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Submitted Via Electronic Mail

February 6, 2024

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–AF94

Ladies and Gentlemen:

Apple Bank (the "Bank" or "we")[1] appreciates the opportunity to provide 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" or the "Proposal"), published in the Federal Register on October 11, 2023.

The Proposed Guidelines set forth a broad set of enforceable standards that the FDIC expects will strengthen the corporate governance and risk management practices of financial institutions, which the FDIC strongly implies was the cause of the early 2023 bank failures. However, as noted in the comment letters of both the American Bankers Association ("ABA") and the Midsize Banking Coalition of America ("MBCA"), which the Bank is an active member of both trade groups and agrees with the comments set forth in their letters, the Proposed Guidelines will miss the goal and/or expectation of the

[1] Apple Bank is a state-chartered non-member savings bank in New York, with approximately $17 billion of assets and $15.1 billion of deposits as of year-end 2023.

FDIC. Instead, we believe the Proposal will create prescriptive corporate governance requirements that will turn financial institution's corporate governance practices into a "check the box exercise" versus a practice that is dynamic and would allow a board of directors to properly perform their true function of holding management accountable for their day-to-day actions and also providing oversight and guidance on the risk that are most important to their financial institution.

In addition to the significant points and concerns set forth in the ABA's and MBCA's letters, we believe there are certain aspects of the Proposal that warrant further discussion. Accordingly, the remainder of this letter highlights aspects of the Proposed Guidelines that the Bank strongly encourages the FDIC to further consider and either ultimately modify or withdraw in their entirety.

I. The asset threshold size for the applicability of the Proposal to state non-member banks needs to be increased to at least $50 billion or more.

Over the past few years, the federal banking regulators, including the FDIC, appear to have taken steps to attempt to better harmonize regulatory requirements/guidance amongst the regulators. For example, the federal banking regulators recently finalized a joint rule with respect to the Community Reinvestment Act, when previously each regulator had their own separate rule. However, the Proposed Guidelines indicate that any bank, which has the FDIC as its primary federal regulator and has total consolidated assets of $10 billion or more (or even in some case banks with less than $10 billion in assets) would be subject to the requirements of the Proposal. The proposed asset threshold for when a state non-member bank would be subject to these heightened standards set by the FDIC is significantly below the asset thresholds set by the other federal banking regulators. In fact, the asset threshold being proposed by the FDIC is 500% less than the OCC's $50 billion asset threshold and 1000% less that the Federal Reserve $100 billion asset threshold. Even more troublesome, is the fact that the reduction in the asset threshold for applicability of the proposed heightened standards has been done without any concrete data being shared by the FDIC as part of the Proposal as to why the drastic reduction in the asset threshold is necessary.

Accordingly, the FDIC needs to increase the asset threshold at which its proposed heightened corporate governance standards apply to at least $50 billion or more. Should the FDIC choose not to increase the asset threshold to at least $50 billion or more, the FDIC should be prepared for many state non-member banks to actively consider and potentially execute against switching its charter to a national bank charter or becoming state member banks.

II. The proposed fiduciary duties required of the board of directors within the Proposed Guidelines runs afoul of most non-member bank's applicable state law fiduciary duties.

The Proposed Guidelines introduce new fiduciary duties and standards on the board of directors that go well beyond what any state laws would require of a board of directors. Specifically, the FDIC has proposed that when boards exercise their fiduciary duties, they take into account that the interest of "all its stakeholders, including shareholders, depositors, creditors, customers, *regulators, and the public*" (emphasis added) are considered.

The fiduciary standard set forth in the Proposed Guidelines does not align to what would be applicable to the board of directors of Apple Bank, a New York state chartered savings bank pursuant to section 7015 of the New York Banking Laws. Although, even if the New York Banking Law was to be read in the broadest way, the law cannot be read to require a fiduciary duty of a board of directors to take into account all of the constituents set forth in the Proposed Guidelines when the board makes a decision. Furthermore, as appropriately pointed out by the ABA in its comment letter, "[n]ot only is it unclear how any director could accurately and reliably identify and evaluate the interest of regulators and the general public …", but to require strict adherence to such a standard with a director's inability to do so potentially resulting in criminal and/or civil liability would be an unfathomable outcome. Moreover, in the case of Apple Bank's directors, even if it was possible to meet the fiduciary standards and duties set for in the Proposed Guidelines, which it is not for the reasons set forth above, since the Proposal's fiduciary requirements do not align with the fiduciary requirements set forth in the New York Banking Laws, the Bank's directors would have to choose to either be in violation of the fiduciary requirements under the FDIC's regulations or the New York Banking Laws. This is a position that no director should ever be placed in or should be expected to operate within.

Accordingly, we strongly encourage the FDIC to acknowledge the long-standing existence of state fiduciary standards and retract the fiduciary standards it sets forth in its Proposed Guidelines. Alternatively, at a minimum the FDIC needs to make it clear in the Proposal that any fiduciary standards it sets forth only applies to the extent those standards align with and do not run opposed to applicable state laws, regulations, or a bank's bylaws.

III. The Proposed Guidelines set unrealistic requirements that the board of directors will *"ensure"* certain actions and/or outcomes.

The Proposed Guidelines requires that certain actions and/or outcomes be "*ensured"* (emphasis added) by a board of directors. As indicated in the December 14, 2023 Society for Corporate Governance's comment letter, the Bank is also not aware of any laws and regulations concerning corporate governance that requires the board of directors to "*ensure"* an outcome occurs, likely because doing so would be completely unrealistic for a group of individuals that is primarily charged with providing guidance and oversight to management while at the same time holding management accountable for the actions they take. To require the board of directors to "*ensure"* a specific outcome would flip these well-known primary responsibilities of a board of directors on its head.

For example, the Proposed Guidelines require boards of directors to "*ensure*" that the bank's compliance with safe and sound banking practices and all applicable laws and regulations. A board of directors will definitely provide guidance and oversight that directs a bank's management to operate in a safe and sound manner and within the confounds of all applicable laws and regulations, to do otherwise would in almost all instances make a board of directors run afoul of its fiduciary duties. However, to require a board to ensure that the aforementioned always occurs would require the board of directors to become actively involved in the day-to-day management of the bank, which runs afoul of any long-standing and universally followed corporate governance standards and/or requirements that Apple Bank is aware of. Moreover, if this was not the intention of the FDIC when proposing this requirement, it will clearly be the result since violations of the Proposed Guidelines are enforceable by both criminal and civil penalties. As such, for a board of directors to be comfortable that the *"ensuring"* requirements set forth in the Proposed Guidelines (i.e., "*ensuring"* the bank's compliance with safe and sound banking practices and all applicable laws and regulations; *"ensuring*" that management corrects deficiencies that auditors or examiners identify; etc.), the board of directors would themselves on a day-to-day basis have to proactively engage in and direct all steps that management is taking, which cannot be the result the FDIC was intending to occur.

If the FDIC chooses to move forward with the "ensure" concept, the number of individuals that will continue or be willing in the future to serve on a state non-member bank's board of directors will drastically decrease. This decrease will be the direct result of it being impossible for a board of directors to "*ensure"* specific outcomes as required by the Proposal and the lack of strict adherence to the Proposed Guidelines resulting in both criminal and civil liability for the board of directors. As a result of this risk and almost certain outcome, no person would want to continue being or in the future agree to be a member of a

state non-member bank's board of directors. Accordingly, for the foregoing reasons, the FDIC should follow the lead set by the OCC when it finalized its heightened standards and remove the requirement that the board of directors *"ensure"* specific outcomes from its Proposal.

IV. The Proposed Guidelines needs to remove its independent majority director requirement.

Despite the FDIC indicating that it is working to better align regulations/rules among the federal regulators, it is unclear to Apple Bank, and likely anyone who has reviewed the Proposed Guidelines, why the FDIC feels it is necessary to require state non-member banks to have a majority independent board of directors. There is no basis provided in the Proposed Guidelines for this requirement or background on how not having a majority independent board of directors was a key catalyst to the bank failures or inappropriate liquidity and interest rate risk management of those banks that failed in early 2023. The FDIC even doubled-downed on this requirement by proposing that an independent director of the bank's holding company would not automatically count as an independent director of the bank, contrary to OCC Guidelines, which treat an independent director of the holding company as independent for the bank.

We can think of no reason for the FDIC to have proposed a standard that is different from the OCC and that does not align with the practice of having overlapping boards of directors at the bank and bank holding company. The practice of having overlapping boards at the holding company and bank level is used by a significant number of banks regardless of whether the bank is a national bank, state member bank, or state non-member bank.

The Proposal suggest that the FDIC believes that a director can still be independent if on the bank holding company's board of directors and on the bank's board of directors, so long as the holding company conducts "*limited or no additional business operations outside of the bank" (*emphasis added). This exception is obscure, at best, and would be virtually impossible for any board of directors to rely upon and/or to execute against with any confidence that an examiner may not deem the bank board of directors to be in non-compliance and, as such, subject to criminal and/or civil liability.

Accordingly, given the perils of being in non-compliance, a bank board of directors would have no chose but to have non-overlapping majority

independent bank and bank holding company boards of directors. However, as noted above, these Proposed Guidelines will already make keeping and attracting director talent a significantly uphill battle, especially in large metropolitan markets where state non-member banks are competing against national banks and state members banks that would not be subject to these Proposed Guidelines, such as the New York metropolitan area where Apple Bank is located. Therefore, we strongly encourage the FDIC to drop this standard from its Proposal.

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Apple Bank believes at a minimum the FDIC needs to take the points raised in this letter into account when finalizing its Proposed Guidelines. The Bank strongly suggests that the best approach for the FDIC to take with respect to its Proposed Guidelines would be to withdraw them in their entirety and follow the lead of the other federal bank regulators (OCC and Federal Reserve) and introduce for comment newly proposed standards that reflect a truly principle-based approach to corporate governance. If the FDIC chooses to move forward with its current Proposed Guidelines, which we strongly discourage and resoundingly believes is the wrong thing to do, at a minimum the FDIC needs to take the points raised in this letter into account and then repropose various aspect of its Proposal for further comment.

Apple Bank appreciates the opportunity to comment on the Proposed Guidelines and welcomes the opportunity to engage in further dialogue about the Proposal. If you have any questions, please contact the undersigned by phone at (212) 224-6409 or by email at jherbert@applebank.com.

Respectfully submitted,

Jeffrey L. Herbert

Cc: Steven Bush (Apple Bank – Chairman & CEO)
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