January 31, 2024

Via email: comments@fdic.gov

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

RE: RIN 3064-AF94: Proposed Corporate Governance and Risk Management Guidelines

Ladies and Gentlemen:

Bank OZK appreciates the opportunity to comment on the notice of proposed rulemaking and issuance of guidelines published on October 11, 2023 by the Federal Deposit Insurance Corporation (the "FDIC") regarding the Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More (the "Proposal"). We are a $34 billion asset regional bank headquartered in Little Rock, Arkansas, with approximately 2,750 employees and 240 offices in eight states.

We are also a member of the Mid-Size Bank Coalition of America (the "MBCA"), which is a non-partisan financial and economic policy organization consisting of more than 100 banks with total assets between $10 billion to $100 billion. We understand that the MBCA is submitting a separate, comprehensive comment letter on the Proposal, and we fully support the positions and points taken by the MBCA in its letter.

We believe that strong corporate governance and risk management are vital to promoting safety and soundness. However, as discussed in this letter, the Proposal would impose a set of highly rigid processes and controls in lieu of the principles-based approach taken by the other federal banking regulators, create sweeping new duties for bank boards of directors, blur the traditional line between board oversight and management execution, and undermine the board's longstanding fiduciary duty and legal obligation to prioritize shareholder value.

The Proposal Creates Prescriptive, Uniform Governance Requirements

The Proposal establishes a lengthy set of very detailed, one-size-fits-all mandatory practices to which banks and boards must conform. In contrast, the comparable standards of both

the Office of the Comptroller of the Currency ("OCC")[1] and the Federal Reserve Board ("FRB")[2] are premised on the articulation of general principles for banks to satisfy. The FDIC's focus on inflexible and prescriptive requirements takes away banks' ability to tailor their governance and risk management programs to their particular size, risk profiles, structures and activities. It also creates a number of unnecessary "check-the-box" exercises that would not meaningfully contribute to effective risk management or high-quality governance but would consume valuable board time better spent providing robust and thorough oversight.

For example, the Proposal requires boards to approve at least annually a broad range of policies governing and guiding the bank's operations. Given the demands and time constraints already facing growing board agendas, we agree with the OCC's view, stated in its adopting release, that "board or board risk committee approval of material policies under the [risk governance] Framework would be burdensome[.]"[3] Similarly, the Proposal's directive that boards must review and approve the bank's risk appetite statement at least quarterly (or more frequently), rather than annually (OCC Guidelines) or periodically (FRB Guidance), could lead to a short-term emphasis on tweaking discrete risk metrics within the risk appetite statement rather than focusing on material items and areas that were outside of appetite during the quarter. This quarterly approval is also at odds with the Proposal's requirement that the risk management program implementing the risk appetite statement only be reviewed annually.

The Proposal Ignores Fiduciary Duty and Corporate Law to Impose Novel and Concerning New Duties on Directors

The Proposal requires the board to "consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators and the public." This would constitute a fundamental shift in the traditional and long-standing role of a corporation to prioritize the creation of long-term value for its shareholders. Indeed, while state law varies with respect to stakeholder standards (variations that are ignored by this uniform requirement), corporate law is generally clear that corporations and boards owe a fiduciary duty to their shareholders. The Proposal (unlike the OCC Guidelines and the FRB Guidance) goes beyond those state law obligations to impose a new, enforceable federal duty to other constituencies completely divorced from the interests of shareholders.

Furthermore, the Proposal fails to explain how exactly the FDIC intends to measure or evaluate the board's performance of this vague balancing act, such as the relative weight to be ascribed to each constituency, the factors or principles to be used to consider diverging interests, or even how a board is expected to define and identify the interest of "the public" as a whole. This novel and ambiguous duty, particularly in the context of the board's existing state and corporate law fiduciary obligations, would create confusion and significant litigation risk among even the most well-intentioned boards. Taken together with the other sweeping expectations of the board

[1] OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches, 79 Fed. Reg. 54518, at 54526 (Sep. 11, 2014) ("OCC Guidelines").
[2] Supervisory Guidance on Board of Directors' Effectiveness, Board of Governors of the Federal Reserve System (Feb. 26, 2021) ("FRB Guidance").
[3] OCC Guidelines at 54526.

described in the Proposal and highlighted in this letter, board service could become an unattractive prospect for precisely those highly qualified director candidates that are crucial to effective and rigorous oversight.[4]

The Proposal Forces the Board to Perform Management Functions

The Proposal misinterprets and confuses the roles of boards of directors and management. It imposes managerial duties on boards that are the responsibility and prerogative of management, as well as expectations that neither boards nor management are capable of performing.[5] For example, the board must:

- *"Establish*" a corporate culture and work environment that promotes responsible, ethical behavior, rather than oversee and challenge the culture and environment established by management.
- *"Establish*" compensation and performance management programs and a code of ethics, rather than review, challenge and approve such programs and code established by management.
- "*Establish*" processes governing risk limit breaches, rather than reviewing, challenging and approving such processes established by management.
- "*Ensure*" that the strategic plan is consistent with relevant policies. The board's responsibility is to direct management to develop the strategic plan, evaluate and approve it annually, and monitor its implementation.
- "*Ensure*" that management corrects deficiencies that auditors or examiners identify in a timely manner. While the board can and should monitor and challenge management's remedial actions, it is not feasible for them to ensure the timely correction of deficiencies.
- "*Confirm*" that the bank operates in a safe and sound manner, in compliance with all laws and regulations. As written, the Proposal suggests that directors must not only oversee, but also independently validate, the work of independent risk management, compliance, and audit functions. The board is not positioned to perform these independent investigative and validation tasks.

The board's proper and well-established role is one of oversight, which includes critical evaluation, review, approval, challenge and accountability. Requiring the board to "establish" and "confirm" various items substitutes the board into an active managerial role and exposes it to liability beyond its traditional scope. It also dilutes the time and attention that boards will be able to devote to other matters squarely within their crucial oversight function. In addition, the

[4] As the Proposal itself aptly notes, directors who fail to discharge their duties may be subject to removal from office, criminal prosecution, civil money penalties imposed by regulators, and civil liability.

[5] This creates yet another conflict with state law, as many states, including Arkansas where we are domiciled, have laws that entitle a director to discharge their duties through reliance on information, opinions, reports, or statements prepared or presented by management, and provide that a director is not liable for any action taken based on such reliance. See Ark. Code Ann. § 4-27-830(b) and (d) of the Arkansas Business Corporation Act of 1987 and Ark. Code Ann. § 23-48-322(e) and (g) of the Arkansas Banking Code of 1997.

Proposal's requirement that the board "ensure" certain events or outcomes are achieved or avoided is a plainly unrealistic expectation that boards have no ability to satisfy. Perhaps for these reasons, neither the OCC Guidelines nor the FRB Guidance impose comparable obligations on the board.[6]

Other Concerns

- The Proposal would become effective immediately upon adoption, with no transition period to comply with the multitude of new and highly prescriptive requirements. A transition period is appropriate for banks to implement, and examiners to become trained on and familiar with, the various elements of the Proposal.
- The Proposal identifies the "sole function" of the board risk committee as responsibility for risk management policies and oversight of the risk management framework, suggesting that it would be problematic for the committee to perform other, complementary or appropriate functions.
- The Proposal's requirement that the board establish processes to report all violations of law to the appropriate enforcement authority raises concerns regarding attorney-client and other privileges and could create unintended incentives regarding the investigation, self-identification and remediation of compliance issues.
- Unlike the FRB Guidance and the OCC Guidelines, the Proposal imposes very detailed and rigid requirements while also being issued as enforceable, binding legal guidelines under Section 39 of the Federal Deposit Insurance Act. Even if some of these expectations are laudable governance practices, they should not themselves constitute violations of the FDIC's safety and soundness standards.

Once again, we appreciate the opportunity to comment on the Proposal and respectfully ask the FDIC to consider these observations. Please feel free to contact me should you have any questions about the information contained in this letter.

Sincerely,

Helen Brown
General Counsel and Corporate Secretary
Bank OZK

[6]The overuse of "ensure" was also part of the OCC proposal in 2014 but, in response to extensive comments, the OCC eliminated this aspect of the proposal in the final OCC Guidelines. In addition, the most recent OCC Director's Book eliminated the "ensure" concept. *See* Office of the Comptroller of the Currency, Director's Book: Role of Directors for National Banks and Federal Savings Associations (November 2020). Similarly, the FRB Guidance avoids use of such a standard.