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February 9, 2024

SUBMITTED ELECTRONICALLY VIA www.FDIC.gov

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: Notice of proposed rulemaking and issuance of guidelines (RIN 3064-AF94).

Dear Mr. Sheesley:

Comenity Capital Bank, a Utah industrial bank, and Comenity Bank, a Delaware commercial bank (together, the "**Banks**")[1] appreciate the opportunity to comment on the proposal approved by the Board of Directors of the Federal Deposit Insurance Corporation (the "**FDIC**") on October 3, 2023, to establish guidelines for corporate governance and risk management for covered institutions with total consolidated assets of $10 billion or more (the "**Proposed Guidelines**").[2]

Overall, the Banks are concerned with the prescriptive nature of the Proposed Guidelines that, directly, would apply to only 59 of the nation's over 4,000 insured depository institutions, based on FDIC data as of September 30, 2023. These institutions, with assets ranging from $10 billion to $600 billion, vary vastly in size, complexity and risk profile. In addition, they vary significantly in terms of available resources—time, money and talent—that will necessarily be diverted to implement a potentially burdensome governance structure that does not apply to smaller and larger peers. In addition, the Banks are concerned that the Proposed Guidelines misconstrue and conflate board and management roles and establish unrealistic expectations of boards as insurers of certain outcomes that will impact the ability of the affected mid-sized institutions to attract and retain high quality directors.

In general, the Banks support the comment letter submitted by the Mid-Size Bank Coalition of America ("**MBCA**"), as well as the individual comment letters submitted by the Society for Corporate Governance and the American Bankers Association, and the joint comment letter submitted by the Bank Policy Institute and American Association of Bank Directors. The Banks write separately to emphasize certain issues that are addressed by the MBCA letter that are of particular importance to the Banks. The Banks believe the following points raised by the MBCA

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[1] Comenity Capital Bank is a Utah-chartered industrial bank headquartered in Draper, Utah, with total consolidated assets of approximately $11.9 billion as of September 30, 2023. Comenity Capital Bank is supervised by the Utah Department of Financial Institutions, as its chartering authority, and by the FDIC, as its primary federal regulator.

Comenity Bank is a Delaware-chartered commercial bank headquartered in Wilmington, Delaware, with total consolidated assets of approximately $8.2 billion as of September 30, 2023. Comenity Bank is supervised by the Delaware Office of the State Bank Commissioner, as its chartering authority, and by the FDIC, as its primary federal regulator. Comenity Bank operates as a credit card bank under the Competitive Equality Banking Act of 1987.

[2] 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 (Oct. 11, 2023).

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will help mitigate (but not eliminate) some of the harm and competitive disadvantage of this disparity.

Increasing the asset threshold. The Banks support the MBCA's recommendation to raise the asset threshold to cover only state non-member banks with average total consolidated assets equal to or greater than $50 billion. This threshold would be consistent with the asset threshold of the Comptroller of the Currency's ("**OCC**") guidelines ("**OCC Guidelines**").[3] The Banks believe that this higher threshold is more appropriate given the significant compliance burdens that would be imposed by the Proposed Guidelines and the more limited resources available to smaller institutions. Furthermore, a higher threshold would be consistent with the principle of tailoring.

Adopting a principles-based approach. Unlike the Board of Governors of the Federal Reserve System's ("**Federal Reserve**") guidance ("**Federal Reserve Guidance**")[4] and OCC Guidelines, which reflect a principles-based approach to corporate governance and risk management, the FDIC's Proposed Guidelines would impose very detailed and highly prescriptive requirements on directors. Among other things, the Proposed Guidelines would impose a higher frequency of required reviews by a board than does the Federal Reserve or OCC and more burdensome procedural requirements for board approval of policies (and an increase of such policies) and its selection of executive officers.

Taken together, we are concerned that these additional burdens would increase the risk that a board may become too focused on ensuring compliance with the detailed procedural requirements of the Proposed Guidelines than on the critical work of guiding the strategic direction of the Banks and overseeing and challenging management, including with respect to risk management. As such, the Proposed Guidelines, if adopted, would risk hampering healthy, robust, and dynamic corporate governance. The Federal Reserve Guidance and the OCC Guidelines strike a different balance, and the Banks support the MBCA's recommendation that the FDIC's Proposed Guidelines likewise adopt a principles-based approach.

Distinguishing the responsibilities of the board from those of management. As explained in further detail in the MBCA letter, the Proposed Guidelines frequently use the word "ensure," as well as words such as "establish," "confirm" and "write," to describe actions our boards would be required to take. This terminology conflates the board's role in overseeing management with primary responsibility for undertaking actions that are traditionally the domain of management. Placing such requirements on the board would blur the line between the responsibilities of the board and management and thereby undercut the board's important role as the body that oversees and holds management accountable. Furthermore, it would increase litigation risk, as potential plaintiffs could seek to file suit whenever a negative outcome occurred that the board was supposed to "ensure" would not occur, even if the board appropriately fulfilled its role in overseeing and holding management accountable. We support the MBCA's recommendation to modify the Proposed Guidelines to more carefully distinguish between the responsibility of the board to provide oversight and management's day-to-day responsibilities for the operations of the bank, including by describing actions of the board as those related to "overseeing management" and holding management accountable.

Removing the requirement to consider the interests of all stakeholders. Although well-intentioned, we believe the statement in the Proposed Guidelines that a board of directors "should consider the interests of all its stakeholders" could be viewed as creating significant new fiduciary duties. These new fiduciary duties may conflict with established state law. Furthermore, they

[3] OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches, 79 Fed. Reg. 54518 (Sept. 11, 2014).

[4] *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.

could significantly increase litigation risk for directors by greatly expanding the scope of persons to whom directors owe fiduciary duties, which would both expand the universe of potential plaintiffs and increase the likelihood that a potential plaintiff might allege a breach of these expanded fiduciary duties given the conflicting interests various stakeholders may have on any given issue. This risk is further heightened by the reference in the Proposed Guidelines to the "public" as a stakeholder. As such, the Banks support the MBCA's recommendation not to expand the long-established fiduciary duties of directors and propose removing from the Proposed Guidelines the statement that a director "should consider the interests of all its stakeholders".

***Corporate culture*.** We recognize that the board has a role in fostering and setting the tone for an institution. However, the Proposed Guidelines' requirement for boards to "establish" the corporate culture and work environment of their respective institutions is a vague and yet substantial responsibility. Placing the burden to "establish" the corporate culture and work environment on the board blurs the line between board and management and, furthermore, is difficult to comply with absent clarification regarding exactly how a board will be assessed against such a requirement. We encourage the FDIC to refer instead to the board's role in setting the tone at the top.

***Director independence*.** The cross-use of directors, including independent directors, among multiple entities in an organization is common in the banking industry. It creates internal efficiencies and allows for the promotion of a unified enterprise strategy. Under the Proposed Guidelines, the FDIC would require the board of a depository institution to include "a majority of outside and independent directors." As defined therein, an otherwise "outside and independent" director would not be independent if that director also serves on the board of an affiliate, thereby limiting this valuable resource.

The independent judgement of a director is not compromised merely by the director also serving on the board of an affiliate because the director must still comply with his or her fiduciary duties, including the duty of loyalty. The purpose of this more stringent independence standard is not clear and goes beyond that adopted by the OCC and Federal Reserve, and even the FDIC's own standards for outside and independent audit committee members under 12 C.F.R. § 363.5. Consistent with the MBCA's recommendation, we urge the FDIC to align to the OCC standard for director independence. If the FDIC declines to adopt the OCC standard, we suggest that the FDIC strike "director" from the listed roles at an affiliate entity that can negate a bank director's independence.

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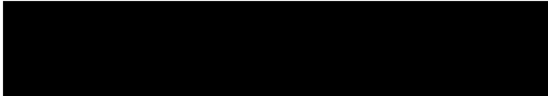
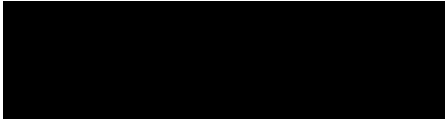
Comenity Bank and Comenity Capital Bank appreciate the opportunity to provide commentary, and respectfully request that the FDIC consider adopting the recommendations made in this letter, the MCBA letter, the individual comment letters submitted by the Society for Corporate Governance and the American Bankers Association, and the joint comment letter submitted by the Bank Policy Institute and American Association of Bank Directors. If you have any questions concerning this comment letter or would like the Banks to provide other information, please do not hesitate to contact us.

Respectfully submitted,



Bruce Bowman
President, Comenity Capital Bank



Baron Schlachter
President, Comenity Bank