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February 9, 2024

Mr. James P. Sheesley
Assistant Executive Secretary
Attention: Comments/Legal OES
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,

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's ("the FDIC" or "the agency") proposed corporate governance and risk management guidelines for covered institutions with total consolidated assets of $10 billion or more ("the Proposal" or "the Proposed Guidelines").[2] Strong corporate governance and risk management practices are indisputable core components of banks' safety and soundness. But as thousands of community banks have capably demonstrated for decades, community banks have sufficient tools to implement strong corporate governance and risk management to satisfy the FDIC's safety and soundness mandates.[3] The Proposed Guidelines unnecessarily modify this existing framework, and will make it extremely difficult for community banks of any size to retain and attract directors, officers and senior leaders or satisfy the FDIC's heightened supervisory expectations for bank boards, senior management, business and front-line units, risk management teams and internal audit functions.

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[1] The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation's community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams. For more information, visit ICBA's website at icba.org.

[2] *Guidelines for Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More*, 88 Fed. Reg. 70391 (Oct. 11, 2023).

[3] The FDIC states it "observed during the 2008 financial crisis and more recent bank failures in 2023 that financial institutions with poor corporate governance and risk management practices were more likely to fail." Nowhere in the Proposal, however, does the FDIC acknowledge that only a very small percentage of banks fail. For example, between 2013 and 2023 only 71 banks failed, meaning the overwhelming majority of banks in the last decade have demonstrated their corporate governance and risk management frameworks are adequate and do not require the significant, drastic, and costly adjustments called for in the Proposal.

Unfortunately, the FDIC's Proposal is so deeply flawed that the Guidelines, if finalized, will undermine some of the very policy objectives the FDIC attempts to address. For example, by imposing new duties on bank directors, introducing limitations on board composition, and increasing liability for bank directors, the FDIC's Proposal will deter competent, capable, and qualified individuals from serving on community bank boards – creating gaps in and impediments to board composition and oversight that would not otherwise exist. Other serious defects in the Proposal include: (1) conflicts with state laws; (2) misalignments with the Federal Reserve Board of Governors ("the Fed") and the Office of Comptroller of the Currency ("the OCC") that create an uneven playing field for state nonmember banks; (3) sweeping language that allows the FDIC to apply the Proposal to any state nonmember bank of any size if the FDIC determines the bank is "highly complex" or presents "heightened risk;" and (4) an immediate effective date without any implementation period.

This Proposal is a significant departure from current corporate governance and risk management principles governed by well-established state laws and guidance previously issued by either the FDIC, OCC, or Fed. ICBA strongly opposes this Proposal, and we encourage the FDIC to withdraw the Proposed Guidelines as there are numerous deficiencies that cannot be corrected without substantial revisions and interagency coordination with the OCC and the Fed.

I. The Proposed Guidelines will make it more difficult for bank directors to execute their roles and will deter individuals from serving on bank boards.

The Proposal imposes sweeping new duties on directors that blur the lines between board and management responsibilities. Some of the most onerous and problematic new duties for the board that are more appropriately tasked to senior management include: (1) setting a "tone at the top" for the institution; (2) responsibility for developing the bank's strategic plan; (3) writing and adopting a Code of Ethics; and (4) establishing processes governing breaches to risk limits and violations of law or regulations, including processes for front line and risk management units to identify, document, escalate and report violations of law or regulations.

In addition to increasing the responsibilities of the board, making it exponentially more difficult and time-intensive for a person to fulfill their duties as a director, the Proposal also introduces new requirements for board composition that will limit or prevent otherwise qualified persons from serving on covered bank boards. For example, not only does the Proposal require "at least a majority of independent directors on the board" but the Proposal also states, "the board should consider how the selection of, and diversity among board members collectively and individually, may best promote effective, independent oversight of the covered institution's management and satisfy all legal requirements for outside and independent directors."[4] Taken as a whole, the Proposal requires a majority of independent directors, diversity among board members, and directors with specialized knowledge of banking – a trifecta of requirements that diminishes the pool of capable, competent, and qualified individuals willing to serve on a bank's board, particularly for banks located in rural communities.[5] ICBA agrees with Vice Chairman Hill's recommendation that the FDIC "should be realistic in their expectations of

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[4] Proposal at 70394 – 70395.

[5] *See Statement by Vice Chairman Travis Hill on the Proposed Corporate Governance Expectations for Large and Midsize Banks* (Oct. 3, 2023) available at: https://www.fdic.gov/news/speeches/2023/spoct0323b.html (noting skepticism whether "a board can satisfy the standards set forth in the Guidelines unless it includes members that have in-depth knowledge of banking.")

individual board members, given that some may not have any background in banking or finance."[6]

Further deterring capable, competent, and qualified individuals from willingness to serve on a bank's board is the FDIC's proposal to make its guidelines enforceable under Section 39 of the FDI Act. Not only is the FDIC proposing to make it more difficult to attract and retain individuals to serve on bank boards, the agency is simultaneously proposing to subject individuals to greater enforcement liabilities in exchange for their service as directors. When coupled with the Proposed Guidelines new requirements that all board members "confirm that the covered institution operates . . . in compliance with all laws and regulations" the Proposal's Section 39 enforcement powers would provide the FDIC expansive carte blanch authority to hold directors and officers liable for minor defects in compliance. ICBA agrees with the statements of FDIC Vice Chairman Hill, explaining "[w]hile institutions certainly should act in compliance with the law, these [proposed] expectations underestimate both the massive complexity of the legal and regulatory world in which banks operate and the challenges associated with knowing with certainty what is or is not a violation of certain laws and regulations."[7] The FDIC should take all reasonable steps ensure the agency is not creating a chilling effect on director recruitment and service by increasing personal liability beyond the considerable liability exposures already in place under existing laws and regulations.

II. The Proposed Guidelines conflict with state laws the FDIC has no authority to override.

State laws make clear that directors owe a fiduciary duty to the corporation and its shareholders.[8] Corporate governance is traditionally within the province of state law – corporate formation and state bank charters are governed by state laws as the FDIC does not have authority to issue bank charters or make rules governing bank charters. Despite the clear delineation between states' authorities to govern bank charters, and the FDIC's authorities to insure depository institutions, the FDIC is proposing a new federal corporate governance standard requiring bank boards to broadly "consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public."[9] This proposed requirement seemingly expands directors' fiduciary responsibilities beyond those legally owed to the bank and its shareholders and ignores the corpus of state corporate laws that do not require directors to consider these same "stakeholder" interests.

ICBA agrees with the statement issued by FDIC Director Jonathan McKernan that "[u]nder some states' laws, a board may consider non-shareholder constituencies only if there are benefits that accrue to the shareholders."[10]

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[6] *Id.*

[7] *Id.*

[8] *See e.g. Quartana v. Jenks*, 436 So.2d 1335 (August 8, 1983) ("Louisiana law imposes on corporate officers and directors a fiduciary duty to the corporation and its shareholders.") *See also In re James River Coal Co.*, 360 B.R. 139 (Feb. 8, 2007) ("Under Virginia law, corporate directors have fiduciary duty to corporation and its shareholders, and they must govern themselves accordingly.")

[9] Proposal at 70404.

[10] Statement by Jonathan McKernan, Director, FDIC Board of Directors, on the Proposed Guidelines Establishing Standards for Corporate Governance and Risk Management (Oct. 3, 2023) available at: https://www.fdic.gov/news/speeches/2023/spoct0323c.html. *See also Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging responsibilities, provided there are rationally related benefits accruing to the stockholders.")

That directors' owe fiduciary duties primarily to the corporation and its shareholders, rather than all non-shareholder constituencies or "stakeholders," is not only a well settled legal principle – it is an approach to decision making that makes practical sense too, as the FDIC has not and cannot explain how a bank required to "consider the interests of all its stakeholders" would resolve or weigh myriad conflicting interests among shareholders, depositors, creditors, customers, regulators and the public.

This proposed requirement also conflicts with the widely recognized business judgment rule. Under the business judgment rule, "corporate directors, acting without corrupt motive and in good faith, will not be held liable for honest errors or mistakes of judgment."[11] Whereas bank directors' decisions related to non-shareholder stakeholders like the public or regulators would ordinarily be protected under the business judgment rule, the Proposal creates novel requirements that extend directors' duties to non-shareholders, and potentially beyond the scope of the business judgment rule's protections.

The FDIC has long pursued an objective of reducing the protections afforded to bankers under state common law business judgment rules.[12] For example, in 2014, the Supreme Court of Georgia answered certified questions from two federal courts about Georgia's common law business judgment rule from separate cases initiated by the FDIC against the officers and directors of failed banks.[13] There, the FDIC argued the business judgment rule was not part of the common law in Georgia, and even if it were, it did not apply to bank officers and directors.[14] The Supreme Court of Georgia rejected both of the FDIC's arguments, holding "the business judgment rule is a settled part of our common law in Georgia . . . [and] applies equally at common law to corporate officers and directors generally and to bank officers and directors."[15]

Whether bank directors consider the interests of stakeholders are decisions that should remain as matters of business discretion, consistent with state common law business judgment rules, as the FDIC lacks authority to create new fiduciary duties or encroach on state corporate laws.[16] Congress has neither provided the FDIC the directive to rewrite and override state corporate laws nor provided the FDIC expanded authority in Section 39 of the Federal Deposit Insurance Act to modify board duties or extend the number of stakeholders to whom a board owes a legal obligation.

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[11] *See FDIC v. Giannoulias*, 918 F. Supp.2d 768 (N.D. Ill. 2013). *See also American Enterprise Bank v. Becker*, 2016 WL 380873 (Jan. 28, 2016) ("The business judgment rule precludes second-guessing of a corporate director's or officer's business decisions, unless those decisions are the product of (1) a failure to exercise due care, or (2) bad faith, fraud, illegality, or (3) gross overreaching.")

[12] *See FDIC v. Loudermilk*, 295 Ga. 579, 588 (July 11, 2014) ("As we understand it, the FDIC essentially argues that the business judgment rule has no application at all to bankers, and if a bank officer or director fails to exercise ordinary care, he is liable, period.")

[13] *See Id.* and *FDIC v. Skow*, 295 Ga. 747 (September 22, 2014).

[14] *See Loudermilk* at 579.

[15] *Id.*

[16] *See generally* 12 U.S.C. § 1831p-1.

III. The Proposed Guidelines create an uneven playing field between similarly situated state nonmember banks, state member banks, and national banks.

Although the FDIC claims the Proposed Guidelines are drawn from other statutory and regulatory authorities and that the FDIC's supervisory framework would closely align with the other Federal banking agencies under the Proposal, there are obvious differences between the Proposed Guidelines and the corporate governance standards adopted by the Fed and OCC.[17] For example, the Proposed Guidelines arbitrarily apply a substantially lower threshold to corporate governance standards - $10 billion in total consolidated assets – than either the OCC's $50 billion threshold for heightened standards, the Fed's $50 billion threshold for Regulation YY, or the Feds $100 billion threshold for enhanced prudential standards for bank holding companies.

Additionally, the Proposal imposes extensive new obligations on state nonmember bank boards that do not apply to the bank boards of state member or national banks. For example, the Proposal requires that covered boards will be required to review and approve a bank's risk profile and risk appetite statement at least quarterly, or more frequently "based on the size and volatility of risks and any material changes in the covered institution's business model, strategy, risk profile, or market conditions."[18] However, the OCC's heightened standards require similar review only on an annual basis, and only by the board's risk committee, while the Fed requires state member bank boards to periodically monitor the bank's risk appetite.[19] The FDIC has not explained why a $10 billion bank that is considerably smaller than a U.S. systemically important institution would be required to review risk appetite statements on a quarterly basis even though banks magnitudes larger would only be required to periodically monitor the bank's risk appetite.

The Proposal is considerably more detailed and prescriptive than either the OCC Heightened Standards or the Fed Enhanced Prudential Standards, meaning the bank boards at state member banks will be more burdened than similarly situated state member or national bank boards, and could face disproportionate potential liabilities due to the increased demands and duties this Proposal places on bank boards. This, coupled with the Proposal's self-reporting provisions, exceed anything required by current regulations, and will not only make it more difficult for state nonmember banks to attract qualified individuals to serve as board members, but may also encourage banks to swap charters to seek relief from the Proposal. ICBA agrees with FDIC Vice Chairman Hill that the expectations set forth in the Proposal "underestimate both the massive complexity of the legal and regulatory world in which banks operate and the challenges associated with knowing with certainty what is or is not a violation of certain laws and regulations."[20]

IV. The Proposed Guidelines are vague, confusing, and could potentially apply to any state nonmember bank of any size.

Not only would the Proposal dramatically impact bank operations for 57 covered institutions, but it would also

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[17] *OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches*, 79 Fed. Reg. 54518 ("OCC Heightened Standards"). *See also FRB, Attachment SR 21-3/CA 21-1: Supervisory Guidance for Boards of Directors of Domestic Bank and Savings and Loan Holding Companies with Total Consolidated Assets of $100 Billion or More* (Feb. 26, 2021)("Fed Enhanced Prudential Standards).

[18] Proposal at 70407.

[19] *See OCC Heightened Standards and Fed Enhanced Prudential Standards.*

[20] *Statement by Vice Chairman Travis Hill on the Proposed Corporate Governance Expectations for Large and Midsize Banks* (Oct. 3, 2023) available at: https://www.fdic.gov/news/speeches/2023/spoct0323b.html.

indirectly require all state nonmember community banks, of any size, to demonstrate readiness to immediately implement the framework any time the FDIC, in its sole discretion, determines the bank to be “highly complex” or presents “heightened risk.” The Proposal does not define the terms “highly complex” or “heightened risk” leaving open the possibility that the Proposed Guidelines will trickle down to community banks. Therefore, implicit in this Proposal is a set of “supervisory best practices” that could effectively require all state nonmember community banks to follow the Proposed Guidelines since the FDIC reserves the right to categorize any of these banks as “highly complex” or presenting “heightened risk.”

The Proposed Guidelines would establish extensive and enforceable standards that would drastically impact bank operations, systems, policies, and procedures and require significant expense and preparation time to implement. That the Proposal would require banks to have significant lead-time or an “on-ramp” to prepare for compliance and implementation is belied by language in the Proposal stating the FDIC “expects that institutions would be well aware in advance if they would exceed the $10 billion threshold and develop compliance programs in advance or plan to reduce their assets.”[21] Yet, the Proposal makes no mention of the other instances, besides crossing the $10 billion asset threshold, which would also require significant lead-time to develop compliance programs prior to becoming a covered institution. The Proposal also fails to consider state law and governing documents, including articles of incorporation and bylaws that prescribe the term, tenure and other conditions for board governance which could prevent a bank from being able to immediately comply with the requirements for board composition set forth in the Proposed Guidelines.

If the FDIC does not intend to apply this proposal to community banks with fewer than $10 billion in assets, the agency must clarify (1) the criteria it will use to categorize a bank as “highly complex,” or demonstrating “heightened risk;” and (2) an appropriate amount of time in which a community bank could prepare to implement the Proposed Guidelines after it is deemed “highly complex,” or presenting “heightened risk.” Without clarification, the Proposed Guidelines potentially capture all state nonmember banks of any size – forcing community banks to rely on the Proposed Guidelines as “best practices,” and demonstrate perpetual readiness to comply with the Guidelines.

V. The Proposed Guidelines are impossible to implement without a transition period to achieve compliance.

The Proposed Guidelines would apply to institutions whose Call Report filings reflect two consecutive quarters of total assets above $10 billion – a period of time the FDIC believes will provide an “on-ramp” for banks to prepare for compliance. As the FDIC explains, “this provides a certain amount of time for institutions to develop the policies, procedures, and programs they need to comply with the proposed Guidelines before they become a ‘covered institution.’”[22] Despite the FDIC’s acknowledgement that institutions may need up to two consecutive quarters to prepare an “on-ramp” for compliance, however, the Proposal does not contain an implementation period. Additionally, the Proposal does not establish any “on-ramps” or transition periods for banks that become covered institutions when the FDIC determines the banks are “highly complex” or present “heightened risk.” In fact, the Proposal does not provide any explanation of when the FDIC would make these determinations, the process it would follow to make these determinations, or how any bank could be swept up in these determinations.

Community banks cannot immediately implement most aspects of the Proposal and will need a significant

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[21] Proposal at 70394.

[22] Proposal at 70394.

amount of lead time to achieve compliance. The FDIC estimates the Proposed Guidelines would compel covered institutions to expend 91,375 labor hours in the first year, and 90,365 labor hours each additional year "to comply with recordkeeping, reporting, and disclosure requirements." These estimates, coupled with the Proposal's sweeping changes to board and risk management practices, suggest that no bank could implement the Proposed Guidelines without a transition period (and a sufficiently long transition period) to make required changes to the roles and responsibilities of the board, size and makeup of the board, organization of the board, committee structures of the board, development and maintenance of a strategic plan, development and maintenance of risk management policies, hiring and oversight of senior management, development and maintenance of processes for responding to violations of laws, regulations, or breaches of internal risk limits or other internal policies and procedures.

VI. Conclusion.

ICBA appreciates the FDIC's commitment to reflect on lessons learned from the 2008 financial crisis and more recent large, regional bank failures. However, the Proposed Guidelines, no matter how well-intentioned, impose sweeping new requirements on covered bank boards that exceed the FDIC's authority, conflict with state laws, and are unnecessary for institutions currently demonstrating strong corporate governance and risk management practices. The FDIC should withdraw this flawed proposal and work with the OCC and the Fed to develop a framework that is consistent across the agencies, promotes a level playing field among banks regardless of charter, and that does not unintentionally capture community banks through vague "supervisory expectations and best practices." Should you wish to discuss our positions in further detail, please contact Jenna Burke at jenna.burke@icba.org.

Sincerely,

/s/ Jenna Burke
Executive Vice President
General Counsel, Gov. Relations & Public Policy
Independent Community Bankers of America