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Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitute Avenue NW
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Re: Proposed Guidance on Supervisory Expectation for Boards of Directors

Ladies and Gentlemen:

Ally Financial Inc. and Ally Bank (collectively, "Ally") appreciate the opportunity to comment on the proposal (the "Proposal") of the Board of Governors of the Federal Reserve System (the "FRB") to address supervisory expectations for boards of directors of banking organizations. Ally shares the FRB's commitment to promote effective governance that contributes to the safety and soundness of banking organizations.

We commend the FRB for proposing principles-based guidance that better distinguishes between the supervisory expectations for boards and senior management, that enables boards to focus on their core responsibilities, and that allows boards to more effectively manage information flow with management.

The FRB's use of a principles-based approach recognizes that effective governance can and should vary based on the composition, experience, and expertise of the board and the activities, complexity, and risk profile of the banking organization. Accordingly, consistent with existing corporate law, we believe that the business judgment of the board in exercising its core responsibilities should be accorded an appropriate degree of deference by the FRB unless the directors are not qualified to fulfill their fiduciary duties to the banking organization, are impaired by conflicts of interest, or act in bad faith or with gross negligence. If the board's judgments instead could be readily second-guessed during supervisory examinations—whether because of perceived best practices at other banking organizations, a difference in opinion after the fact on how a core responsibility should have been exercised, or otherwise—the very purpose of the Proposal would be thwarted.

We therefore respectfully request that the FRB consider incorporating the following specific changes and clarifications into the final guidance.



I. Consideration of Business Judgment in the Key Attributes

Ally supports the FRB's realignment of supervisory expectations to the board's core responsibilities through a principles-based approach. We also generally agree with the five key attributes of an effective board that have been proposed by the FRB.

We believe, however, that the FRB should expressly recognize that the board's business judgment plays a critical role in exercising its core responsibilities and exhibiting the five key attributes.

Indirect evidence of that recognition exists in the Proposal—for example, in the statement that corporate and securities laws were considered in its development (including applicable Delaware law, rules and regulations of the U.S. Securities and Exchange Commission, and listing standards of the New York Stock Exchange and the NASDAQ Stock Market) and in the requirements and expectations that were drawn specifically from those laws.\(^1\) The centrality of the board's business judgment is also implied in the FRB's view that "applying standardized expectations for boards of directors fails to take into account differences in firms' activities, risk profiles, and complexity, and potentially prevents a board from achieving maximum effectiveness in meeting its core responsibilities.\(^2\)

Yet, without an express statement of recognition, examiners may infer—out of an abundance of caution—that no deference at all is appropriate even for the most qualified of boards and even when no conflict, bad faith, or gross negligence exists. This, in turn, could lead to perceived best practices, mere differences in opinion, and other subjective criteria being cited as a basis for second-guessing how the board exercises its core responsibilities and exhibits the five key attributes. If this were to occur, the concerns identified by the FRB during its review and discussions with independent directors would resurface, and the very purpose of the principles-based guidance would be undermined. Further, with governance and controls being one of only three components under the proposed large financial institution rating system, we are concerned that a banking organization could suffer meaningful consequences if subjective judgments during supervisory examinations could be substituted after the fact for the legitimate business judgments of the board.

Expressly recognizing an appropriate degree of deference to the board's business judgment would also ensure that the Proposal does not conflict with applicable corporate and securities laws.

Proposal, 82 Fed. Reg. 37,219, 37,224 (Aug. 9, 2017).

² *Id.* at 37,220.



The FRB stressed that nothing in the Proposal supersedes or replaces "any applicable legal, regulatory, or listing requirements to which firms may currently be subject in the United States" or "is believed to conflict with such requirements." But for this to hold true, directors must have the latitude bestowed by corporate law to exercise their judgment in directing and overseeing the business and affairs of the banking organization consistent with their fiduciary duties of care and loyalty. The purpose of the business-judgment rule under corporate law is not simply to insulate directors from liability but, importantly, to encourage them "to attempt to increase stockholder wealth by engaging in those risks that, in their business judgment, are in the best interests of the corporation." For banking organizations, of course, decisions about risk tolerance and strategic direction must be consistent with principles of safety and soundness and other banking laws, but as a matter of corporate law, these in the end must be decisions of the directors who have been duly elected by the banking organization's stockholders and not ones that are in effect substituted or otherwise dictated by the federal banking agencies in the course of supervisory examinations.

Therefore, we respectfully recommend that the FRB expressly state in the final guidance that, in exercising the core responsibilities and exhibiting the five key attributes, the business judgment of the board must be accorded an appropriate degree of deference unless the directors are not qualified to fulfill their fiduciary duties to the banking organization, are impaired by conflicts of interest, or act in bad faith or with gross negligence. Examples of where that deference is appropriate in each of the five key attributes include (1) how much detail is "sufficient" to create a "clear" strategy and risk tolerance, (2) what constitutes an "appropriate level of detail and context" for information from senior management and when, if ever, directors need to "seek information" about the banking organization and its activities outside of meetings, (3) what constitutes a "robust and active inquiry" and "clear financial and nonfinancial performance objectives" in connection with holding senior management accountable and when, if ever, "other members of senior management" require succession plans that must be approved by the board, (4) how a board "can identify" specific instances or decisions that were materially impacted by the independence and stature of risk management or internal audit, and (5) what is the requisite "diversity of skills, knowledge, experience, and perspectives" for the board.

³ *Id.* at 37,224.

See, e.g., Brehm v. Eisner (In re Walt Disney Co. Derivative Litigation), 906 A.2d 27, 52 (Del. 2006) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) overruled on other grounds) ("Our law presumes that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company.").

In re Goldman Sachs Group, Inc. Shareholder Litigation, 2011 WL 4826104 at *23 (Del. Ch. Oct. 12, 2011) (quoting In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 139 (Del. Ch. 2009)).



II. Other Aspects of the Key Attributes

In addition to appropriate deference to the board's business judgment, we respectfully propose the following clarifications to the key attributes:

- All. Clarify that a key attribute may be exhibited by a committee of the board rather than by the board as a whole, which—for example, in the case of approving performance objectives and compensation for the chief executive officer—may be required by applicable corporate and securities laws.
- Setting clear, aligned, and consistent direction. Clarify that not every risk-management, incentive-compensation, and performance-management policy, program, or plan may be "significant" and therefore in need of the board's approval—for example, a liquidity-risk-management policy of an individual business line or component of a business line.
- Actively manage information flow and board discussions. Clarify that (1) the "practices and processes in place to evaluate information flows" can be practices and processes of senior management that facilitate the board's receipt of timely, accurate, and sufficiently detailed information to make sound, well-informed decisions and (2) only a chair, a lead director, or another director, rather than all of them, need take an active role in setting meeting agendas.
- Support the independence and stature of independent risk management and internal audit. Clarify that a risk committee "can effect changes that align with the firm's strategy and risk tolerance" by reporting and making recommendations to the board rather than by usurping the board's role in providing overall direction and oversight for the business and affairs of the banking organization.

III. Permissive Sharing of Self-Assessments

We agree with the FRB that a board should be able to provide examiners with a self-assessment of its effectiveness but should not be obligated to do so. We respectfully request that the FRB clarify, moreover, that a banking organization would not be disadvantaged if its board were to keep all or part of any self-assessment confidential. A board, for example, may conclude that confidentiality will facilitate enhanced candor, transparency, and dialogue among the directors and, in such a case, should be able to reap those benefits without risking supervisory disfavor.



IV. Communication of Supervisory Findings

We support the FRB's proposal to have senior management address Matters Requiring Immediate Attention ("MRIAs") and Matters Requiring Attention ("MRAs"). As the FRB noted in the Proposal, senior management is ably positioned to take corrective action since they are responsible for the banking organization's day-to-day operations. Therefore, we agree that MRIAs and MRAs should be directed to senior management unless the MRIAs or MRAs relate to significant weaknesses in the board's governance structure and practices or unless senior management fails to take or ensure appropriate action is taken to correct material deficiencies or weaknesses.

Ally appreciates this opportunity to provide comments on the Proposal and is grateful for the FRB's consideration of our views. If you have any questions about our submission, we would be glad to address them.

Respectfully,

Scott A. Stengel General Counsel