United States Senate
WASHINGTON, DC 20510

July 31, 2024

The Honorable Martin Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street NE
Washington, DC 20429

Dear Chairman Gruenberg:

We write to you today regarding the Federal Deposit Insurance Corporation (FDIC)'s notice of proposed rulemaking and issuance of guidelines entitled "Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More" (the Proposal).[1] Specifically, we are concerned that the rulemaking contains a multitude of issues and flaws that collectively will hinder, not improve, safety and soundness within the U.S. financial system.

Safety and soundness is the cornerstone regulatory principle of the U.S. banking system. To maintain this principle, financial institutions and financial regulators alike must operate under clear and well-defined regulatory frameworks. As the banking failures of 2023 showed, ineffective risk management by financial institutions[2] paired with ineffective risk supervision by financial regulators[3] are key areas from which potential hazards may arise. The failure of Silicon Valley Bank (SVB) in particular, where bank management's perilous concentration and interest-rate strategies were met with sluggish and lackluster responses by financial regulators, underscores the necessity for regulatory constructs to emphasize clear and direct accountability standards for both bank management and regulators. Unfortunately, the Proposal, as drafted, indicates the FDIC is preparing to move in the opposite direction.

Firstly, the Proposal seeks to impose new responsibilities on a financial institution's Board of Directors (Board) that are more properly tasked to senior management. In establishing these requirements, the Proposal inherently wrests important management considerations and responsibilities away from the proper executives and teams within a financial institution and instead places them at the feet of the Board. This includes, but is not limited to, the wholly new requirements that a Board "ensure" and "confirm" bank safety and soundness, effective risk governance, and legal compliance.[4] Other federal prudential regulators – namely the Office of the Comptroller of the Currency (OCC) – acknowledged[5] the drawbacks of this arrangement and ultimately removed analogous requirements in a previously-considered rulemaking. Concerningly, the FDIC has not.

[1] https://www.federalregister.gov/documents/2023/10/11/2023-22421/guidelines-establishing-standards-for-corporate-governance-and-risk-management-for-covered
[2] https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf
[3] *Id*.
[4] https://www.federalregister.gov/documents/2023/10/11/2023-22421/guidelines-establishing-standards-for-corporate-governance-and-risk-management-for-covered
[5] https://www.federalregister.gov/documents/2014/09/11/2014-21224/occ-guidelines-establishing-heightened-standards-for-certain-large-insured-national-banks-insured

In doing so, the FDIC seeks to push forward a rulemaking that will functionally blur the lines between the responsibilities of senior management and the responsibilities of the Board. This will undoubtedly add unnecessary friction into bank management and erode the clear delineation of responsibilities for key management decisions. Most concerningly, the insertion of the Board into the risk management process will degrade the relationship between relevant risk management roles and operational accountability. As the saying goes, when everyone is responsible, no one is. The Proposal seeks to codify that principle, an outcome that will heighten risks to safety and soundness, not prevent them.

Secondly, the Proposal adopts a one-size-fits-all approach to Board governance that may, in many cases, conflict with regulatory requirements from other financial regulators or even state law. The portions of the Proposal devoted to Board composition matters or the requirement to consider non-shareholder constituencies are broad and, at times, at odds with other regulators and state laws.[6] For instance, the overly-prescriptive nature of the Proposal may present issues for certain banking institutions organized under a parent holding company. In these situations, the Financial Stability Board (FSB) has indicated a clear preference that the risk management functions reside with a firm's chief risk officer on an "enterprise-wide" basis.[7] If adopted, the Proposal will exist in tension with that standard. Similarly, it is unclear whether the FDIC considered the numerous state laws or the decades of legal jurisprudence surrounding them that the Proposal would undermine. These issues, and many others, led the Conference of State Bank Supervisors to describe the Proposal as "fatally flawed" and call for it to be withdrawn entirely.[8]

Finally, by applying the Proposal to all FDIC-regulated institutions down to $10 billion in assets, and establishing the optionality to subsequently waive that cap at its own discretion, the FDIC seeks the power to impose burdensome corporate governance standards all the way down to some of the smallest U.S. banks. Yet the FDIC fails to provide any empirical evidence that the Proposal will produce a discernable benefit in exchange for this mandate. This is especially true for the smaller institutions covered under the Proposal. For small and rural lenders, many of which operate in areas with limited population and talent pools, the Proposal's burdensome requirements for Board composition are functionally unrealistic and out of touch.

Given the broad range of concerns we share regarding the Proposal, we respectfully request answers to the following questions no later than Friday, August 16, 2024:

1. The FDIC extended its original comment period from December 11, 2023, to February 9, 2024. Analysis[9] of the feedback received indicates that 92% of posted comments either opposed the Proposal entirely or raised substantial concerns. Does the FDIC plan to make changes to the Proposal, or withdraw it entirely, given the extraordinarily high rate of negative feedback?

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[6] https://www.csbs.org/why-fdic-should-withdraw-its-corporate-governance-risk-management-proposal
[7] https://www.fsb.org/wp-content/uploads/r_130212.pdf
[8] https://www.csbs.org/why-fdic-should-withdraw-its-corporate-governance-risk-management-proposal
[9] https://www.davispolk.com/sites/default/files/2024-03/fdic-corporate-governance-proposal-commentlletter-analysis.pdf

2. Chairman of the Board of Governors of the Federal Reserve system Jerome Powell characterized the feedback for the Basel III Endgame proposal, 97% of which was negative, as “unlike anything I’ve seen,” and promised “broad material changes” [10] in response.

    a. Given the similar proportion of critical feedback between the two proposals, should the FDIC pursue broad material changes if it ultimately does not withdraw the Proposal?

    b. Is consistency in the manner in which federal prudential regulators respond to instances of similar notice and comment feedback important to ensure public confidence in the federal rulemaking process?

3. The Proposal is notably opposed by the Conferences of State Bank Supervisors, as well as numerous[11] state[12] regulators[13], officials[14], and all 50 state Bankers’ Associations.[15] To what extent, if any, did the FDIC engage with state-based regulators or stakeholders when drafting the Proposal?

4. *For Acting Comptroller Hsu*: As detailed above, the OCC, the agency you lead as Acting Director, abandoned previous rulemaking efforts similar to the Proposal. Specifically, the OCC determined, “…the OCC did not intend to assign managerial responsibility to the board of directors or its risk committee. 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.”[16]

    a. Is this still the position of the OCC?

    b. Does your position align or diverge from the OCC statement above?

While we agree that sound corporate governance is a necessity, the Proposal represents a significantly flawed approach to prudential regulation that seeks to micromanage Board affairs in a manner that will inject unnecessary uncertainty in key bank management activities. It will unduly burden banks that serve and operate in small and rural communities. And, perhaps most concerningly, the Proposal lacks consensus support among FDIC leadership, is out of step with

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[10] https://www.reuters.com/markets/us/powell-says-he-expects-broad-material-changes-basel-proposal-2024-03-06/
[11] https://www.fdic.gov/resources/regulations/federal-register-publications/2023/2023-guidelines-establishing-standards-for-corporate-governance-3064-af94-c-053.pdf
[12] https://www.fdic.gov/resources/regulations/federal-register-publications/2023/2023-guidelines-establishing-standards-for-corporate-governance-3064-af94-c-056.pdf
[13] https://www.fdic.gov/resources/regulations/federal-register-publications/2023/2023-guidelines-establishing-standards-for-corporate-governance-3064-af94-c-036.pdf
[14] https://www.fdic.gov/resources/regulations/federal-register-publications/2023/2023-guidelines-establishing-standards-for-corporate-governance-3064-af94-c-055.pdf
[15] https://www.aba.com/-/media/documents/comment-letter/clfdic20240209.pdf?rev=6db88ac7a10f4a05aaa0baedd06371e0
[16] https://www.federalregister.gov/documents/2014/09/11/2014-21224/occ-guidelines-establishing-heightened-standards-for-certain-large-insured-national-banks-insured

other prudential regulators, and actively opposed by state supervisors. For these reasons, we respectfully request the FDIC withdraw the Proposal.

We appreciate your attention in this matter.

Sincerely,

Thom Tillis
United States Senator

Tim Scott
United States Senator

Mike Crapo
United States Senator

M. Michael Rounds
United States Senator

John Kennedy
United States Senator

Bill Hagerty
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