October 30, 2024

Chief Counsel's Office
Office of the Comptroller of the Currency
Attention: Comment Processing
Docket ID OCC-2023-0016
400 7th Street SW, Suite 3E-218
Washington, DC 20219

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
Docket No. OP-1828
20th Street and Constitution Avenue NW
Washington, DC 20551

James P. Sheesley
Assistant Executive Secretary
Attention: Comments/Legal OES
RIN: 3064-ZA39 (EGRPRA)
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996; Docket ID OCC-2023-0016; Docket No. OP-1828; RIN 3064-ZA39; Document No. 2024-16729; 89 FR 62679 (Aug. 1, 2024)

Dear Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on the joint notice of regulatory review ("Regulatory Review") of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve ("Fed"), and the Federal Deposit Insurance Corporation ("FDIC") (collectively, "the Agencies").[2]

The Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA") requires the Federal Financial Institutions Examination Council ("the Council") and the Agencies to conduct a review of all regulations prescribed by the Council. The Agencies categorize the regulations at least every 10 years, provide public notice, and solicit public comment. The public

[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] Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996; RIN: 1557-0312; Docket ID OCC-2023-0016; Docket No. OP-1828; RIN 3064-ZA39; Document No. 2024-16729; 89 Fed. Reg. 62679 (Aug. 1, 2024), https://www.federalregister.gov/documents/2024/08/01/2024-16729/regulatory-publication-and-review-under-the-economic-growth-and-regulatory-paperwork-reduction-act.

is asked to identify areas of the regulations that are outdated, unnecessary, or unduly burdensome. In this Regulatory Review, the Agencies seek comment on regulations in three categories:

- Consumer Protection;
- Directors, Officers, and Employees; and
- Money Laundering.

Better Markets offers the following recommendations on these topics:

- First, within the category of Consumer Protection, we strongly support efforts by the FDIC to expand deposit insurance coverage to include certain small business transaction accounts.[3] This coverage would add meaningful stability in the event of financial stress and protect Main Street Americans and businesses while at the same time not adding unreasonable costs or exacerbating the moral hazard problem.

- Second, also within the category of Consumer Protection, the regulations related to the advertisement of FDIC insurance coverage should be changed to increase the accountability for misleading statements and advertisements by both banks and fintech companies that partner with banks. The implicit free pass for first-time offenders should also be removed.[4]

- Third, within the category of Directors, Officers, and Employees, the Agencies should strengthen enforceable rules and guidelines that hold boards of directors accountable for the safe and sound operations of banks and fulfilling their fiduciary duties.[5] This is particularly necessary for banks that are large and systemically important, as these can disrupt financial stability, harm Main Street Americans, and cost taxpayers billions of dollars in the event of bank failures.

In summary, financial regulations are vital to protect Main Street Americans and financial stability. We welcome this opportunity to contribute to the review of these regulations and encourage the Agencies to implement changes as soon as practicable.

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[3] *See, e.g.*, Better Markets Comment Letter, *Request for Information on Deposits* (Oct. 7, 2024), https://bettermarkets.org/wp-content/uploads/2024/10/Better-Markets-Comment-Letter-FDIC-RFI-Deposits.pdf.

[4] *See, e.g.*, Better Markets Comment Letter, *Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses* (Oct. 30, 2024), https://bettermarkets.org/wp-content/uploads/2024/10/Better-Markets-Comment-Letter-RFI-Bank-Fintech-Arrangements.pdf.

[5] *See, e.g.*, Better Markets Comment Letter, *Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More* (Feb. 9, 2024), https://bettermarkets.org/wp-content/uploads/2024/02/Better-Markets-Comment-Letter-FDIC-Corporate-Governance-Risk-Management.pdf.

BACKGROUND

This EGRPRA review is the third in a series of similar reviews conducted by the Agencies; the two prior reviews were completed in 2007 and 2017.[6] While useful changes were made as a result of these prior reviews, additional opportunities for improvement in banking regulation remain.

Recent decades have been characterized by intense regulatory activity, which has affected all banks. While these rules are intended to protect society and the financial system from harm, they require time, resources, understanding, and action by banks. This burden often weighs heavier on community banks, as they have less staff to dedicate to compliance activities.

Throughout the country, particularly in rural areas, community banks are the lifeblood of Main Street, providing essential financial services and support to individuals, businesses, and community organizations. For example, the data show that more than half—65 percent—of the more than 1,200 rural counties across the country were served by at least one community bank in 2023.[7] In many counties, these community banks provide the only bank access because there are no large bank branches. Furthermore, while ***large banks have been shutting down branches*** and thus curtailing banking access, community banks ***opened 82 new offices*** in metropolitan and rural areas.[8] Of course, it is essential that banks operate safely, but it is also important to make sure that regulation is appropriate to the size and systemic importance of banks.

FDIC research notes that between 2008 and 2019, there were 157 final rules and programs that applied to community banks, which equates to an average of 1 per 28 days.[9] The FDIC appropriately states:

> So numerous were the new regulations that keeping current with them would have challenged any bank, but ***especially a small bank with limited compliance resources***. Some of these regulatory actions created new obligations for banks, but many of them benefited banks. . . . A common feature of these rules, however, is that the affected banks needed to understand them. Putting aside any consideration of the substantive effects of these rule changes, their large number and scope make clear that ***merely being knowledgeable about changes in bank regulation can be, by itself, an important and potentially daunting task for any bank***.[10]

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[6] *See, e.g.*, ECONOMIC GROWTH AND REGULATORY PAPERWORK REDUCTION ACT, HISTORY, https://egrpra.ffiec.gov/index.html (last visited Oct. 24, 2024).

[7] Michael Hoffman, Camille Keith, Joycelyn Lu, & LaShawn Reed-Butler, *2023 Summary of Deposits Highlights*, 18 FDIC QUARTERLY, at 70 (2024), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2024-vol18-1/fdic-v18n1-4q2023.pdf.

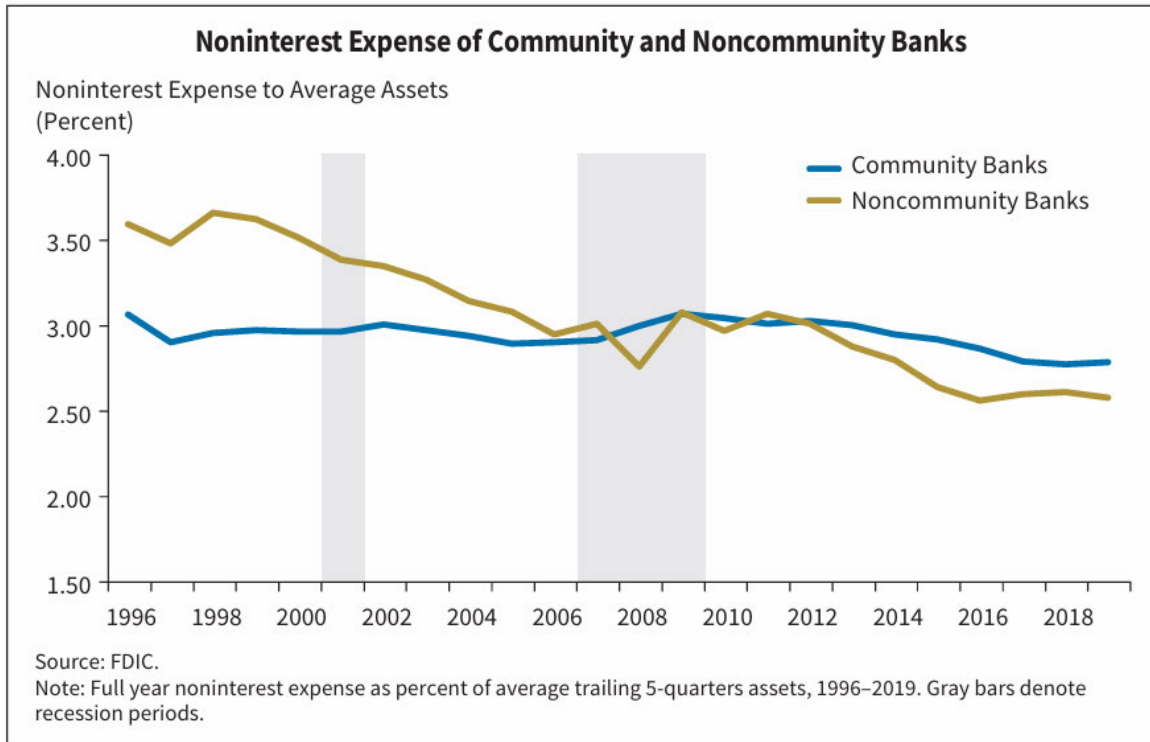
[8] *Id*.

[9] FEDERAL DEPOSIT INSURANCE CORPORATION, FDIC COMMUNITY BANKING STUDY, at 5-2 (Dec. 2020), https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf.

[10] *Id*. at 5-1 (emphasis added).

The cost of understanding and complying with regulations is typically a part of banks' noninterest expense. FDIC research shows that community banks' noninterest expense relative to average assets has been higher than noninterest expense at noncommunity banks since 2008 (see Chart 1).[11]

Chart 1



More specifically, ***noninterest expense relative to average assets is highest for the smallest community banks*** and has resulted in consistently lower profitability at these institutions (see the dark blue lines in Chart 2 and Chart 3).[12]

[11] *Id*. at 5-3.

[12] *Id*. at 5-4.

Chart 2

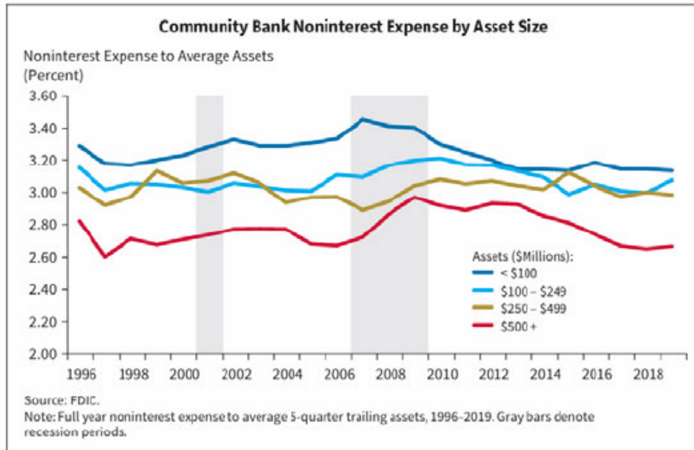
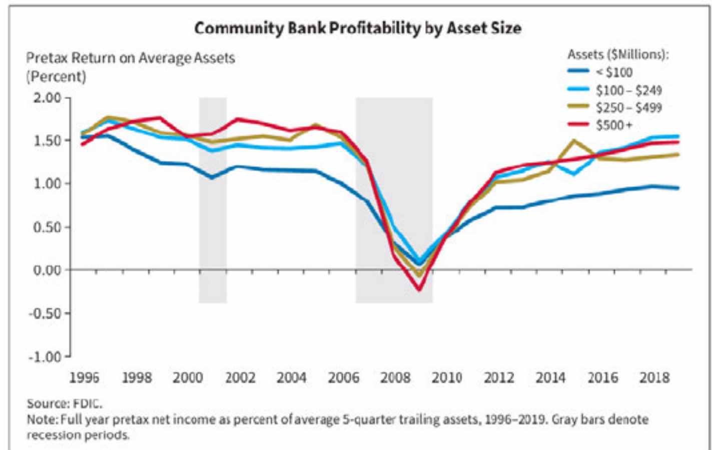


Chart 3



SUMMARY OF THE REGULATORY REVIEW

Pursuant to EGRPRA, this Regulatory Review is assessing three categories of regulations to identify outdated or unnecessary components as well as other necessary changes, including:

- Consumer Protection;
- Directors, Officers, and Employees; and
- Money Laundering.[13]

The focus of the EGRPRA review process is on smaller banks, specifically how to reduce the regulatory "burden" on these institutions. Importantly, this must be considered in relation to consumer protections, bank safety and soundness, and stability of the entire financial system.

SUMMARY OF COMMENTS

As stated earlier in this letter, Better Markets welcomes the opportunity to participate in the Regulatory Review by offering several comments on ways in which regulations should be changed to meet the goals of reducing the burden on small banks while maintaining bank safety and soundness as well as financial stability.

Our recommendations are as follows:

[13] Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, *supra* note 2 at 62679.

- Expand deposit insurance coverage to include small business transactional accounts. This coverage would add meaningful stability in the event of financial stress and protect Main Street Americans and businesses while at the same time not adding unreasonable costs or unduly exacerbating the moral hazard problem.

- Increase enforcement for misrepresentation of deposit insurance. Part 328 regulations related to FDIC insurance coverage should be changed to strengthen the negative consequences and increase the accountability for misleading statements and advertisements by both banks and fintech companies that partner with banks. The implicit free pass for first-time offenders should also be removed.

- Strengthen enforceable rules and guidelines that hold boards of directors accountable for the safe and sound operations of banks and fulfilling their fiduciary duties. This is particularly necessary for banks that are large and systemically important, as these can disrupt financial stability, harm Main Street Americans, and cost taxpayers billions of dollars in government bailouts in the event of large bank failures.

COMMENTS

I. EXPAND DEPOSIT INSURANCE COVERAGE TO INCLUDE SMALL BUSINESS TRANSACTIONAL ACCOUNTS.

In the aftermath of the 2008 financial crisis, and following the 2023 regional banking crisis, concerns about transactional accounts that support entities such as small businesses and local municipalities grew. These transaction accounts benefit Main Street Americans and businesses—providing functionality such as facilitating regular salary payments for small businesses' employees. However, these transaction accounts may regularly exceed the deposit insurance limit and therefore be partially uninsured and possibly unprotected from bank failure. Therefore, the FDIC should work to expand deposit insurance coverage to include certain small business transaction accounts.[14]

Concentration levels of uninsured deposits generally increase with bank size. In its rulemaking related to the special assessment that was required to replenish the Deposit Insurance Fund ("DIF") after the Silicon Valley Bank ("SVB") and Signature Bank ("Signature") failures,[15] the FDIC showed that larger banks have far higher concentrations of uninsured deposits (more than half of total deposits) compared to smaller banks with uninsured deposits only accounting for about one-third of total deposits (see Table 1).[16]

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[14] *See, e.g.*, Better Markets Comment Letter, *supra* note 3.

[15] Special Assessments Pursuant to Systemic Risk Determination, RIN 3064–AF93, 88 Fed. Reg. 32694 (May 22, 2023), https://www.federalregister.gov/documents/2023/05/22/2023-10447/special-assessments-pursuant-to-systemic-risk-determination.

[16] *Id*. at 32697-98.

Table 1

Uninsured Deposits as a Percentage of Total Domestic Deposits, by Banking Organization Asset Size	
Asset Size of Banking Organization	**Ratio of Uninsured Deposits to Total Domestic Deposits (%)**
$1 to $5 Billion	33.2
$5 to $10 Billion	35.0
$10 to $50 Billion	39.9
$50 to $250 Billion	44.2
Greater than $250 Billion	51.8

Recently, however, uninsured depositors have been less likely to lose money when a bank fails. For example, one study[17] shows that only 6.6% of bank failures between 2008 and 2011 resulted in losses to uninsured depositors, and even fewer—5.7% of the bank failures between 2012 and 2022 resulted in uninsured depositor losses. This is in sharp contrast to the nearly two-thirds—62.5%—of bank failures between 1992 and 2007 that included uninsured depositor losses.[18] Furthermore, systemic risk exceptions have been granted, most recently for SVB and Signature in 2023,[19] which protected uninsured depositors at large banks that fail. This is in sharp contrast to the most recent small bank failure—The First National Bank of Lindsay in Lindsay, OK.[20] Uninsured depositors were not protected in this resolution.[21] The FDIC did make 50% of the uninsured funds available to depositors, but this will still result in substantial losses for some bank customers.[22] This can have the effect of more uninsured deposits moving into systemically important banks, which are most likely to receive taxpayer-funded government support.

With the current system of deposit insurance, community banks are at a clear disadvantage. Given the recent track record of coverage for uninsured depositors at large and systemically important banks that fail but no coverage for uninsured depositors at smaller banks, it would stand to reason that holders of small business transactional accounts could decide to pull funds from smaller banks and move them to larger banks that are perceived to be too big to fail. This increases

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17 Michael Ohlrogge, *Why Have Uninsured Depositors Become De Facto Insured?*, 100 NYU L. REV. (forthcoming), https://dx.doi.org/10.2139/ssrn.4624095.

18 *Id.*

19 Press Release, Board of Governors of the Federal Reserve System, *Joint Statement by Treasury, Federal Reserve, and FDIC* (Mar. 12, 2023), https://www.federalreserve.gov/newsevents/pressreleases/monetary20230312b.htm.

20 Press Release, Federal Deposit Insurance Corporation, *First Bank & Trust Co., Duncan, OK, Acquires Insured Deposits of The First National Bank of Lindsay, Lindsay, OK* (Oct. 18, 2024), https://www.fdic.gov/news/press-releases/2024/first-bank-trust-co-duncan-ok-acquires-insured-deposits-first-national.

21 *Id.*

22 *Id.*

liquidity risk for community banks, often at times when the banking system is already under stress.

In 2008, the Transaction Account Guarantee ("TAG") program was developed and could be used as a road map for the expansion of deposit insurance coverage. As the FDIC explains in its 2023 report on deposit insurance options, a targeted increase in insurance coverage would support businesses' operational needs and increase financial stability without substantially and materially increasing moral hazard or costs of deposit insurance for banks.[23] We therefore support continued exploration of the viability of such an expansion of deposit insurance coverage.

II. INCREASE ENFORCEMENT FOR MISREPRESENTATION OF DEPOSIT INSURANCE.

Like many other companies, banks employ services provided by a variety of outside professionals and businesses and have done so for many years. Responsible use by banks of outside services can benefit the public by reducing the costs of banking services and providing small banks a way to offer products that they might not otherwise be able to offer. As described by the Agencies and other observers of the banking industry, however, a growing number of banks are essentially delegating important parts of their lending, deposit taking, or payment activities to third-party fintech firms.[24]

Increasing reliance by banks on fintech firms to provide banking services is a serious matter of concern for several reasons. Broadly speaking, and most fundamentally, the U.S. framework of banking laws and regulations is predicated on the societal importance of a safe and sound banking system that supports economic growth, complies with consumer protection laws, and safeguards the financial system from being used for illicit purposes. Fintech partners of banks are outside the perimeter of day-to-day bank regulation and may treat their legal obligations less seriously, undermining bank regulation and compromising its effectiveness in achieving these societal goals. Fintech companies are also typically less stable financially than banks, and the bankruptcy of a fintech company can adversely affect partner banks as well as a host of retail customers who may have been deceived into believing their funds were as safe as they would be in an insured bank.

The Agencies' recent enforcement actions related to third-party risk, the FDIC's series of advisory letters to nonbank entities regarding misleading deposit insurance representations, and the April 22, 2024, bankruptcy of Synapse Financial Technologies, Inc. and subsequent events,[25]

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[23] FEDERAL DEPOSIT INSURANCE CORPORATION, OPTIONS FOR DEPOSIT INSURANCE REFORM 16-19 (May 1, 2023), https://www.fdic.gov/analysis/options-deposit-insurance-reforms/report/options-deposit-insurance-reform-full.pdf.

[24] *See, e.g.*, Better Markets Comment Letter, *supra* note 4.

[25] *See* Jelena McWilliams, *In re SYNAPSE FINANCIAL TECHNOLOGIES, INC., CHAPTER 11 TRUSTEE'S THIRD STATUS REPORT* (June 21, 2024) https://www.cravath.com/a/web/TuPGwDdX7zyWeATdGJCkc/9cXbw9/9890-287-06_20_2024-pacer287-main-document-012731-00001-central-district-of-california.pdf.

demonstrate that safety-and-soundness concerns, violations of law, and customer harm associated with these arrangements are real, and in some cases severe.

Better Markets identified 22 advisory letters that the FDIC sent to fintech firms and related entities in 2022, 2023, and through October 2024, demanding that these entities cease and desist making false and misleading claims about deposit insurance coverage.[26] Each advisory letter contains examples of what the FDIC believed were the fintech firm's false or misleading claims. Details differ across the letters, but frequently recurring themes include language implying or flatly stating—falsely—that the fintech firm itself is FDIC insured, that the fintech firm customer's funds are protected by the FDIC in the event the fintech firm fails, or that crypto assets or stocks are protected by FDIC insurance. One entity went so far as to register the Internet domain name "FDICCrypto.com," where users were redirected to a crypto trading platform.

As Better Markets detailed in its recent response to the FDIC's Request for Information on Bank-Fintech Arrangements,[27] the FDIC should issue an interim final rule to amend parts 328.102 and 328.106 of its regulations to remove what amounts to an implicit free pass for first offenders.

Part 328.102 of the FDIC's regulations, which prohibits false or misleading statements about deposit insurance, sets out a three-part test to define when the FDIC will deem a misrepresentation about deposit insurance to have been made knowingly. Paraphrasing, the three-part test is that the person (i) has made false or misleading representations; (ii) has been advised by the FDIC in an advisory letter (discussed below) that such representations are false or misleading; and (iii) thereafter, continues to make these, or substantially similar, representations.[28]

Part 328.106 of the FDIC's regulations, which addresses informal resolution, states that if the FDIC becomes aware that a person may be making false or misleading representations regarding deposit insurance, the FDIC may issue an advisory letter. It goes on to state, among other things:

> Where a recipient of an advisory letter described in paragraph (a) of this section provides the FDIC with the requested written commitments within the timeframe specified in the letter, and where any required remediation has been verified by FDIC staff, the FDIC will generally take no further administrative enforcement against such a party under § 328.107.[29]

Taken together, these two provisions seem to all but guarantee that there will be a free pass for first offenders regarding deposit insurance misrepresentations. The message in part 328.106 is that if the FDIC catches a person making false or misleading deposit insurance claims, it will issue an advisory letter asking that person to stop. If the misconduct stops, there will be no formal

[26] Better Markets Comment Letter, *supra* note 4 at 7-9.

[27] *Id*. at 19-20.

[28] 12 C.F.R 328.102(b)(6).

[29] 12 C.F.R 328.106(c).

penalty, even if the bank has already benefited from the misleading statements. The message in part 328.102 is that the FDIC will not find a misrepresentation to have been made knowingly unless the person has first received an advisory letter and then continued to make the same or similar misrepresentations. A literal reading could even suggest that after receiving an advisory letter, a person could try making substantially different misrepresentations, and the informal process would merely start over with a new advisory letter.

These two provisions appear to suggest an FDIC predisposition to not use formal action to address deposit insurance misrepresentations, except perhaps as a last resort. Yet the result is that the regulations all but provide an open invitation for entities to attract retail funds by making deceptive assurances about bank partnership arrangements, knowing that there will be no penalty if they are caught. This is a highly inappropriate set of incentives that puts consumers at risk of severe financial harm.

Better Markets urges the FDIC to revise these parts of its regulations to convey explicitly that there will be no formal penalty for misrepresentations about deposit insurance ***only*** if the FDIC has a strong basis for believing the misrepresentations were both inadvertent and unlikely to cause harm, and that the sending of an advisory letter is ***not*** a precondition for formal action or further factual determinations by the FDIC. Moreover, the consumer harm arising from events such as the Synapse bankruptcy suggests sufficient urgency to warrant the use of an Interim Final Rule to make these amendments.

III. STRENGTHEN ENFORCEABLE RULES AND GUIDELINES THAT HOLD BOARDS OF DIRECTORS ACCOUNTABLE FOR THE SAFE AND SOUND OPERATIONS OF BANKS AND FULFILLING THEIR FIDUCIARY DUTIES.

In October 2023, the FDIC introduced a proposal[30] that would raise the standards and expectations for formal board and management structures ("corporate governance") at the largest banks that the FDIC supervises to align with these banks' size and complexity. Better Markets supported[31] the proposal and urged the FDIC to implement the changes as soon as practicable, but unfortunately, the Proposal is still pending.

Numerous studies in the wake of both the 2008 financial crisis and the 2023 regional bank failures have linked inadequate corporate governance to bank crises, contagion, crashes, and failures. 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, but they can also harm and impose significant costs on the American public, taxpayers, the financial system, and the economy as a whole. While the FDIC's proposal would only apply to fewer than 60 banks—

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[30] 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.

[31] *See, e.g.*, Better Markets Comment Letter, *supra* note 5.

state nonmember banks with total consolidated assets of $10 billion or more—it would benefit ***all banks***, including small banks, because the entire banking system would be safer and more stable.

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 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.***[32]

Similarly, the Organization for Economic Co-operation and Development ("OECD") found that the 2008 financial 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.[33]

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 stated:

> ***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

[32] GROUP OF THIRTY, TOWARD EFFECTIVE GOVERNANCE OF FINANCIAL INSTITUTIONS 5 (2012), https://group30.org/publications/detail/155 (emphasis added).

[33] Grant Kirkpatrick, *The Corporate Governance Lessons from the Financial Crisis*, OECD JOURNAL: FIN. MKT. TRENDS 62 (2009), https://www.oecd-ilibrary.org/finance-and-investment/the-corporate-governance-lessons-from-the-financial-crisis_fmt-v2009-art3-en (emphasis added).

or—less often—incompetence and genuine ignorance. Both are unacceptable and require consequential penalties and real accountability by the Banking Agencies.

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.[34]

Evaluations of the 2023 bank failures by the Fed and FDIC clearly tie the failures to inadequate corporate governance. For example, the Fed's report on 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.[35]

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***

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[34] 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.

[35] 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).

> ***where it could not effectively manage its liquidity in a time of stress, making it unable to meet very large withdrawal requests.***[36]

We continue to recommend that the FDIC guidelines to strengthen corporate governance expectations be finalized. These changes are necessary and long overdue. Furthermore, the Fed[37] and the OCC[38] should amend their ***guidance*** related to corporate governance because guidance is not enforceable.[39] We believe that the lack of enforceability in the Fed's and OCC's guidance on Boards of Directors is a critical weakness.

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[36] 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).

[37] 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.

[38] 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.

[39] 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. Better Markets Comment Letter, *Role of Supervisory Guidance, Notice of Proposed Rulemaking* (Jan. 4, 2021), https://tinyurl.com/253te2gf; *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.

CONCLUSION

We hope these comments are helpful for this Regulatory Review.

Sincerely,

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