February 6, 2024

Via Electronic Submission

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

Re: Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More [RIN 3064-AF94]

Dear Mr. Sheesley,

Thank you for the opportunity to comment on the proposed guidelines for corporate governance and risk management. As Commissioner of the North Dakota Department of Financial Institutions, I am the state regulator in North Dakota overseeing 58 banks, 55 of which are non-member banks and therefore under Federal Deposit Insurance Corporation (FDIC) oversight. I appreciate our partnership in our joint supervisory responsibilities over state-chartered banks. North Dakota banks are central to economic growth and development and are essential in providing financial services to our citizens, especially in rural areas. For banks to remain safe and sound, I agree with FDIC that corporate governance is important; however, I believe these proposed standards are misguided, work against your stated goals, and are unnecessary. Not only are these standards in apparent conflict with state law, but with better guidance already in place in the FDIC Risk Management Manual of Examination Policies, these new standards are redundant and should be withdrawn.

Conflict with State Law

The FDIC is proposing to establish corporate governance standards, which conflict with state law. Corporate governance standards are set by individual states, not the federal government. Likewise, the proposed expansion of fiduciary duties to consider "all stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public" also conflicts with state law. North Dakota law governing the standard of conduct for directors of financial institutions establishes the duty to be what is "in the best interest of the financial institution, and with the care

an ordinarily prudent person in a like position would exercise under similar circumstances.[1]" The law further discusses "duty of loyalty to the financial institution or the shareholders" and makes clear that the duty is first to consider "best interests of the financial institution." This aligns with what is outlined in the FDIC Risk Management Manual of Examination Policies for legal liability of directors, as well as the 1992 FDIC "Statement Concerning the Responsibilities of Bank Directors and Officers." The proposed governance and fiduciary duty standards are a dramatic change from the current guidance outlined for financial institutions – guidance which has worked well for many years when enforced. These proposed changes create a conflict between state and federal law, which causes confusion, and forces a bank to choose whether to violate state or federal law.

Arbitrary Applicability

The applicability of the proposed standards is for banks with total consolidated assets of $10 billion or more unless the FDIC determines that other institutions are "highly complex or present a heightened risk that warrants the application of these guidelines." This appears to be an arbitrary decision on behalf of the FDIC since "highly complex" or "heightened risk" are undefined terms that are open for interpretation and judgement. Would it apply to any bank that encounters challenges where it is no longer in satisfactory condition? And if so, would the standards be lifted as soon as the bank is no longer "heightened risk?" This ambiguity within the proposed rule will result in inconsistent application between examiners, states, and regions.

Regulators have long-standing practices, guidance, and tools to assist banks to return to a satisfactory condition without the need for new governance standards, an additional regulatory burden, imposed on banks. It would be a distraction and take away resources the bank needs to focus on safety and soundness. For example, in a state where agriculture is a major economic driver, banks' risk posture may fluctuate with agricultural conditions. Banks mitigate these fluctuations well; however, there may be times when asset quality is affected, and one could assume that the FDIC would consider the bank of "heightened risk." To then impose the proposed standards, making the bank focus on board membership rather than managing its asset quality, would be a distraction and not help risk management efforts.

Board Member Criteria

The proposed standards modify long-standing supervisory expectations for board member criteria and responsibilities. The proposed standards prioritize director independence and diversity and give prescriptive directives for responsibilities that appear to conflict with traditional supervisory expectations for management. This overlap between director and management responsibilities is confusing. The FDIC Risk Management Manual of Examination Policies lays out expectations of board members and management and leaves board membership criteria broad, making it a business decision tailored to the specific bank needs. Although independent board members can add tremendous value to bank boards due to their outside perspective, board members with limited business acumen and lack of knowledge of banking would likely not contribute to the safety and soundness of the institution. Individuals with an understanding of banking, risk management, and other business criteria, along with a good reputation, are valuable on a bank board and should be primary considerations in the selection of bank board members. The proposed standards are

---

[1] North Dakota Century Code §6-03-04.1. North Dakota Century Code §10-19.1-50 outlines identical provisions for directors of other corporations (not financial institutions).

issued due to an assertion that more failures happen as a result of weak board governance. That the board governance would be stronger with these standards, when no criteria regarding banking experience is considered, is questionable. Encouraging banks to have a qualified and involved board is already a parameter in current outstanding guidance. Through our examination processes, board governance is regularly assessed, and weaknesses in board composition or board member skillset can therefore be addressed through our current supervisory framework. In addition, since there are liabilities imposed on bank directors, it will be difficult to find individuals willing to serve on bank boards. Prescribing one-size-fits-all board governance standards, focusing almost exclusively on independence, is both regulatory overreach as well as counterproductive to your stated goal of stronger corporate governance.

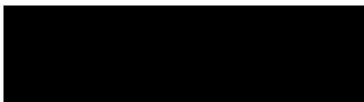
State-Charter Disadvantage

Although both the Office of the Comptroller of the Currency and the Federal Reserve Board of Governors have issued guidance for corporate governance, they are less stringent, less prescriptive, and more importantly, for institutions with asset size of $50 billion or more and $100 billion or more, respectively. The difference between regulators put state nonmember banks at a disadvantage. The standards impose an additional regulatory burden unique to state nonmember banks, and therefore causes an unlevel playing field for the various banks operating in North Dakota. Due to the disadvantages, and to remain competitive, banks would likely opt into the federal banking framework instead of the state banking framework, which is an unfortunate dismantling of the successful dual banking system.

Conclusion

Due to the infringement on states' rights and the disadvantage the proposed standards would have for most of our state-chartered banks, this proposal should be withdrawn. As regulators we already have tools to enforce appropriate corporate governance and risk management practices as necessary. A better solution to ensure there is proper corporate governance and effective directors in our supervised banks is to enforce what is already in place through our regular supervisory processes. Imposing unnecessary rules that will seriously impede the ability for banks to be flexible and innovative, will not prevent bank failures. A strong supervisory system where examiner tools are used when needed in a timely manner will result in a safe and sound banking system. Therefore, I respectfully request that this proposal is withdrawn.

Sincerely,



Lise Kruse
Commissioner