February 9, 2024

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; FDIC RIN 3064-AF94; 88 FR 70391 (Oct. 11, 2023) [Extension of Comment Period; FDIC RIN 3064-AF94; 88 FR 84089 (Dec. 4, 2023)]

Dear Mr. Sheesley:

Better Markets[1] appreciates the opportunity to comment on the proposed guidelines ("Proposal") for corporate governance and risk management.[2] The Proposal is intended to raise the standards and expectations for formal board and management structures at the largest banks that the FDIC supervises to align with these banks' size and increased complexity, relative to banking organizations with less than $10 billion in total assets that would not be subject to the Proposal.

Specifically, the Proposal would add a new appendix ("Appendix C") to FDIC's standards for safety and soundness regulations in part 364, pursuant to Section 39 of the Federal Deposit Insurance Act ("FDI Act").[3] The new appendix would apply to all insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations that are subject to Section 39, with total consolidated assets of $10 billion or more on or after the effective date of the final guidelines ("covered firms").

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[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More; FDIC RIN 3064-AF94; 88 FED. REG. 70391 (Oct. 11, 2023), https://www.federalregister.gov/documents/2023/10/11/2023-22421/guidelines-establishing-standards-for-corporate-governance-and-risk-management-for-covered.

[3] Federal Deposit Insurance Act of 1950, 12 U.S.C. 1829, Section 39, https://www.govinfo.gov/link/uscode/12/1829.

We support the Proposal and urge the FDIC to implement the changes as soon as practicable. As the FDIC highlights in the Proposal, bank failures in the 2008 Financial Crisis ("2008 Crisis") and again in 2023 show that poor corporate governance and insufficient risk management practices make financial institutions more likely to fail.[4] Not only do these failures negatively impact and result in costs to the FDIC's Deposit Insurance Fund and the failed institutions' depositors, customers, and employees, they can harm and impose significant costs on the American public, taxpayers, the financial system, and the economy as a whole. Therefore, covered firms should be held accountable for appropriate corporate governance and risk management to protect all stakeholders and the financial system.

BACKGROUND

Corporate governance is a broad term that includes the oversight and guidance of a company's strategic direction and controls. Strong corporate governance is a critical element for a strong bank and in turn a strong financial system. The Organization for Economic Co-operation and Development ("OECD") partnered with the Group of 20 ("G20") to develop what has become the primary international standard for corporate governance. These groups summarize:

> Corporate governance involves a set of relationships between a company's management, board, shareholders and stakeholders. Corporate governance also provides the structure and systems through which the company is directed and its objectives are set, and the means of attaining those objectives and monitoring performance are determined.[5]

Corporate governance and risk management are key responsibilities of boards of directors, as highlighted by the Basel Core Principles for Effective Banking Supervision.[6] Bank boards of directors are responsible for ensuring a bank has effective risk management and internal control frameworks and for the oversight of senior management, the latter of which is expected to implement these processes and run the bank in a manner consistent with the boards' risk appetite and direction. When risk management processes are consistently ineffective, it is ultimately the boards' failure, either due to providing insufficient resources to management to carry out these responsibilities or by failing in its duty to oversee management and ensure it has implemented effective risk management. This applies to financial risks as well as the risk a bank will be run in a manner that fails to comply with the laws and rules to which it is subject.

The FDIC includes these principles in its Risk Management Manual of Examination, and provides the following expectations:

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[4] Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More, *supra* note 2, at 70391.

[5] Organization for Economic Co-operation and Development, *G20/OECD Principles of Corporate Governance 2023* 6 (Sept. 11, 2023), https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en.

[6] Basel Committee on Banking Supervision, *Core Principles for Effective Banking Supervision* 39 (Sept. 14, 2012), https://www.bis.org/publ/bcbs230.pdf.

> ***Each member of the board of directors should have the skills, integrity, knowledge, and experience necessary to allow the director to fulfill his or her responsibilities to the insured institution.*** The qualifications should be considered in light of the institution's size, complexity and risk profile. Board membership should be considered not only on an individual basis, but also collectively such that the composition provides a well rounded set of skills, knowledge, and experience.
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> ***The board of directors is responsible for actively overseeing the affairs of the institutions***.[7]

Over the years, the FDIC has provided additional insight into its corporate governance expectations, including the Pocket Guide for Directors—originally published in 1988—which contains information on corporate governance and fiduciary responsibilities of board members.[8] This was followed by the FDIC's Statement Concerning the Responsibilities of Bank Directors and Officers[9] in 1992 which provided information about the duty of loyalty and duty of care expectations for board members and officers, and the Corporate Codes of Conduct: Guidance on Implementing an Effective Ethics Program[10] in 2005 to make clear the importance of an effective internal corporate code of conduct or written ethics policy. More recently, in 2016, the FDIC published a refresher on corporate governance and fiduciary responsibilities for bank directors.[11] However, these supplementary documents have primarily focused on boards of directors at community banks, not covered firms. Therefore, the Proposal's focus on expectations and guidelines for covered firms fills a glaring gap that should have been addressed a long time ago.

Numerous studies in the wake of both the 2008 Crisis and the 2023 regional bank failures have linked inadequate corporate governance to bank crises, contagion, crashes, and failures. For example, the Group of Thirty ("G30") highlighted the devastating impact that ineffective corporate governance had on banks around the world in 2008 and beyond:

> In the wake of the crisis, financial institution (FI) governance was too often revealed as a set of arrangements that approved risky strategies (which often

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[7] Federal Deposit Insurance Corporation, *Risk Management Manual of Examination Policies*, at 4.3-6 (Jan. 2, 2024), https://www.fdic.gov/resources/supervision-and-examinations/examination-policies-manual/risk-management-manual-complete.pdf (emphasis added).

[8] Federal Deposit Insurance Corporation, *Pocket Guide for Directors* (Jan. 3, 2024), https://www.fdic.gov/resources/bankers/bank-directors/pocket-guide/index.html.

[9] Federal Deposit Insurance Corporation, *Statement Concerning the Responsibilities of Bank Directors and Officers*, FIN. INST. LETTER (Dec. 3, 1992), https://www.fdic.gov/regulations/laws/rules/responsibilities-bank-directors-officers.pdf.

[10] Federal Deposit Insurance Corporation, *Corporate Codes Of Conduct Guidance on Implementing an Effective Ethics Program*, FIN. INST. LETTER (Oct. 21, 2005), https://www.fdic.gov/news/financial-institution-letters/2005/fil10505.html.

[11] Federal Deposit Insurance Corporation, *A Community Bank Director's Guide to Corporate Governance: 21st Century Reflections on the FDIC Pocket Guide for Directors*, SUPERVISORY INSIGHTS (Apr. 2016), https://www.fdic.gov/regulations/examinations/supervisory/insights/sise16/si-se2016.pdf.

> produced unprecedented short-term profits and remuneration), was ***blind to the looming dangers*** on the balance sheet and in the global economy, and therefore ***failed to safeguard the FI, its customers and shareholders, and society at large***. ***Management teams, boards of directors, regulators and supervisors, and shareholders all failed, in their respective roles, to prudently govern and oversee.***[12]

Similarly, the OECD finds that the 2008 Crisis was rooted in inadequate corporate governance:

> ***When they were put to a test, corporate governance routines did not serve their purpose to safeguard against excessive risk taking in a number of financial services companies.*** A number of weaknesses have been apparent. The risk management systems have failed in many cases due to corporate governance procedures rather than the inadequacy of computer models alone: information about exposures in a number of cases did not reach the board and even senior levels of management, while risk management was often activity rather than enterprise-based. These are board responsibilities. In other cases, boards had approved strategy but then did not establish suitable metrics to monitor its implementation.[13]

Among others, Better Markets has consistently emphasized the critically important role that bank boards of directors play in the pursuit of a strong and well-functioning banking system as well as the need for increased accountability and consequential penalties when the board fails to carry out its responsibilities. In a recent report that was published following the spring 2023 bank failures, Better Markets states:

> ***Unlike most other corporations, the consequences of large banks being poorly run can be catastrophic for the economy***. . . When a bank is dangerously run, or breaks rules or laws, whether due to mismanagement, negligence, recklessness, or intentional actions, it is either the result of choices made by those that run the bank or—less often—incompetence and genuine ignorance. Both are unacceptable and require consequential penalties and real accountability by the Banking Agencies.

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[12] Group of Thirty, *Toward Effective Governance of Financial Institutions*, 5 (2012), https://group30.org/publications/detail/155 (emphasis added).

[13] Grant Kirkpatrick, *The Corporate Governance Lessons from the Financial Crisis*, OECD JOURNAL: FIN. MKT. TRENDS 2 (2009), https://www.oecd.org/finance/financial-markets/42229620.pdf (emphasis added).

> ***A key tenet of corporate governance, including at banks, is that the ultimate responsibility for ensuring an organization is responsibly run lies with the board of directors.***[14]

Recent evaluations of the 2023 bank failures by the Fed and FDIC clearly tie the ultimate failures to inadequate corporate governance. For example, the Fed's report on Silicon Valley Bank ("SVB") and its holding company Silicon Valley Bank Financial Group ("SVBFG") states:

> ***SVBFG's rapid failure can be linked directly to its governance*** . . . ***The full board of directors did not receive adequate information from management about risks at SVBFG and did not hold management accountable.*** For example, information updates that management sent the board did not appropriately highlight SVBFG's liquidity issues until November 2022 despite deteriorating conditions. Moreover, the board put short-run profits above effective risk management and often treated resolution of supervisory issues as a compliance exercise rather than a critical risk-management issue. Compensation packages of senior management through 2022 were tied to short-term earnings and equity returns and did not include risk metrics. As such, managers had a financial incentive to focus on short-term profit over sound risk management.[15]

Similarly, the FDIC's report on Signature Bank of New York ("SBNY") states:

> ***SBNY management did not prioritize good corporate governance practices***, did not always heed FDIC examiner concerns, and was not always responsive or timely in addressing FDIC supervisory recommendations (SRs). SBNY funded its rapid growth through an overreliance on uninsured deposits without implementing fundamental liquidity risk management practices and controls. Additionally, SBNY failed to understand the risk of its association with and reliance on crypto industry deposits or its vulnerability to contagion from crypto industry turmoil that occurred in late 2022 and into 2023. ***Although fallout from the liquidation of Silvergate and the failure of SVB was unprecedented and unfolded rapidly, SBNY's poor governance and inadequate risk management practices put the bank in a position where it could not effectively manage its liquidity in a time of stress, making it unable to meet very large withdrawal requests.***[16]

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[14] Dennis M. Kelleher & Tim Clark, *Banking Crisis Exemplifies the Fed's Enforcement Failures: Here's What to Do About It*, Better Markets, 7-8 (May 15, 2023), https://bettermarkets.org/wp-content/uploads/2023/05/Banking-Enforcement-Report-5.15.23-Final.pdf (emphasis added); *see also* Better Markets Comment Letter, *Proposed Guidance on Supervisory Expectation for Boards of Directors* (Feb. 15, 2018), https://bettermarkets.org/wp-content/uploads/2021/07/FRS-CL-BoD-Supervison-Expectations-2-15-18.pdf.

[15] Board of Governors of the Federal Reserve System, *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank* 3 (Apr. 2023), https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf (emphasis added).

[16] Federal Deposit Insurance Corporation, *FDIC's Supervision of Signature Bank* 2 (Apr. 28, 2023), https://www.fdic.gov/news/press-releases/2023/pr23033a.pdf (emphasis added).

To summarize, the Proposal is necessary and long overdue to provide the FDIC's expectations for corporate governance at covered firms, given their larger size and increased complexity. It is also beneficial to better align with the Federal Reserve[17] ("Fed") and Office of the Comptroller of the Currency[18] ("OCC") post-2008 Crisis expectations related to corporate governance, which have been available for many years.

SUMMARY OF THE PROPOSAL

The Proposal states that the board of directors "has the ultimate responsibility for the safe and sound operation of the institution, overseeing management, and fulfilling its fiduciary duties."[19] To that end, the Proposal contains the following guidelines for covered firms:

- **Board Composition** – direction on the number of board members as well as the diversity of their characteristics, backgrounds, and skills. The guidelines also state that the board should include a majority of outside, independent directors.

- **Duties of the Board** – direction on setting an appropriate tone and corporate culture that promotes responsible and ethical behavior; approving the strategic plan and policies; establishing a code of ethics; providing active oversight of management; exercising independent judgment; selecting and appointing qualified executive officers; providing ongoing training to directors; conducting an annual effectiveness self-assessment; and establishing and implementing compensation and performance management programs.

- **Committees of the Board** – direction on the establishment of an organizational structure that keeps board members informed and provides an adequate framework to oversee the covered firm. This structure should include an audit committee, a compensation committee, a trust committee (for covered firms that have trust powers), a risk committee, and any other committees that the board thinks are needed to perform its duties.

Furthermore, the guidelines state that the "board of a covered institution should establish, and management should implement and manage, ***a comprehensive and independent risk***

[17] Board of Governors of the Federal Reserve System, *Supervisory Guidance for Assessing Risk Management at Supervised Institutions with Total Consolidated Assets Less than $100 Billion*, SUPERVISORY LETTER 16-11 (June 8, 2016), https://www.federalreserve.gov/supervisionreg/srletters/sr1611.htm.

[18] OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of Regulations; RIN 1557-AD78; 79 FED. REG. 54518 (Sept. 11, 2014), https://www.federalregister.gov/documents/2014/09/11/2014-21224/occ-guidelines-establishing-heightened-standards-for-certain-large-insured-national-banks-insured.

[19] Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More, *supra* note 2, at 70394.

management function and effective programs for internal controls, risk management, and audit."[20] This includes several components:

- **Risk Management Program** – identify, measure, monitor, and manage risk to ensure that the institution is in compliance with laws and regulations.

- **Risk Profile and Risk Appetite Statement** – create, review, and regularly update a risk profile that establishes risk limits in the aggregate and for each line of business.

- **Risk Management Program Standards** – design a formal risk management program to implement the risk appetite statement in a way that is commensurate with the covered firm's structure, risk profile, complexity, activities, and size. Three distinct units—the front-line units, the independent risk unit, and the internal audit unit—should report to and be held accountable by the Chief Executive Officer ("CEO") and the board.

- **Communication Processes** – require regular communication to reinforce the risk appetite statement and align management's and employees' risk-taking decisions with it.

- **Processes Governing Risk Limit Breaches** – establish a process for and ensure accountability for reporting and resolving risk-limit breaches.

- **Processes Governing Identification of and Response to Violations of Law** or Regulations – identify and document all violations of law or regulations and notify the CEO, audit committee, and risk committee of violations. Also, report actions that are being taken to return the institution to compliance with the law or regulation.

Along with being more detailed than either the Fed or OCC's direction related to corporate governance, the Proposal and its ***guidelines*** differ from the other Agencies' ***guidance*** because it is enforceable, pursuant to Section 39 of the FDI Act. In contrast, the Fed and OCC's guidance is not enforceable.[21] We believe that the lack of enforceability in the Fed's and OCC's guidance on

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20 *Id*, at 70406 (emphasis added).

21 On September 11, 2018, the Fed, FDIC, OCC, CFPB, and NCUA issued a joint statement that greatly limited supervisors' use of ***guidance*** to address a bank's risky conduct even if it threatened safety and soundness or financial stability unless it also broke a specific law or rule. *See* Joint Press Release, *Agencies issue statement reaffirming the role of supervisory guidance* (Sept. 11, 2018), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180911a.htm.

Better Markets warned of the damaging nature of weakening the enforceability of supervisory guidance in a comment letter filed to the agencies in 2021, but the rule was ultimately finalized nonetheless, effective May 10, 2021. *See* Better Markets Comment Letter, *Role of Supervisory Guidance, Notice of Proposed Rulemaking* (Jan. 4, 2021), https://bettermarkets.org/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20Notice%20of%20Proposed%20Rulemaking%20-%20Role%20of%20Supervisory%20Guidance.pdf.

See also Final Rule, *Role of Supervisory Guidance*, 88 Fed. Reg. 18173 (Apr. 8, 2021), https://www.govinfo.gov/content/pkg/FR-2021-04-08/pdf/2021-07146.pdf.

Boards of Directors is a critical weakness, and the enforceability aspect of the FDIC Proposal is vitally important.

SUMMARY OF COMMENTS

The Proposal has several strengths that we believe elevates it above the Fed's and OCC's guidance on corporate governance and will benefit the American public. Specifically, the greater detail on expectations—especially related to the covered firm's strategic plan and risk oversight—and the enforceability of these expectations are particularly valuable. We applaud the FDIC for including these provisions and urge the FDIC to retain them in the final guidelines.

We also note the difference in size applicability of the FDIC's Proposal compared to similar guidance from the OCC and Fed. The FDIC's Proposal applies to all FDIC-supervised institutions with total consolidated assets of $10 billion or more while the OCC's and Fed's guidance generally applies to institutions with $50 billion or more. We believe that the FDIC's size threshold is appropriate and agree with the Proposal's assertions that as firms grow larger their complexity increases and the damage that their failure can cause to the American public and the financial system increases.[22] The Proposal clarifies that **only 57 of the 3,012 banks that the FDIC supervises have total assets of $10 billion or more and will be subject to the guidelines**.[23] Conversely, the 2,955 banks that have less than $10 billion in total assets would not be subject to the new guidelines. Of course, there remains a risk of regulatory arbitrage given that some institutions could choose to switch charters to the OCC or Fed to avoid the FDIC's guidelines. However, necessary and appropriate rules should never be weakened for fear of regulatory arbitrage; rather, other regulators should reconsider their own inadequate rules and see any such rechartering as evidence of the need for stronger rules. This would expand the protection that enhanced corporate governance provides to the financial system as a whole as well as to individual banks and members of the American public who trust these banks with their financial transactions and life savings.

Despite the many strengths of the Proposal, we urge the FDIC to make several changes before finalizing:

- Remove the word "should" from the guidelines and replace it with "must" to preserve their enforceability. Statements about what covered firms or boards "should consider," "should set," or "should adopt" undermines the guidelines' key attribute of enforceability.

- Revise the guidelines to address instances in which the bank CEO or other bank employee is also a member of the board. The Proposal clearly states that there should be a majority of independent directors and appropriate diversity on the board, which we support. Furthermore, we support the Proposal's statement that the board is responsible for providing active oversight of management as well as establishing compensation and performance management programs. Given these expectations, we

[22] Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More, *supra* note 2, at 70392.

[23] *Id*, at 70397 (emphasis added).

believe that having the CEO or other bank management official also serve in the role of Chairman of the Board—presents a clear conflict of interest. While one can cite examples of where dual roles are held at purportedly successful banks, those examples should not and cannot be used as a model for all banks.

- Add more detail and clarity to the "skills" component of the board diversity guidelines to ensure that covered firms' board members collectively have the requisite professional experience to be an effective board member. We agree with the Proposal's broad range of attributes that contribute to board diversity. Board members' professional skills are a critical component of this diversity and the guidelines should be further defined to ensure that covered firms have the strongest possible board composition.

COMMENTS

I. REMOVE THE WORD "SHOULD" FROM THE GUIDELINES AND REPLACE IT WITH "MUST" TO PRESERVE THEIR ENFORCEABILITY.

As mentioned earlier, one of the key strengths of this Proposal is the fact that the guidelines would ostensibly be enforceable for covered firms. However, the frequent usage of phrases such as "should consider," "should set," or "should adopt" undermines this enforceability. The use of language like "may" and "should" instead of "shall" or "must" suggests that the provisions that follow are meant to be "precatory, not mandatory."[24] To improve the clarity of the guidelines and ensure that the FDIC's expectations are clearly enforceable, we recommend removing all instances of phrases using "should" and replacing them with more directive language.

II. REVISE THE GUIDELINES TO ADDRESS INSTANCES IN WHICH THE BANK CEO OR OTHER BANK EMPLOYEE IS ALSO A MEMBER OF THE BOARD.

Whether or not a bank CEO, or other management official, serves on the bank's board is a question that has been often debated by policymakers and academics. In the context of this Proposal, the FDIC has provided several clear statements related to this issue, including the need for independent judgment by board members, the responsibility that board members have for providing oversight of management, and the role that board members have to select and appoint executive officers as well as establish and oversee compensation and performance management for the CEO and other executives. While one can cite examples of where dual roles are held at purportedly successful banks, those examples should not and cannot be used as a model for all banks. Relying on the CEO to lead and oversee these activities presents a conflict of interest.

Nevertheless, several large banks have chosen to employ this duality—with the same

[24] *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta,* 785 F.3d 710, 718 (D.C. Cir. 2015) (quoting *Judd v. Billington,* 863 F.2d 103, 106 (D.C. Cir. 1988)).

individual acting as both CEO and Chairman of the Board—and accept the risk and potential blind-spots and devastation that it can bring. A clear example of the risk of this structure is Citigroup during the lead up to the 2008 Crisis, under the leadership of Charles Prince who was both CEO and Chairman of the Board.[25] Despite Prince's statements about the responsibility of the board to set the appropriate tone at the top, establish safety nets, and correct mistakes, the effects of the bank missing the mortgage-related risk that was building ultimately led to the loss of billions of dollars and served as a catalyst for the 2008 Crisis that cost millions of Americans their livelihoods. The blindness to risks that were building rendered the board superfluous at best:

> In September 2007, with Wall Street confronting a crisis caused by too many souring mortgages, Citigroup executives gathered in a wood-paneled library to assess their own well-being.
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> There, Citigroup's chief executive, Charles O. Prince III, learned ***for the first time*** that the bank owned about $43 billion in mortgage-related assets. He asked Thomas G. Maheras, who oversaw trading at the bank, whether everything was O.K. . . .
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> For months, Mr. Maheras's reassurances to others at Citigroup had quieted internal concerns about the bank's vulnerabilities. But this time, a risk-management team was dispatched to more rigorously examine Citigroup's huge mortgage-related holdings. They were too late, however: within several weeks, Citigroup would announce billions of dollars in losses.[26]

Another example of this risky structure is at Morgan Stanley, where John Mack was CEO and Chairman of the Board from 2005 through 2009.[27] Morgan Stanley had cumulative losses in its subprime mortgage portfolio of nearly $10 billion in the fourth quarter of 2007. Despite these enormous losses, Mr. Mack kept his job, took home an $800,000 paycheck, and deflected responsibility:

> Mr. Mack ***blamed the firm's inadequate risk-monitoring procedures*** and said the firm's risk managers would now report to the chief financial officer, which is the practice at Goldman Sachs. Previously the risk managers had reported to Zoe Cruz, the co-president overseeing trading, who was ousted by Mr. Mack last month, a further indication that ***the firm's big bets lacked objective risk oversight***. . . .
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> By all accounts, Mr. Mack still ha[d] the support of his board, which include[d] four holdovers from the Purcell era. . . . Mr. Mack, has ties to the firm's glory days in the 1970s and 1980s and with his ability to charm, he is still liked within the firm.[28]

The Basel committee highlights the need for bank supervisors to establish clear direction

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[25] *See, e.g.*, Eric Dash & Julie Creswell, *Citigroup Saw No Red Flags Even as It Made Bolder Bets*, N.Y. TIMES (Nov. 22, 2008), https://www.nytimes.com/2008/11/23/business/23citi.html.

[26] *Id* (emphasis added).

[27] *See, e.g.*, Landon Thomas Jr., *$9.4 Billion Write-Down at Morgan Stanley*, N.Y. TIMES (Dec. 20, 2007), https://www.nytimes.com/2007/12/20/business/20wall.html.

[28] *Id* (emphasis added).

to mitigate risk in these situations, including:

> [E]xpectations for checks and balances and a clear allocation of responsibilities, accountability and transparency among the members of the board and senior management and within the bank. In addition to guidance or rules, where appropriate, supervisors should also share industry best practices regarding corporate governance with the banks they supervise.[29]

As mentioned earlier, there have been numerous studies of the costs and benefits of separation of the CEO and Chairman roles. Clearly, in the example above, a lack of separation as well as inadequate checks and balances resulted in tremendous costs, not only to the bank but also to society as the 2008 Crisis unfolded. One study that aptly summarizes the collective wisdom of several academics also emphasizes the importance of strong supervisory oversight and contains evidence that shows how this oversight can help to counteract the risk of duality:

> Duality is associated with a greater risk-taking . . . Duality may impact boardroom communication and disrupt free-flow of information, impacting effective risk oversight. . . . Specifically, this study next delimits [bank holding companies] BHCs that are subject to lighter regulation intensity from those BHCs which are subject to greater monitoring intensity. . . . the earlier positive relation between Duality and risk-taking continues as before for BHCs with lower monitoring standards. However, the robust association between the CEO Chairman role and ***risk-taking measures completely dissipates for BHCs that embrace heightened monitoring***.
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> ***Regulators require firms to adopt effective corporate governance structures in order to promote safety and soundness. Non-value maximizing and excessive risk-taking behaviours may be curbed by regulatory initiatives as well as enhanced internal monitoring.***
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> From a policy perspective, these results suggest that no single variable . . . can capture an issue as complex as financial institutions governance profiles . . . ***Instead, the overall bundle of governance arrangements and external supervision or monitoring appears to be far more relevant to fully appreciate the trade-off of monitoring choices available to board directors*** . . .[30]

Given this insight, we urge the FDIC to establish and add to the Proposal a framework to assess the Board's effectiveness, including the Board's chosen structure and its ability to establish an appropriate tone at the top, and incorporate the results of this assessment into the Management rating component of regulatory examinations.

[29] Basel Committee on Banking Supervision, *supra* note 6.

[30] Walter Gontarek & Yacine Belghitar, *CEO Chairman Controversy: Evidence from the Post Financial Crisis Period*, 56 REV. OF QUANTITATIVE FIN. AND ACCT. 696-700 (2021), https://link.springer.com/article/10.1007/s11156-020-00906-9 (emphasis added).

III. ADD MORE DETAIL AND CLARITY TO THE "SKILLS" COMPONENT OF THE BOARD DIVERSITY GUIDELINES TO ENSURE THAT COVERED FIRMS' BOARD MEMBERS COLLECTIVELY HAVE THE REQUISITE PROFESSIONAL EXPERIENCE TO BE AN EFFECTIVE BOARD MEMBER.

The Proposal appropriately emphasizes the need for a diverse board of directors:

> [I]mportant aspects of diversity may include: social, racial, ethnic, gender, and age differences; skills, differences in experience, perspective, and opinion (including professional, educational, and community or charitable service experience); and differences in the extent of directors' ownership interest in the covered institution.[31]

Numerous studies provide evidence of the benefits of increased diversity along multiple dimensions of firm performance, decision making, and innovation.[32] While a diverse board clearly brings a variety of valuable viewpoints to discussions and decisions, we believe that the Proposal, and in turn the American public and the financial system more broadly, would benefit from increased specificity related to the "skills" component of diversity. In other words, the individuals on the board must have fluency with banking and finance to contribute appropriately to board business. Furthermore, as explained above, the Proposal contains many new responsibilities for which board members will be accountable. These responsibilities require significant professional banking knowledge and experience.

Evidence from the board composition at some of the largest banks in 2008 reinforces our recommendation and demonstrates the problems that can result from board members who do not have direct banking expertise. These individuals may not be able to ask appropriate questions and challenge management's decisions when needed. To illustrate, a 2008 analysis of board member biographies at eight of the largest financial institutions showed a serious lack of direct banking experience—that we now know contributed to the 2008 Crisis:

> ***[M]ore than two-thirds of the occupants of those board seats had no significant recent experience in the banking business. Fewer than half had any financial services industry experience at all.***
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> Moreover, many of the directors without a financial background happened to sit on highly technical board committees. At Lehman, for example, Roger Berlind, a theatre impresario and private investor . . . [was] on both the board's audit committee and the finance and risk committee. At Citi, John Deutch, a former head of the CIA who [was] a physical chemistry professor at the Massachusetts Institute of Technology, [sat] on the audit and risk management committee. Similarly,

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[31] *Id*, at 70404.

[32] *See, e.g.*, Gennaro Bernile, Vineet Bhagwat, & Scott Yonker, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J. OF FIN. ECONOMICS 588-612 (Mar. 2018), https://www.sciencedirect.com/science/article/abs/pii/S0304405X17303215; David A. Carter, Betty J. Simkins, & W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REVIEW (Feb. 4, 2003), https://onlinelibrary.wiley.com/doi/10.1111/1540-6288.00034; Jens Hagendorff & Kevin Keasey, *The Value of Board Diversity in Banking: Evidence from the Market for Corporate Control*, 18 THE EUROPEAN J. OF FIN. (June 28, 2010), https://www.tandfonline.com/doi/full/10.1080/1351847X.2010.481471.

> Tommy Franks, the retired top US Army general, [was] on the audit committee of Bank of America.[33]

Prudence and a focus on protecting the many stakeholders and customers of covered firms clearly supports the need for professional banking experience for board members. Finding qualified board members should not be difficult. Remember, the Proposal only applies to the fewer than 60 institutions that meet the definition of a covered firm. Fewer than 10 of these covered firms are located outside of a metropolitan area. Those that are not in a metropolitan area are located in micropolitan areas[34] and none of the covered firms are located in rural counties where finding individuals with professional banking experience might be difficult. Conversely, the nearly 3,000 FDIC-supervised firms—primarily community banks that are more likely to be located in rural areas—***would not be subject to our recommended addition of required professional banking experience for board members.*** In summary, the added cost or difficulty of finding individuals with appropriate skills to be an effective board member would be well worth the benefit of stronger overall corporate governance of covered firms.

CONCLUSION

We hope these comments are helpful for the prompt finalization of the Proposal.

Sincerely,

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[33] Francesco Guerrera & Peter Thal Larsen, *Gone By the Board? Why Bank Directors Did Not Spot Credit Risks*, FIN. TIMES (June 25, 2008), https://www.ft.com/content/6e66fe18-42e8-11dd-81d0-0000779fd2ac. *See also* Robert C. Pozen, *The Big Idea: The Case for Professional Boards*, HARV. BUS. REV. (Dec. 2010), https://hbr.org/2010/12/the-big-idea-the-case-for-professional-boards.

[34] The U.S. Census Bureau states that "**Metropolitan statistical areas** consist of . . . *at least one urban area of at least 50,000 population, plus adjacent counties* having a high degree of social and economic integration with the core as measured through commuting ties" and "**Micropolitan statistical areas** consist . . . *at least one urban area of at least 10,000 but less than 50,000 population, plus adjacent counties* having a high degree of social and economic integration with the core as measured through commuting ties." *See* U.S. Census Bureau, *Glossary*, https://www.census.gov/programs-surveys/metro-micro/about/glossary.html.