November 18, 2024

The Honorable Martin J. Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Chairman Gruenberg,

We write to raise concerns with the Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More (Guidelines), which the Federal Deposit Insurance Corporation (FDIC) has proposed to govern state-chartered banks that are not members of the Federal Reserve System (Covered Banks). The Guidelines contravene the authority Congress has given the FDIC, improperly interfere with the established powers of the States to regulate Covered Banks, are a significant departure from existing law and corporate governance principles, and conflict with the standards promulgated by the Office of the Comptroller of the Currency (OCC) and Federal Reserve Board (FRB) that govern other banks. Although the FDIC claims that the Guidelines are not a departure from current expectations, the proposal would fundamentally reshape corporate governance for Covered Banks and alter the relationship between their boards of directors and their management, leading to a host of severe negative consequences for the Covered Banks, their customers, and the industry as a whole. Consequently, the FDIC should fully withdraw the Guidelines.

As an initial matter, we disagree with the FDIC's position that it has the power to issue the Guidelines under its statutory authority to ensure the safety and soundness of Covered Banks. As you undoubtedly know, "**the weight of case law hold[s] that "[t]he 'unsafe or unsound practice' provision ... refers only to practices that threaten the financial integrity of the association.**"[1] The FDIC has never explained why Covered Banks' current corporate governance practices come close to threatening their financial integrity, or how the Guidelines would somehow enhance their financial integrity. On this basis alone, the FDIC should withdraw the proposed Guidelines.

In the case that the FDIC did have the authority to issue the Guidelines, they are irreparably flawed for several reasons.

First, the Guidelines would fundamentally change the liability and responsibilities of boards of directors and senior management. The proposal would demand a bank board play an active role in the day-to-day functions of management by impossibly requiring a board to "ensure" that bank management is in compliance with the proposed FDIC standards and to "confirm" the bank complies with all laws and regulations. The Guidelines would also overhaul the role of a board

[1] Johnson v. Off. of Thrift Supervision, 81 F.3d 195, 204 (D.C. Cir. 1996) (quoting Gulf Fed. Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., 651 F.2d 259, 267 (5th Cir.1981), cert. denied, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982))

of directors by exposing board members to civil and criminal liability in a manner incongruent with both governing state laws and the standards of the OCC and FRB. The excessively prescriptive nature of the Guidelines would hamstring the ability of a bank board of directors to function effectively and discourage directors from serving on a board.

The Guidelines compound this problem by adopting a strained concept of "independent" and requiring a Covered Bank's board to include a majority of outside and independent directors, meaning a director that is "(a) not a principal, member, officer, or employee of the institution, and (b) not a principal, member, director, officer, or employee of any affiliate or principal shareholder of the institution." The FDIC apparently included this requirement into place without any concern for the large number of current bank directors who would be forced to resign as a result of this requirement, much less the loss of capabilities and expertise or the difficulty of replacing the directors who were forced to resign, especially if all Covered Banks needed to seek large numbers of qualified new bank directors all at the same time. The FDIC also did not consider the important coordination and efficiencies advantages that come from having the same directors sit on the boards of both the holding company and the bank.

Second, the Guidelines' requirements that directors "should consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public" are inconsistent with the law of almost every state regarding directors' fiduciary duties that run solely or primarily to the shareholders. Your agency has not explained why it is seeking to intrude on an area of corporate law that generally has been left to the States since the founding of this country. The FDIC's actions would put directors in a no-win situation of needing to follow contradictory federal and state law.

Third, the Guidelines also arbitrarily set the asset threshold for covered institutions far below the thresholds for heightened standards under the other banking regulations. The OCC and FRB apply heightened standard governance regimes for institutions with assets of $50 billion or more, while your agency's proposed Guidelines would apply to covered institutions with $10 billion or more in assets. The FDIC also maintains the ability to apply the Guidelines to institutions with assets less than $10 billion if the bank presents heightened risk, which the FDIC does not clearly define. The FDIC has not justified why the Guidelines are inconsistent with the OCC and FRB and has not articulated how the current regulatory framework for FDIC-supervised institutions with assets of $10 billion is insufficient.

The internal processes required by the Guidelines would make compliance functionally impossible. The Guidelines would undermine sound risk management practices and introduce massive risk into the banking system. We urge the FDIC to withdraw the proposal and take feedback from the public into further consideration.

Sincerely,

Frank D. Lucas
Member of Congress

French Hill
Member of Congress

Dan Meuser
Member of Congress

Andrew R. Garbarino
Member of Congress

Monica De La Cruz
Member of Congress

Roger Williams
Member of Congress

William R. Timmons, IV
Member of Congress

Scott Fitzgerald
Member of Congress

Mike Flood
Member of Congress

Andy Ogles
Member of Congress