



MID-SIZE BANK COALITION OF AMERICA

February 1, 2024

Via Electronic Mail

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

Re: Notice of Proposed Rulemaking and Issuance of Guidelines: Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of \$10 Billion or More; RIN 3064–AF86

Ladies and Gentlemen:

On behalf of the Mid-Size Bank Coalition of America (the **MBCA**),¹ I appreciate the opportunity to submit this letter in response to the request of the Federal Deposit Insurance Corporation (the **FDIC**) for comment 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**), published in the Federal Register on October 11, 2023.

Overview

The MBCA appreciates the importance of strong and effective corporate governance. However, the Proposed Guidelines fall short in many ways.

First, the Proposed Guidelines fail to strike the right balance between process and core safety and soundness concerns, especially when compared to the more modulated viewpoints of other banking agencies. The MBCA recommends that the FDIC align its standards with the

¹ The MBCA is a non-partisan financial and economic policy organization comprising the CEOs of mid-size banks doing business in the United States. Mid-size banks are defined as banks with assets between \$10 and \$100 billion. *See About Us*, MBCA, <https://midsizebanks.com/about-us/> (last visited Oct. 24, 2023). Founded in 2011 to represent the views of mid-size banks, the MBCA has more than 100 members and educates lawmakers about the financial regulatory issues and policies affecting the ability of mid-size banks to compete fairly and to support and contribute to the growth of the U.S. economy more fully. MBCA has more than 100 member banks, which average approximately \$20 billion in size and serve customers and communities through more than 13,000 branches in all 50 states, the District of Columbia, and three U.S. territories. *See Members*, MBCA, <https://midsizebanks.com/members/> (last visited Oct. 24, 2023).

principles-based standards of the Federal Reserve Board (**FRB**) and Office of the Comptroller of the Currency (**OCC**) (**Section A**).

Second, the Proposed Guidelines would impose sweeping fiduciary duties on directors in a way that creates potential conflicts with many state laws. The MBCA recommends that the FDIC reconsider imposing these fiduciary duties (**Section B**).

Third, the Proposed Guidelines blur the distinction between board oversight and management's day-to-day responsibilities for the operations of the banking organization. The MBCA recommends that the FDIC more carefully distinguish between the responsibilities of board and of management in the Proposed Guidelines (**Section C**).

Fourth, the Proposed Guidelines apply to banks with \$10 billion or more in total consolidated assets. Given the substantial burdens imposed by the Proposed Guidelines, the MBCA recommends that the FDIC raise the asset threshold of the Proposed Guidelines to cover banks with average total consolidated assets equal to or greater than \$50 billion (**Section D**).

Fifth, the Proposed Guidelines would impose unusual and burdensome requirements with respect to independent directors and self-reporting violations of law. The MBCA recommends that the FDIC revise or reconsider the independent director requirements (**Section E**) and self-reporting requirements (**Section F**) in the Proposed Guidelines.

Sixth, the Proposed Guidelines fail to clarify aspects of key terms and are internally inconsistent. The MBCA recommends that the FDIC clarify the "dominant policymaker" provisions (**Section G**), definition of "large" financial firm (**Section H**), and other inconsistencies (**Section I**) under the Proposed Guidelines.

Seventh, the FDIC has not taken appropriate measures to effectively implement the Proposed Guidelines. The MBCA recommends that the FDIC enhance examiner training (**Section J**) and provide an appropriate transitional period for banks to achieve full compliance with the Proposed Guidelines (**Section K**).

A. The FDIC should align its standards with those of the FRB and OCC, which reflect a principles-based approach to corporate governance and risk management. The FDIC's Proposed Guidelines are quite different from the standards of the FRB² and OCC,³ including that they are more prescriptive than those standards despite targeting significantly smaller institutions.

- **Three Different Standards.** The policy goal of creating a third set of board-effectiveness standards among the federal banking agencies is unclear and at odds with recent efforts to

² *Supervisory Guidance on Board of Directors' Effectiveness*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 26, 2021), <https://www.federalreserve.gov/supervisionreg/srletters/SR2103a1.pdf> [hereinafter FRB Guidance].

³ 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) [hereinafter OCC Guidelines].

harmonize interagency standards.⁴ While the FDIC’s stated intention is to harmonize its corporate governance and risk management requirements with the FRB Guidance and OCC Guidelines,⁵ the Proposed Guidelines create disharmony by imposing a different asset threshold; creating enforceable guidelines;⁶ and imposing very detailed, highly prescriptive, and unprecedented requirements that risk burdening boards and hampering robust, dynamic, and healthy governance.

- ***Poorly Calibrated to the March 2023 Turmoil.*** Unlike the FRB Guidance and OCC Guidelines, the Proposed Guidelines were developed, in part, in response to the March 2023 bank turmoil. The FDIC broadly notes that poor corporate governance and risk management contributed to the March 2023 bank failures and that bank failures negatively impact both the Deposit Insurance Fund (**DIF**) and stakeholders.⁷ We are concerned that the FDIC has not demonstrated how the highly prescriptive guidelines it proposes would prevent the poor corporate governance and risk management practices that reportedly contributed to the March 2023 bank failures. Burdening directors with highly prescriptive technical requirements would, we fear, divert attention away from core risk management responsibilities. By contrast, adopting a principles-based approach similar to the FRB Guidance and the OCC Guidelines could allow boards to better focus on core risks, avert failure, and preserve the DIF.⁸
- ***Increased Difficulty in Attracting Director Talent.*** The uniquely prescriptive standards of the Proposed Guidelines, together with the specter of public enforcement actions, increases the risk that a board may become more focused on achieving compliance with the detailed procedural requirements of the Proposed Guidelines, rather than the critical work of safety and soundness. These dynamics, which are not an issue in the principles-

⁴ See, e.g., Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg 74183 (Oct. 30, 2023); *Interagency Overview of the Community Reinvestment Act Final Rule*, FED. DEPOSIT INS. CORP. (Oct. 24, 2023), <https://www.fdic.gov/news/fact-sheets/interagency-overview-cra-final-rule-10-24-23.html>; *Joint Statement on Liquidity Risks to Banking Organizations Resulting from Crypto-Asset Market Vulnerabilities*, FED. DEPOSIT INS. CORP. (Feb. 23, 2023), <https://www.fdic.gov/news/financial-institution-letters/2023/fil23008a.pdf>; Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers, 86 Fed. Reg. 66424 (Nov. 23, 2021).

⁵ 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, 70393 (Oct. 11, 2023) [hereinafter Proposed Guidelines].

⁶ The Proposed Guidelines would be enforceable under Section 39 of the Federal Deposit Insurance Act. This policy choice is in contrast with the FRB’s approach of adopting principles-based guidance. It is also in contrast to the OCC, which has chosen the path of enforceable guidelines, but carefully calibrated its corporate governance guidelines to be general principles.

⁷ Proposed Guidelines, *supra* note 5 at 70391.

⁸ Cf. FDIC Statement of Policy on the Development and Review of Regulations and Policies, 78 Fed. Reg. 22771 (Apr. 17, 2013) (Establishing principles to guide the FDIC’s rulemakings and stating: “Once the need or requirement for a regulation or statement of policy is determined, the FDIC evaluates benefits and costs, based on available information, and considers reasonable and possible alternatives.”)

based approaches of the FRB and OCC, will also make it more difficult for banks to attract qualified directors.

- ***Quarterly vs. Annual.*** The Proposed Guidelines would impose a higher frequency of required reviews by the board than does the OCC or FRB. For example, the Proposed Guidelines would require the board to approve the risk appetite statement quarterly, as compared to annually under the OCC Guidelines and periodically under the FRB Guidance. Quarterly risk appetite approvals could lead to misalignments with strategic plans, which are typically approved yearly and forecasted on a three- to five-year time horizon. Quarterly approvals may also lead covered institutions to modify acceptable risk levels rather than address items outside of acceptable levels.
- ***Ineffective One-size-fits-all Approach.*** Unlike the standards in the FRB Guidance and OCC Guidelines, the prescriptive requirements for a risk management program in the Proposed Guidelines would not give boards sufficient flexibility to adopt governance and risk management practices that are tailored to an institution's size, business model, complexity, and risk profile. For example, the Proposed Guidelines would restrict the ability of banks and their holding companies to establish common, enterprise-wide risk management policies and frameworks.
- ***Too Many Policies to Approve.*** The Proposed Guidelines would impose a more burdensome requirement on boards to approve a broad swath of policies on an annual basis which will markedly impede on the time available to boards for conducting effective oversight of management. By contrast, the OCC made a conscious decision not to require approval of many policies by the board.⁹
- ***Executive Officers.*** The Proposed Guidelines also contain requirements with respect to the board's involvement in the selection of executive officers. For instance, the Proposed Guidelines imply the board must appoint all executive officers, which is broader than the OCC Guidelines and FRB Guidance. The Proposed Guidelines specify that selection criteria for executive officers should include "integrity, technical competence, character, and experience in financial services," which is not found in either the FRB Guidance or OCC Guidelines. While integrity and character are laudable attributes, their inclusion in the Proposed Guidelines raises the specter of enforcement actions if directors are later deemed to have chosen the wrong person.
- ***Self-Assessment.*** The FDIC's requirement that the board, as part of its yearly self-assessment, evaluate whether it has met the guidelines, means that boards will find themselves obligated to engage in a recurring check-the-box compliance exercise that is not necessary under the more principles-based approach of the FRB and the OCC and may undermine the value of the self-assessments where directors may be reluctant to determine that guidelines have not been met in some respects. This type of exercise could undermine

⁹ See, e.g., OCC Guidelines, *supra* note 3 at 54526 ("The OCC believes that board or risk committee approval of material policies under the Framework would be burdensome, and that these policies should be approved by management instead.").

the spirit of candid qualitative and dynamic self-assessments, whose focus may change from year to year depending upon a board's priorities.

B. *The Proposed Guidelines would impose sweeping fiduciary duties on directors in a way that creates potential conflict with many state laws.* The Proposed Guidelines state that a director should consider “the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public.” This directive could create significant new fiduciary duties for directors.

- ***Shareholder Value States.*** The new federal overlay risks being at odds with many shareholder value states. Even in those states, directors often, as they consider the long-term interests of shareholders, assess the impact that certain actions may have on creditors, customers and depositors but weigh them according to the facts at hand.
- ***Stakeholder Value States.*** The proposal may also conflict with duties applicable to directors under stakeholder standards because, although those standards broaden duties beyond shareholder value, the particular formulation can vary by state. Moreover, even in stakeholder value states, the consideration is almost always discretionary.¹⁰
- ***Interest of Regulators.*** The Proposed Guidelines' broad, vague reference to the interests of regulators would be new and unusual. We question how a board can consider, in its fiduciary duties, the interest of regulators. We also question whether a covered institution must consider all state and federal regulators that touch upon banking. Aside from the narrow interest of protection of the Deposit Insurance Fund, we further question what the independent interest of a regulator is at all.
- ***The Public.*** The Proposed Guidelines' vague reference to “the public” as a stakeholder is highly unusual. While the most expansive stakeholder states allow directors to consider the interests of “the community” or “the economy of the state and nation,”¹¹ the former is limited to a specific geographic area in which the institution operates and the latter is confined only to the economic interests of the state or nation. By contrast, “the public” is not limited in any way, which will make it difficult for directors of regional banks to consider all potential interests of the public over an undefined area.
- ***False Impression on Alignment.*** By individually listing the interests of shareholders, depositors, creditors, customers, regulators, and the public, the Proposed Guidelines could give the false impression that the interests of different stakeholders are inherently unaligned. In fact, all stakeholders should be uniformly aligned on the overall objectives

¹⁰ MARK A. SARGENT AND DENNIS R. HONABACH, D&O LIABILITY HANDBOOK § I:24 (“All but the Arizona and Idaho [nonshareholder constituency] statutes simply allow the directors to take into account the interests of nonshareholder constituencies when considering the best interests of the corporation”).

¹¹ *Id.*

of safety and soundness, meeting the needs of communities, and operating in compliance with laws and regulations.

- ***Should Not Exceed State Law.*** The OCC states in its Director’s Book that the corporate governance provisions discussed in the book are not intended to, nor do they, exceed applicable state law requirements.¹² The FDIC should adopt a similar standard.
- ***Risk of Liability and More Talent Issues.*** Whether and how the proposed standards would be enforced by various parties could lead to confusion and related litigation risk such as shareholder derivative actions. The potential establishment of a new fiduciary duty and the associated exposure to liability this would create for directors may make it even more difficult for banks to attract qualified candidates to serve on their boards. The Proposed Guidelines should not expand the long-established fiduciary duties of directors. The FDIC should revise the text in the Proposed Guidelines accordingly.

C. *The FDIC should more carefully distinguish between the responsibilities of board and of management.* The Proposed Guidelines blur the distinction between board oversight and management’s day-to-day responsibilities for the operations of the banking organization. This conflation is in sharp contrast to the FRB Guidance and OCC Guidelines, which more carefully reflect the appropriate role of the board in overseeing management.

- ***Overuse of Ensure.*** The Proposed Guidelines’ expansive and repetitive use of the term “ensure” is at odds with the well-established role of the board to oversee and hold management accountable. The term “ensure” raises the risk that the board will need to be deeply involved in the day-to-day activities of the bank, thereby transforming a board’s core oversight function into a management function.¹³ The term might also be read by plaintiffs to connote a guarantee of results.
 - The proposal would require that the board “ensure” that management corrects deficiencies that auditors or examiners identify in a timely manner. Aside from the fact that this enforceable requirement does not take into account the possibility of an appeal of identified deficiencies, or the possibility that an examination team or auditor might not be correct, it is not feasible for a board to “ensure” such actions by management. The FHFA’s similar requirement,¹⁴ which requires that a board “assure its oversight” of the “responsiveness” of executive officers in “addressing

¹² OFFICE OF THE COMPTROLLER OF THE CURRENCY, DIRECTOR’S BOOK: ROLE OF DIRECTORS FOR NATIONAL BANKS AND FEDERAL SAVINGS ASSOCIATIONS 2 (2020), <https://www.occ.gov/publications-and-resources/publications/banker-education/files/directors-book.html>.

¹³ Similar concerns exist with the Proposed Guidelines’ frequent use of “establish,” “confirm” and “write.” Verbs like these further conflict with the board’s well-established oversight role. For instance, the Proposed Guidelines impose a duty on each director to “confirm that the institution operates in a safe and sound manner, in compliance with all laws and regulations.” As written, this text suggests that directors must not only oversee, but also independently validate, the work of independent risk management, compliance, and audit functions.

¹⁴ 12 C.F.R. § 1239.4.

all supervisory concerns,” is a much more sensible formulation that takes into account the role of the board in holding senior management accountable without muddying the role of the board and that of management.

- 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. Similarly, the FRB Guidance avoids use of such a standard.
- **Words That Do Not Match the Board’s Role.** The Proposed Guidelines also assign other types of actions to the board that do not reflect the appropriate role of the board in providing oversight, including the frequent use of “establish,” “confirm” and “write.”
 - For example, the Proposed Guidelines impose a duty on each director to “confirm that the institution operates in a safe and sound manner, in compliance with all laws and regulations.” As written, this text suggests expanded obligations and liability for directors in that directors must not only oversee, but also independently validate, the work of independent risk management, compliance, and audit functions.
 - The Proposed Guidelines would require the board to “establish” a corporate culture and work environment, rather than emphasizing the role of the board in setting an appropriate tone for the bank.
- **Oversight Role.** The FDIC should modify the Proposed Guidelines to focus on the board’s responsibility for oversight of management and the bank’s risk management program, rather than on ensuring outcomes. We suggest that the FDIC describe the actions that the FDIC expects bank directors to take, such as requiring the board to “oversee” and “hold management accountable,” which more accurately reflect the oversight function that is core to the directors’ duties. In stark contrast to the Proposed Guidelines, the recent Interagency Principles for Climate-Related Financial Risk Management adopted by the FDIC, OCC and FRB assign a more appropriate role for the board.¹⁵

D. The FDIC should raise the asset threshold of the Proposed Guidelines to cover banks with average total consolidated assets equal to or greater than \$50 billion, consistent with the asset threshold of the OCC Guidelines and more appropriate given the burdens imposed by the Proposed Guidelines. If adopted, the Proposed Guidelines would apply to banks with \$10 billion or more in total consolidated assets, while the OCC Guidelines apply only to banks with \$50 billion or more in total assets and the FRB Guidance applies only to bank holding companies with \$100 billion or more in total assets.

¹⁵ See Principles for Climate-Related Financial Risk Management for Large Financial Institutions, *supra* note 4 at 74187 (“A financial institution’s board should *understand* the effects of climate-related financial risks. . . The board should *oversee* the financial institution’s risk-taking activities, *hold management accountable* for adhering to the risk management framework . . .”) (emphasis added).

- **Tailoring.** In drafting the Proposed Guidelines, the FDIC has abandoned the well-established principle that effective risk management should be tailored to the size of the institution and the nature, scope, and inherent risk of its activities. As a result, the Proposed Guidelines would apply evenly to all covered institutions regardless of their inherent risk profiles. Indeed, the only mention of tailoring in the proposal is that the covered institutions “are typically more complex and present a higher risk profile than community banking organizations with less than \$10 billion in total assets.”
- **Compliance Burden.** Applying prescriptive standards that are even more prescriptive than those applicable to larger national banks to all state non-member banks with \$10 billion in total consolidated assets risks increasing compliance burdens on the smallest banks that do not have the same capacity to defray those costs as do the larger institutions supervised by the OCC and FRB.
 - The cumulative effect of these prescriptive requirements would be substantial. The FDIC estimates that the Proposed Guidelines would compel covered institutions to expend 91,375 labor hours on achieving compliance in the first year. This amounts to 1,523 hours (or 190 working days of eight hours each day) for each of the 60 FDIC-supervised institutions that currently have \$10 billion or more in total consolidated assets. However, the proposed OCC Guidelines estimated a burden per respondent of 7,200 hours each year (900 working days),¹⁶ while the final OCC Guidelines estimated a burden per respondent of 3,776 hours each year (472 working days).¹⁷ Given that the Proposed Guidelines are more prescriptive and burdensome than the OCC Guidelines, the FDIC’s estimate likely significantly underestimates the true labor burden of the Proposed Guidelines.
 - Increased compliance burdens could in turn incentivize covered institutions to become members of the Federal Reserve System or convert to national banking charters to avoid FDIC supervision.
- **SEC Requirements.** The Proposed Guidelines would also add another layer of regulatory complexity for many covered institutions. Many FDIC-supervised banks with \$10 billion or more in total consolidated assets are owned by publicly traded bank holding companies and are subject to Securities Exchange Commission (SEC) and market listing rules regulating corporate governance.¹⁸ Thus, the Proposed Guidelines would further

¹⁶ OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches, 79 Fed. Reg. 4282, 4294 (Jan. 27, 2014).

¹⁷ OCC Guidelines, *supra* note 3 at 55542.

¹⁸ See, e.g., 17 C.F.R. § 229.407; 5600. Corporate Governance Requirements, NASDAQ, <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series> (last visited Jan. 29, 2024); 303A.00 Corporate Governance Standards, NYSE, <https://nyseguide.srorules.com/listed-company-manual/09013e2c8503fca9>.

complicate covered institutions' attempts to standardize governance practices across the public bank holding company and its largest subsidiary, the bank.

- **Cost-Benefit.** We question whether increasing burdens on smaller banks by requiring more director time and management process—to achieve the same result as the OCC Guidelines and FRB Guidance—achieves the stated goals of the FDIC in promulgating the guidelines.

E. *The Proposed Guidelines would impose unusual and burdensome requirements on the boards of directors for banks and their holding companies with respect to independent directors.* The Proposed Guidelines would require a majority independent board and, for this purpose, an independent director of the bank's holding company would not automatically count as an independent director of the bank, contrary to the OCC Guidelines, which treat an independent director of the holding company as independent for the bank.

- **Align to OCC Model.** There is no reason for the FDIC to adopt a standard that is different from the OCC and which is at odds with the dominant model of a complete overlap board, which has proven to be efficient and effective for many institutions, supporting their enterprise risk management objectives.
- **Limited or No Additional.** In order for a director of the bank's holding company to count as an independent director of the bank under the Proposed Guidelines, the holding company must conduct limited or no additional business operations outside of the bank. This standard is vague, would be impracticable to implement and may lead to bank boards and holding company boards working in silos. It is also unnecessary if the FDIC adopts the OCC model. If, however, the FDIC chooses to adopt this proposed standard, it must define precisely what it means by "limited or no additional." Given the long lead time for attracting qualified directors, this cannot be a standard left to the interpretation of individual examination teams.
- **Any Other Institution.** The FDIC should clarify that it does not mean to prohibit an independent director from serving on the board of "any other institution" but instead only the board of "an affiliate of the institution" (here, the bank).
- **Align to Regulation W.** The FDIC should also clarify that serving on the board of an operating subsidiary of the bank would not prevent a director from being considered independent. Such a clarification would be consistent with the definition of "affiliate" in Regulation W, which addresses similar policy concerns.

F. *The FDIC should revise and reconsider the self-reporting requirements in the Proposed Guidelines.* Banks are subject to extensive, ever-evolving laws and regulations, including numerous reporting requirements. The Proposed Guidelines include extensive and unprecedented provisions that would require a board to establish, and the bank to adhere to, processes for bank personnel to timely identify, assess, document, and report all violations of law.

- **No Materiality Threshold.** In certain cases, the FDIC would require that a bank report suspected violations of law to the relevant law enforcement and federal and state agencies,

without regard for the nature or materiality of the violations or the bank’s level of certainty that the violations occurred. The FDIC should revise the Proposed Guidelines to establish a materiality threshold for reporting suspected violations.

- **Timely Reporting.** The Proposed Guidelines vaguely require a board to timely identify and report violations of law. The FDIC should clarify what qualifies as timely under the Proposed Guidelines.
- **Unintended Consequences.** The Proposed Guidelines’ self-reporting requirements could pose unintended consequences, such as altering banks’ incentives to conduct investigations and self-identify and remediate compliance issues. In addition, the FDIC should consider how these requirements would overlap or conflict with existing obligations on banks. Further, these requirements raise concerns regarding how external reporting requirements would interact with attorney-client and other privileges if information is provided to authorities other than bank agencies and supervisors.¹⁹

G. It is unclear how and to what extent the Proposed Guidelines’ provisions on a “dominant policymaker” are intended to apply to a mid-size bank. The Proposed Guidelines contain a caution about a board being influenced by a “dominant policymaker,” whether the person is a manager, shareholder, or director.

- **Official vs. Policymaker.** The FDIC has previously addressed the concept of a “dominant official” in its RMS Manual of Examination Policies – Management, where it describes “the risks associated with institutions controlled by an official that has material influence over virtually all decisions involving the bank’s policies and operations.” While the examination manual refers to this scenario using the terms “control” and “official,” the Proposed FDIC Guidelines refer to a “dominant policymaker” without explaining what, if any, rationale is behind the use of the different terms (i.e., “official” and “policymaker”).
- **Application to Private Company.** Many privately held banks are owned by a limited number of shareholders and, consequently, have one or more individuals who could be viewed by the FDIC as a “dominant policymaker.” The FDIC should clarify what constitutes a “dominant policymaker” and explain that the Proposed Guidelines should not be interpreted as preventing or discouraging banks from being owned by a limited number of shareholders.
- **Application to Public Company.** Although the term “dominant policymaker” may make sense for a privately held or family-controlled company, its application to a non-member bank whose parent is publicly traded risks creating confusion. Thus, the FDIC should clarify how this term would apply to such a non-member bank.

H. It is unclear what qualifies as a “large” financial firm under the Proposed Guidelines. The Proposed Guidelines require that the covered institution’s Chief Risk Officer be experienced in identifying, assessing, and managing risk exposures of “large financial firms.” The Proposed

¹⁹ See 12 U.S.C. § 1828(x).

guidelines fail to define what qualifies as a large financial firm. Similarly, the Proposed Guidelines stipulate that a covered institution’s risk committee must include at least one member experienced in identifying, assessing, and managing risk exposures of “large firms.” As with large financial firms, the Proposed Guidelines fail to define large firms. The FDIC should more clearly define these terms.

I. ***The Proposed Guidelines are internally inconsistent, which would lead to confusion and inconsistent application.*** In many instances, the Proposed Guidelines are internally inconsistent. These internal inconsistencies would create confusion for covered institutions attempting to comply with the Proposed Guidelines’ requirements. Further, these inconsistencies would lead to inconsistent application of the guidelines to covered institutions. Examples of inconsistencies in the Proposed Guidelines include:

- ***Strategic Plan.*** One portion of the preamble states that the board is “responsible” for the strategic plan and direction of the covered institution and that the development and approval of a strategic plan is the “common responsibility” of a board.²⁰ However, another portion of the preamble and the regulatory text state that the board should “direct the CEO” to develop a written strategic plan.²¹
- ***Responsibility for Hiring.*** One portion of the preamble describes the board “as the body that appoints and compensates the CEO (and possibly other management as well, either in whole or by committee).”²² However, another portion of the preamble and a portion of the regulatory text stipulate that the board must select and appoint qualified “executive officers.”²³
- ***Ethics Code.*** One portion of the preamble states that the “[P]roposed guidelines also emphasize the importance for the board and management to adopt a code of ethics . . . to ensure the covered institution and its employees adhere to applicable laws and regulations, including consumer protection laws and regulations.”²⁴ By contrast, another portion of the preamble states that “the tone set by the board is closely related to other concepts . . . including a Code of Ethics that encourages responsible behavior.”²⁵ “Encourage” is better aligned to the oversight role of the board than “ensure.”

²⁰ Proposed Guidelines, *supra* note 5 at 70395.

²¹ *Id.* at 70405.

²² *Id.* at 70395.

²³ *Id.* at 70396.

²⁴ *Id.* at 70394 (emphasis added).

²⁵ *Id.* at 70395 (emphasis added).

- ***Self-Assessment Timing.*** The preamble states that the board should conduct a self-assessment on a “regular basis,”²⁶ while the regulatory text states that the board should conduct an annual self-assessment.²⁷ Annual self-assessments are the market standard.
- ***Second Line of Defense.*** One portion of the regulatory text stipulates that “the board of a covered institution should establish . . . a comprehensive and independent risk management function and effective programs for . . . risk management.”²⁸ Yet, another portion of the regulatory text states that “the independent risk management unit should design a formal risk management program.”²⁹ In line with the board’s oversight role, the board should oversee the independent risk management function as it designs and establishes a formal risk management program.

J. *Examiner training needs to be enhanced before examiners can be expected to appropriately supervise compliance with the Proposed Guidelines.* Examiners-in-charge do not have experience supervising institutions for compliance with the Proposed Guidelines. This lack of experience among examiners risks leading to inconsistent application of the Proposed Guidelines. To avoid this result, the FDIC should sufficiently train examiners before implementing the Proposed Guidelines.

K. *The FDIC should provide an appropriate transitional period pursuant to which banks are given at least one year from publication to achieve full compliance.* If adopted as written, the Proposed Guidelines would be effective immediately for covered banks, with no transition period to achieve compliance. A transition period to achieve compliance will be especially critical for the smallest institutions with fewer resources.

Respectfully submitted,



Brent Tjarks
Executive Director
Mid-Size Bank Coalition of America

²⁶ *Id.* at 70396.

²⁷ *Id.* at 70406.

²⁸ *Id.* at 70406.

²⁹ *Id.* at 70407.