FDIC Proposed Corporate Governance Guidelines

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Issue Update

In October 2023, the FDIC issued proposed corporate governance and risk management guidelines that would generally apply to all insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations with total consolidated assets of $10 billion or more. The FDIC would reserve its authority and discretion to apply the standards to an institution below the $10 billion threshold if FDIC determines that the institution's operations are highly complex or present heightened safety and soundness risks. Similarly, the FDIC would reserve its authority and discretion to postpone or waive any covered institution's mandatory compliance.

The FDIC generally describes the Proposed Guidelines as a collective restatement of existing FDIC and joint agency guidance that will better align its existing heightened corporate governance standards with those of the OCC and Federal Reserve Board. However, the Proposed Guidelines' wide range of new, highly prescriptive standards for directors, boards, and board committees would be enforceable under Section 39 of the Federal Deposit Insurance Act. The Proposed Guidelines would require that a covered institution's board be majority-independent, diverse across a range of personal attributes and experiences, and that its directors consider, "the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public." Notably, in describing several new standards, the Proposed Guidelines adopt the word "ensure" and similarly narrow verbs – such as when proposing to require that a board "ensure that management corrects deficiencies that auditors or examiners identify in a timely manner."

Why It Matters

The Proposed Guidelines would represent a sea change in prudently managed, already closely supervised institutions' corporate governance and risk management practices. The proposal would create significant regulatory uncertainty and undermine – not strengthen – the safety and soundness of covered institutions and, in turn, the broader banking industry and the Deposit Insurance Fund.

As a primary matter, the FDIC has failed to clearly articulate why additional heightened corporate governance standards are necessary. Although the FDIC claims that the proposed guidelines with help prevent large insured institution failures like those of Signature Bank and First Republic Bank, the FDIC's own reports on its supervision of those two institutions clearly show the FDIC was not hampered by a lack of sufficiently robust regulatory tools but by a largely unexplained failure to use them appropriately. Covered institutions and their boards are already subject to the FDIC's rigorous continuous examination process (CEP), through which FDIC specialists have uninterrupted access to subject institutions, as well as the FDIC's independent audit committee standards and well-established state fiduciary standards.

Furthermore, the Proposed Guidelines conflate the most basic divisions of responsibility among directors and management, mandate patently unachievable outcomes, and ignore important implications of state law, the unique challenges and considerations of rural, geographically remote, family-owned, and otherwise closely held institutions, and the realities of our nation's director population and pipeline. These concerns are greatly compounded by the fact that, under the Proposed Guidelines, directors would face dramatically increased personal liability – often for outcomes well

beyond their control. In response, ABA together with all 52 state banking associations filed this Comment Letter.

Recommended Action Items

Encourage the FDIC to fully withdraw the Proposed Guidelines. If the FDIC can better articulate why additional FDIC heightened corporate governance standards are reasonably necessary, banks should encourage the FDIC to develop such standards as principles-based guidance aligned with established principles of prudent corporate governance and the OCC's and Federal Reserve Board's heightened standards, tailored to apply only to institutions that may truly present heightened safety and soundness concerns, and designed to be applied consistently across covered institutions. Banks should also encourage the FDIC to clarify that it does not intend for such guidance to conflict with or supersede applicable state law.