

***Ethics***

*Establishment of a Written Code of Ethics - One-Time.*

*Annual Review of Written Code of Ethics - Ongoing.*

***Management Performance Review***

*Establishment of a Management Performance Review Process - One-Time.*

*Annual Review of Management Performance Review Process - Ongoing*

***Succession Plan***

*Development of a Succession Plan - One-Time.*

*Annual Review of Succession Plan - Ongoing*

***Director Training***

*Establishment of a Training Program for Directors - One-Time.*

***Board Self-Assessment***

*Board Annual Self-Assessment - Ongoing.*

***Compensation and Performance Management***

*Establishment of a Compensation and Performance Management Program - One-Time.*

*Annual Review of Compensation and Performance Management Program - Ongoing.*

***Charters for Board Committees***

*Establishment of a Written Charter for Board Committees - One-Time*

*Annual Review of Written Charter for Board Committees - Ongoing.*

***Charter for Internal Audit***

*Board Approval of Charter of Internal Audit Function - One-Time.*

*Board Annual Review of Charter of Internal Audit Function - Ongoing*

***Audit Committee Approval of Audit Services and CAO***

*Audit Committee, Approval of all Audit Services Section - Ongoing.*





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*Audit Committee, Approval all Decisions Regarding the Appointment or Removal and Annual Compensation and Salary Adjustment for the CAO - Ongoing*

**Risk Committee**

*Risk Committee, Approval of Risk Management Policies - One-Time.*

*Risk Committee, Annual Review of Charter of Internal Audit Function - Ongoing.*

*Risk Committee, Quarterly Review of CRO Reports - Ongoing.*

*Risk Committee, Quarterly Documentation of Proceedings and Risk Management Decisions - Ongoing.*

*Risk Committee, Approval of Decisions Regarding Appointment or Removal of CRO - Ongoing.*

**Risk Management Program**

*Board Establishment of a Comprehensive Risk Management Program Section - One-Time.*

*Board Annual Review of Comprehensive Risk Management Program - Ongoing.*

*Board Establishment of a Risk Profile - One-Time.*

*Board Quarterly Review of Risk Profile - Ongoing.*

*Establishment of a Comprehensive Written Statement that Establishes Risk Appetite Limits - One-Time.*

*Board Quarterly Review and Approval of Risk Appetitive Statement - Ongoing*

*Report Risk Limit Breaches to the FDIC - Ongoing.*

*Front Line Unit, Establishment of Written Policies that Include Risk Limits - One-Time.*

*Front Line Unit, Annual Review of Written Policies that Include Risk Limits - Ongoing.*

*Front Line Unit, Establish Procedures and Processes, as Necessary to Ensure Compliance with Board Policies - One-Time*

*Front Line Unit, Annual Review of Procedures and Processes, as Necessary to Ensure Compliance with Board Policies - Ongoing.*

*Front Line Unit, Quarterly Monitor and Report Compliance with Respective Risk Limits - Ongoing.*

*Independent Risk Management Unit, Quarterly Monitor and Report on the Covered Institution's Risk Profile Relative to Risk Appetite and Concentration Limits - Ongoing.*

*Independent Risk Management Unit, Establishment of Policies Relative to Concentration Risk Limits - One-time.*

*Independent Risk Management Unit, Review and Update of Policies Relative to Concentration Risk Limits - Ongoing.*

*Independent Risk Management Unit, Establishment of Procedures and Processes to Ensure Compliance with Board Risk Management Policies - One-time.*

*Independent Risk Management Unit, Review and Update of Procedures and Processes to Ensure Compliance with Board Risk Management Policies - Ongoing.*

*Independent Risk Management Unit, Quarterly Monitor and Report to CEO and Risk Committee Front Line Units' Compliance with Risk Limits - Ongoing*

**Internal Audit**

*Internal Audit Unit, Establishment of an Audit Plan - One-Time*

*Internal Audit Unit, Quarterly Report Changes to Audit Plan - Ongoing.*

**Risk Management Units**

*Board Establishment of Processes that Require the Front Line and Independent Risk Management Units to Identify and Distinguish Breaches, as well as Establishment of Accountability for Reporting and Resolving Breaches - One-Time.*



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*Board, Annual Review of Processes that Require the Front Line and Independent Risk Management Units to Identify and Distinguish Breaches, as well as Establish Accountability for Reporting and Resolving Breaches - Ongoing*

*Front Line and Independent Risk Management Units Report to the FDIC of Breach of a Risk Limit or Noncompliance with the Risk Appetite Statement or Risk Management Program - Ongoing.*

*Board, Establishment of Processes that Require Front Line and Independent Risk Management Units to Identify, Distinguish, Document, and Report Violations of Law or Regulations - One-Time.*

*Board, Annual Review of Processes that Require Front Line and Independent Risk Management Units to Identify, Distinguish, Document, and Report Violations of Law or Regulations - Ongoing*