February 9, 2024

VIA Electronic Mail

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

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–AF86

Federal Deposit Insurance Corporation:

I submit this letter, on behalf of First Internet Bank of Indiana ("First Internet Bank" or "we"), in response to the request of the Federal Deposit Insurance Corporation ("FDIC") for comment on its notice of proposed rulemaking published in the Federal Register on October 11, 2023.[1]

First Internet Bank commenced banking operations in 1999 as the first state-chartered, FDIC-insured Internet bank. Headquartered in Fishers, Indiana, we currently hold approximately $5.2 billion in assets and offer a wide range of commercial, small business, consumer, municipal and novel banking products and services. We conduct our consumer and small business deposit operations and consumer lending primarily through digital channels on a nationwide basis and have no traditional branch offices. Our commercial products are delivered through a relationship banking model or strategic partnerships and include commercial and industrial, construction and investor commercial real estate, single tenant lease financing, public finance, healthcare finance, small business lending, franchise finance and commercial deposits and treasury management.

While we echo and support the points made by many of the banks and trade associations who have submitted comments on the Proposed FDIC Guidelines to date, we write to highlight aspects of the Proposed FDIC Guidelines that are particularly troubling to First Internet Bank, and likely to other state-chartered, non-member banks ("FDIC-regulated institutions"). Specifically, the Proposed FDIC Guidelines seek to further stack the competitive landscape of banking against FDIC-regulated institutions in favor of institutions whose primary federal regulators are the Office of the Comptroller of the Currency ("OCC-regulated institutions") or the Federal Reserve Board ("FRB-regulated institutions"). Under the Proposed FDIC Guidelines, FDIC-regulated institutions would be forced to incur significantly more in risk and compliance costs than their OCC-regulated and FRB-regulated brethren and face an uphill battle in recruiting and maintaining a competent

[1] 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) (the "Proposed FDIC Guidelines").

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board of directors. We expect, in light of the Proposed FDIC Guidelines and the FDIC's other attempts to discourage innovation and customer service, that multiple FDIC-regulated institutions may seek to become an OCC-regulated institution or a FRB-regulated institution.

At a minimum, the Proposed FDIC Guidelines should be revised to: (i) more closely align with the standards published by the Federal Reserve Board ("FRB")[2] and the Office of the Comptroller of the Currency ("OCC")[3]; (ii) clarify that directors do not owe any additional duties or face any additional liabilities; and (iii) simplify, not obfuscate, the reporting requirements imposed on FDIC-regulated institutions.

I. The FDIC should align the Proposed FDIC Guidelines with the FRB Guidance and the OCC Guidelines.

The Proposed FDIC Guidelines differ materially from the FRB Guidance and the OCC Guidelines, despite the FDIC's stated intention to harmonize corporate governance and risk practices for all banks.[4] The Proposed FDIC Guidelines apply to much smaller banks, require more frequent board action, and impose additional and conflicting limitations on board and board committee eligibility.

The $10 billion consolidated assets threshold in the Proposed FDIC Guidelines is significantly lower than the asset thresholds set by the FRB Guidance ($100 billion) or the OCC Guidelines ($50 billion), without any supportable explanation or basis for the deviation. In addition, the FDIC reserves to its own, open-ended discretion the right to force a FDIC-regulated institution with less than $10 billion in consolidated assets to comply with the Proposed FDIC Guidelines.[5] The Proposed FDIC Guidelines represent a sea change, with no stated transition period or time to come into compliance.

The Proposed FDIC Guidelines would also mandate more frequent required reviews and actions by the board of a FDIC-regulated institution than the boards of a FRB-regulated institution or an OCC-regulated institution. For example, the Proposed FDIC Guidelines would require the board of a FDIC-regulated institution to approve a risk appetite statement quarterly, while the OCC Guidelines make that an annual requirement and the FRB Guidance only requires the risk appetite

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[2] *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 (the "FRB Guidance").

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

[4] Proposed FDIC Guidelines, 88 Fed. Reg. at 70393 ("these proposed Guidelines are intended to be generally consistent with the goals communicated through the OCC's and Federal Reserve Board's published issuances in an effort to harmonize corporate governance and risk management requirements for covered institutions that present a higher risk profile with those applicable to entities supervised by the other Federal banking agencies.")

[5] Proposed FDIC Guidelines, 88 Fed. Reg. at 70404 ("Upon notice to the institution, the FDIC reserves the authority to apply these Guidelines, in whole or in part, to an institution that has total consolidated assets less than $10 billion, if the FDIC determines such institution's operations are highly complex or present a heightened risk that warrants the application of these Guidelines.")

statement to be reviewed "periodically". In addition, the Proposed FDIC Guidelines would impose a more burdensome requirement on boards of FDIC-regulated institutions to approve policies on at least an annual basis. By contrast, the OCC decided not to require board approval of many of the same policies.[6]

The Proposed FDIC Guidelines also require a majority independent board and, contrary to the OCC Guidelines, an independent director of the bank's holding company would not automatically count as an independent director of the bank.

The foregoing deviations from the FRB Guidance and the OCC Guidelines are meaningful, as they automatically impose additional costs, liability and restrictions on FDIC-regulated institutions that OCC-regulated institutions and FRB-regulated institutions do not incur, and the FDIC has not explained its reasoning behind the competitive disparity that the FDIC seems to desire.

II. The FDIC should clarify that the Proposed FDIC Guidelines do not expand the existing fiduciary duties of directors or make directors liable to new constituents.

The Proposed FDIC Guidelines confuse the traditional and accepted role of board oversight with management's day-to-day operational responsibility and seem to drastically increase director duties and liability, again in contrast to the FRB Guidance and the OCC Guidelines and without sufficient justification.

The Proposed FDIC Guidelines seek to introduce new fiduciary duties and standards on the board of directors of a FDIC-regulated institution that go well beyond what any other laws require of a board of directors. Specifically, the FDIC has proposed that when boards exercise their fiduciary duties, they consider the interests of "all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public."[7] Yet, inexplicably, the Proposed FDIC Guidelines do not indicate that the board should consider the best interests of the institution itself, or any of its employees or communities. The expanded list of "stakeholders" would constitute a fundamental shift in the traditional corporate goal of prioritizing the creation of long-term value for shareholders. While state law varies (variations that the FDIC Proposed Guidelines ignore), corporate law is generally clear that corporations and boards do not owe a fiduciary duty to creditors and other stakeholders, except in certain limited circumstances. The Proposed FDIC Guidelines (unlike the OCC Guidelines and the FRB Guidance) goes beyond those state law obligations to impose a new obligation to other constituencies divorced from the interests of shareholders, and seemingly enforceable by civil and criminal penalties.

Furthermore, the Proposed FDIC Guidelines fail to state any standards for how exactly the FDIC intends to measure or evaluate the board's performance, such as the relative weight to be ascribed to each group, how to consider diverging interests, or how a board is expected to define

[6] OCC Guidelines, at 54526 ("The OCC believes that board or risk committee approval of material policies under the Framework would be burdensome, and that these policies should be approved by management instead.").

[7] Proposed FDIC Guidelines, 88 Fed. Reg. at 70404.

and identify the interest of "the public" as a whole. This ambiguous duty would create confusion and significant litigation risk for boards. Taken together with the other extensive obligations of the board described in the Proposed FDIC Guidelines, board service at a FDIC-regulated institution becomes particularly unappealing, especially relative to board service at FRB-regulated institutions and OCC-regulated institutions.

The Proposed FDIC Guidelines also confuse the roles of boards of directors and management. They would impose managerial duties on boards that are the responsibility of management, as well as expectations that no board is capable of performing. Specifically, the Proposed FDIC Guidelines use words like "establish," "confirm" and "ensure" to describe board responsibilities (i.e., "establish" processes governing risk limit breaches; "confirming" 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's proper and well-established role is one of oversight. Requiring the board to "ensure," "establish" and "confirm" various items substitutes the board into active management and exposes it to substantial additional liability. This is especially true since violations of the Proposed FDIC Guidelines are enforceable by both criminal and civil penalties. The Proposed FDIC Guidelines even make the board responsible to conduct an annual self-assessment that evaluates the board's effectiveness in satisfying the Proposed FDIC Guidelines. Absent day-to-day management, it is unclear how the board itself can effectively satisfy the Proposed FDIC Guidelines.

The FDIC has not justified the sweeping changes to the role and liability of the board of directors at a FDIC-regulated institution that the Proposed FDIC Guidelines represent, let alone why such changes are required at FDIC-regulated institutions and not OCC-regulated institutions or FRB-regulated institutions. The FDIC should retract the novel and ambiguous fiduciary standards and "stakeholders" it sets forth in its Proposed FDIC Guidelines. Otherwise, the FDIC will be actively working to push talented directors away from serving on the boards of FDIC-regulated institutions.

III. The FDIC should delete the self-reporting requirements in the Proposed FDIC Guidelines.

The Proposed FDIC Guidelines require covered institutions to promptly self-report all noncompliance with a risk appetite statement or risk management program to the FDIC and all violations of law or regulations to the appropriate law enforcement agencies.[8] These new reporting obligations do not match anything required by the FRB or OCC and dramatically expand current reporting obligations for FDIC-regulated institutions. The language of the Proposed FDIC Guidelines is unclear as to whether such reporting obligations are to be informed by scope, materiality, or similar considerations, the required timing of reporting, and what exactly constitutes a "breach of a risk limit or noncompliance with the risk appetite statement or risk management program." The FDIC should not impose unprecedented, substantive changes without a full explanation and justification for the changes.

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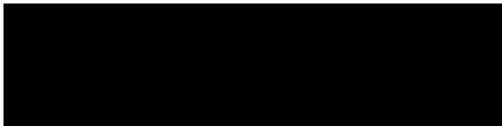
[8] Proposed FDIC Guidelines, 88 Fed. Reg. at 70408-09.

In conclusion, the Proposed FDIC Guidelines differ in significant and meaningful ways from the guidance published by the FRB and OCC, without any explanation why FDIC-regulated institutions warrant more onerous and prescriptive standards than OCC-regulated institutions and FRB-regulated institutions. The FDIC should, at a minimum, raise the asset size threshold, clearly distinguish between board and management roles, and delete the new self-reporting obligations. As currently proposed, the Proposed Guidelines threaten, as opposed to protect, the safety and soundness of FDIC-regulated institutions and the whole banking system.

Sincerely,



Nicole S. Lorch
President, Chief Operating Officer
and Secretary to the Board