AMERICA'S MUTUAL BANKS
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February 9, 2024

VIA E-MAIL: comments@FDIC.gov

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

RE: 12 CFR Part 364
RIN 3064-AF94

Dear Sir or Madame;

America's Mutual Banks ("AMB") welcomes the opportunity to comment on the FDIC's notice of Proposed Rulemaking and Issuance of Guidelines Establishing Standards for Corporate Governance and Risk Management. AMB is a trade group representing the interests of mutual holding companies and mutual FDIC's insured institutions. www.americasmutualbanks.com. AMB members are very familiar with the concept of non-shareholder constituencies. They value and serve their community and exist principally to be a vital financial conduit and member of that community. AMB's primary mission is to inform thought leaders, legislators and government officials of the peculiar structure of mutual banking organizations, their special community orientation, their best practices and the need for compatibility of the application of regulatory concepts to mutual organizations. Too frequently, AMB has had to remind members of Congress and the regulatory agencies that proposals that are designed with "one-size-fits-all" in mind are a much more common problem for mutual institutions.

AMB supports the concept of sound corporate governance and appropriate risk controls as necessary for any banking institution. It is pleased that the FDIC has chosen to refrain from applying the proposal's more granular requirements to institutions under $10 billion in assets. Almost all mutual banks and mutual holding companies fall under that threshold. Nonetheless, we are concerned that the precedent of applying the principles embodied in the proposal to banks over $10 billion in assets will cause supervisory officials and examiners to informally apply the same principles to institutions whose asset size is below the threshold. We also believe that professional investors and class action lawyers will attempt to twist their interpretation of a final regulation to impose federal responsibilities on mutual directors that are not recognized under state law with the purpose of furthering their personal gain.

These risks are much greater for mutual institutions. In many states, laws do not provide current clear guidance as to how standard fiduciary concepts are applied to mutual institutions. Too often state legislatures have conflated mutual deposit rights with stockholder rights in stock banks. Legislative efforts to restate or "modernize" saving institutions laws have commonly omitted distinctions material to mutuality. Similarly, state court decisions in the last few decades sometimes mistakenly refer to depositors and members in mutual banks as "stockholders" failing to recognize the statutory and case law distinctions in their rights as compared with stockholder rights. This problem is caused by the often times confusing terminology that distinguishes the different types of mutual institutions, the declining number of mutual institutions in states which once chartered them in the hundreds, elimination of a single thrift federal regulator for mutual institutions, and the overall dominance of commercial banks in the financial sector.

Mutual members and depositors do not have perfected ownership rights in their institutions. There is no profit incentive in a mutual. No member or depositor has the right to buy or sell an equity interest in a mutual institution and federal and state laws have distinguished their rights as inchoate from stockholder rights. This legal distinction was affirmed in a series federal and state judicial decisions that were handed down during the 1980s involving challenges to state and the Federal Home Loan Bank Board's mutual the stock conversion regulations. See two 1980 federal circuit court decisions: *York v FHLBB and The Council of Mutual Institutions v the FHLBB*. These principles are incorporated in the FDIC's regulations and guidance governing stock conversions. AMB is very concerned that whatever principles are developed under this proposal, they will informally and mistakenly be applied to mutual institutions below $10 billion in assets. We ask the FDIC to emphasize strongly in any final regulation that it recognizes the material distinctions between stock and mutual bank governance as a matter of law.

While AMB refrains from particular comments on the proposal, it has concerns that it may be equating violations of state corporate governance laws and principles with safety and soundness. The FDIC should clarify that it does not assume the authority to make a determination of a violation of state fiduciary laws absent a state court finding. We are also concerned that the proposal is an escalation of the regulatory trend to equate director duties with senior executive duties. Directors should not ever be distracted by suggestions they should micromanage a bank. We do not believe this is supported by state laws. Moreover, Congress, has never stated an intention to give the FDIC authority to dictate state corporate governance to FDIC insured institutions who are chartered and regulated by the states and the OCC. Some of the concepts embodied in the proposal suggest a degree of responsibility culpability for directors and fiduciaries that exceeds both common-law and statutory principles in most states. Even if there were authority for such a regulation, it raises a different issue which the proposal fails to address, i.e. for choice of law purposes law determining which state laws apply to a particular transaction. The OCC has grappled with this issue for years and has a regulation which at best seems to suggest a multitude of choices.

In sum, because of the unreliability of state laws governing mutual governance in offering any clear and convincing standard as to the application of corporate governance to mutual institutions, AMB is sensitive to any proposal that attempts to equate safety and soundness with state fiduciary governance laws. Governance is dictated by the need to provide guidance between a corporation and the rights of its equity owners not a federal regulatory deposit insurance authority. If the FDIC believes it has evidence that certain governance standards are necessary to assure safety and soundness, it should identify them with specificity so as to eliminate any doubt that such linkage is authorized by its governing statutes.

Sincerely,

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