

January 29, 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

Via electronic submission: comments@FDIC.gov

Re: Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of \$10 Billion or More

Dear Mr. Sheesley:

I write on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of US public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$5 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants. Our associate members include non-US asset owners with about \$5 trillion in assets, and a range of asset managers with more than \$55 trillion in assets under management.¹

As a leading advocate for good corporate governance, CII is supportive of the FDIC's efforts to promote corporate governance best practices across financial institutions. We also believe that the FDIC should ensure that the final guidelines do not suggest that boards of directors should directly perform management functions.² CII offers the following comments on particular elements of corporate governance, some of which may further enhance the language in the proposed guidelines and others which respond to the FDIC's request for more suggestions for corporate governance. The following views are derived from our member-approved corporate governance policies,³ which have been developed over many years by our U.S. Asset Owner Members.

¹ For more information about the Council of Institutional Investors (CII), including its board and members, please visit CII's website at <http://www.cii.org>.

² See, for example, Sullivan & Cromwell. 2023. FDIC Proposes Corporate Governance and Risk Management Guidelines, p. 2. <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/FDIC-Proposes-Corporate-Governance-Risk-Management-Guidelines.pdf>

³ CII. 2023. [Policies on Corporate Governance](#).

Board of Directors

Independence – At least two-thirds of board members and all members of the board’s audit, compensation and nominating should be independent.^{4,5} CII policy defines an independent director as someone whose only nontrivial professional, familial or financial connection to the corporation, its chairman, CEO or any other executive officer is his or her directorship.⁶ The independent directors should also hold regularly scheduled executive sessions without any of the management team or its staff present. (CII Policy 2.3)

Leadership – The board should be chaired by an independent director; the CEO and chair roles should only be combined in very limited circumstances. Where the board has determined that a combined CEO/chair role is in the best interest of the corporation, it should name a lead independent director who should have approval over information flow to the board, meeting agendas and meeting schedules to ensure a structure that provides an appropriate balance between the powers of the CEO and those of the independent directors.^{7,8} (CII Policy 2.4)

Size – Absent compelling, unusual circumstances, a board should have no fewer than five and no more than 15 members. This is to ensure that a board is not too small to maintain the needed expertise and independence, and not too large to function efficiently. (CII Policy 2.11)

Attendance – Directors are expected to attend all meetings of the board and any committees they are a member of, and the board should have a clearly defined attendance policy. (CII Policy 2.8d)

Succession planning – The proposed guidelines touch on board succession planning for the CEO and other key personnel. Given the importance of board members and the CEO to corporate governance, the FDIC should consider clarifying that the board should have short- and long-term succession plans for both board members as well as the CEO and key personnel. (CII Policies 2.8a, 2.9)

⁴ CII’s Corporate Governance Policies explain there are several reasons that independence is so important, including that: Independence is critical to a properly functioning board; certain clearly definable relationships pose a threat to a director’s unqualified independence; the effect of a conflict of interest on an individual director is likely to be almost impossible to detect, either by shareowners or other board members; and while an across-the-board application of any definition to a large number of people will inevitably miscategorize a few of them, this risk is sufficiently small and is far outweighed by the significant benefits.

⁵ Almaquoshi & Powell. 2020. Audit Committee Indices, Firm Value, and Accounting Outcomes. *Journal of Business Finance & Accounting*, Vol. 48, Iss. 1-2, pp. 185-229. <https://doi.org/10.1111/jbfa.12478>

⁶ CII [policy](#) provides further information about how to assess director independence that may be helpful in the FDIC’s rulemaking.

⁷ Lamoreaux, Lubomir, & Mauler. 2019. Lead Independent Directors: Good governance or window dressing?, *Journal of Accounting Literature*, Vol. 43, pp. 47-69. <https://doi.org/10.1016/j.acclit.2019.06.001>

⁸ Rajkovic. 2020. Lead independent directors and investment efficiency, *Journal of Corporate Finance*, Vol. 64, 101690. <https://doi.org/10.1016/j.jcorpfin.2020.101690>

Diversity – Boards should be diverse, including such considerations as background, experience, age, race, gender, ethnicity, and culture.^{9,10} (CII Policy 2.8b)

“Over-boarding” – Directors must be able to devote sufficient attention to their duties.¹¹ Directors who are employed full-time by a for-profit corporation should serve on no more than two total for-profit boards. All other directors should serve on no more than four total for-profit boards. (CII Policy 2.11)

Informed Directors – Directors should receive training from independent sources on their fiduciary responsibilities and liabilities. Directors have an affirmative obligation to become and remain independently familiar with company operations; they should not rely exclusively on information provided to them by the CEO to do their jobs. The board should periodically assess whether directors feel they have sufficient information to make well-informed decisions and reasonable access to management on matters relevant to shareowner value. (CII Policy 2.12a)

Management

Compensation – Executive pay should be cost-effective and equitable. It is the job of the board of directors and the compensation committee specifically to ensure that executive compensation programs are effective, reasonable and rational with respect to critical factors such as company performance, industry considerations, risk considerations and compensation paid to other employees. (CII Policy 5.1)

Clawback policies should ensure that boards can refuse to pay and/or recover previously paid executive incentive compensation in the event of acts or omissions resulting in fraud, financial restatement or some other cause the board believes warrants recovery, which may include personal misconduct or ethical lapses that cause, or could cause, material reputational harm to the company and its shareholders.¹² (CII Policy 5.7) A board clawback policy would be in addition to the FDIC’s clawback authority under section 210(s) of the Dodd–Frank Wall Street Reform and Consumer Protection Act. CII was a strong advocate for the adoption of the clawback requirement in Section 954 of the Act, which requires a clawback policy as a condition of being listed on the national securities exchanges.

Chief Risk Officer (CRO) – CII does not have a policy on whether the Chief Risk Officer (CRO) should report to the CEO, the board or a committee of the board, or both. However, the proposed definitions appear to *require* that the CRO report to the CEO for administrative matters. The FDIC may wish to clarify if its intention is to require that every CRO report to the CEO, or if its

⁹ Bernile, Bhagwat, & Yonker. 2018. Board diversity, firm risk, and corporate policies. *Journal of Financial Economics*, Volume 127, Iss. 3, pp. 588-612. <https://doi.org/10.1016/j.jfineco.2017.12.009>

¹⁰ Conyon & He. 2017. Firm performance and boardroom gender diversity: A quantile regression approach. *Journal of Business Research*, Volume 79, pp 198-211. <https://doi.org/10.1016/j.jbusres.2017.02.006>

¹¹ Hauser. 2018. Busy directors and firm performance: Evidence from mergers. *Journal of Financial Economics*, Volume 128, Iss. 1, pp. 16-37. <https://doi.org/10.1016/j.jfineco.2018.01.009>

¹² Chan, Chen, et al. 2012. The effects of firm-initiated clawback provisions on earnings quality and auditor behavior. *Journal of Accounting and Economics*, Vol. 54, Iss. 2-3, pp. 180-196. <https://doi.org/10.1016/j.jacceco.2012.05.001>

intention is rather to provide that *if* the CRO reports to the CEO, then the scope of that reporting is limited solely to administrative matters.

Scope of Guidelines

The proposed rule solicits input on the scope of FDIC-supervised institutions subject to the guidelines. Publicly traded companies, private companies and companies in the process of going public should practice good governance. The FDIC should consider how to promote good governance practices at all of the companies it supervises, including institutions with assets of less than \$10 billion.

Other Corporate Governance Suggestions

The FDIC solicited input on other corporate governance ideas. The FDIC may wish to refer to CII's full list of [Policies on Corporate Governance](#), which are incorporated by reference into this comment letter.

The proposed guidelines also provide that the term “corporate” and “corporation” as used in the guidelines includes alternative forms of business enterprises, such as limited liability companies (LLCs). However, some business associations other than a corporation, such as an LLC, are generally not governed by a board of directors *per se*.¹³ The FDIC may wish to consider how to ensure adequate corporate governance while allowing these business associations to comply with applicable state law.

Estimate of Costs and Benefits

The FDIC also solicited input on whether the proposed guidelines have any costs or benefits that the FDIC has not identified. According to the FDIC's policies, estimates of costs and benefits should include the total impact on society, not just the costs and benefits for covered financial institutions.¹⁴ A benefit the FDIC may not have considered is that the adoption of effective corporate governance strategies is associated with increased long-term shareholder value.^{15,16}

¹³ See, for example, Shade. 2010. Business Associations in a Nutshell, West Academic. p. 110.

¹⁴FDIC. 2013. [Statement of Policy on the Development and Review of Regulations and Policies](#).

¹⁵CII. 2022. [Empirical Research on ESG Factors and Engaged Ownership: A Bibliography](#).

¹⁶ Laeven & Chhaochharia. 2008. Corporate Governance, Norms and Practices. Available at SSRN: <https://ssrn.com/abstract=1103608> or <http://dx.doi.org/10.2139/ssrn.1103608>

We appreciate the opportunity to share our views with you. If you should have any additional questions, please feel free to contact me at 202.261.7098 or james@cii.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Crowe". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

James Crowe, DSW
Research Manager
Council of Institutional Investors