



June 3, 2022

Federal Deposit Insurance Corporation  
Attn: James P. Sheesley, Assistant Executive Secretary  
Comments—RIN 3064–ZA32  
550 17<sup>th</sup> Street NW  
Washington, DC 20429

Submitted via <https://www.fdic.gov/resources/regulations/federal-register-publications/index.html> and Email to: [comments@fdic.gov](mailto:comments@fdic.gov)

Re: Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064–ZA32)

Dear Sir:

On behalf of the undersigned, we respectfully submit the following comments in response to the Federal Deposit Insurance Corporation (“FDIC”)’s Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (“Proposed Principles”).<sup>1</sup> Our comments here echo our comments in response to the Office of the Comptroller of the Currency (“OCC”)’s request for feedback regarding Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks (“OCC Proposed Principles”). We request that the FDIC not adopt the Proposed Principles on the following bases.

First, the FDIC’s Proposed Principles single out climate-related risk alone for special treatment, despite more serious threats that include economic downturns, foreign wars, and public health crises. We disagree that climate-related financial risk is the single gravest threat to the U.S. banking system and that it needs special treatment. Under the Proposed Principles, banks will be required to monitor and respond to climate-related risk even when immaterial, to undertake costly scenario analyses that are not required even for other material risks, and to labor under a series of requirements that have no role where other risks are concerned. This special concern for and attention to climate-related risks is irrational. There is no evidence that such risks stand above other dangers to the banking system or that banks need prompting to consider such risks. Climate risk does not need special treatment. With the Proposed Principles, the FDIC

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<sup>1</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), *Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions* (RIN 3064–ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>.

ignores a more realistic and holistic approach to risk management in favor of political and social concerns.

Second, the proposed special treatment of climate-related risk will come with great costs that the FDIC cannot ignore. Under the Proposed Principles, banks will incur needless additional operating costs which they will pass on to consumers. Businesses that produce essential goods like electricity and other energy will find it more difficult to obtain credit. Americans who work for these businesses will suffer lost jobs. States that produce energy will also be adversely affected as FDIC “principles” are used by lenders against energy producers. Critical consumer goods will become more expensive. Home loans in regions allegedly exposed to climate risk may become harder to obtain. Banks will be encouraged to exclude areas of the economy. The potential adverse effects of these Proposed Principles on states, businesses, and consumers cannot be overstated. The FDIC does not and cannot show that the Proposed Principles justify these immense costs or that they benefit more than a few activists and politicians.

Third, the Proposed Principles will force banks to monitor and account for speculative and immaterial risks. Banks will be required to spend more on professionals and compliance, trying to comply with these amorphous principles. Activists daily assert new, speculative harms from climate change. Under the Proposed Principles, banks may be forced to take each of these asserted harms seriously, constricting credit and other services to avoid entirely speculative risk.

Fourth, the Proposed Principles are not guidance at all. These will become (and are likely intended to be) de facto legislative rules and administrative regulations. The Proposed Principles expand far beyond the scope of current law, bind the FDIC staff, and given the extraordinary power the staff hold over regulated banks, it binds banks as well. The FDIC should instead engage in rulemaking and provide the full set of analyses and procedures that must accompany such proceedings.

Finally, the Proposed Principles also violate the FDIC’s own regulations, in which the agency committed just a year ago that it would not attempt to issue binding regulations through guidance. The FDIC’s casual disregard of its own regulations is one more reason the Proposed Principles, if finalized, would be arbitrary and capricious.

The FDIC should not adopt the Proposed Principles because they will not assist banks to assess and prepare for all material risks. Instead, the Proposed Principles will adversely affect states, businesses, and consumers and cause banks to incur more costs. The Proposed Principles may even weaken federally chartered banks and the national and state banking systems.

## **BACKGROUND**

On May 20, 2021, President Biden issued the Executive Order on Climate-Related Financial Risk (“Executive Order”).<sup>2</sup> The Executive Order alleges that physical and transition risks arising from climate change may affect financial institutions.<sup>3</sup> On October 15, 2021, the Administration released “A Roadmap to Build a Climate-Resilient Economy” (“Roadmap”).<sup>4</sup> The Roadmap is “a comprehensive, government-wide strategy to measure, disclose, manage, and mitigate the systemic risks climate change poses to American families, businesses, and the economy.”<sup>5</sup>

On December 16, 2021, the OCC issued OCC Bulletin 2021-62 entitled Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback.<sup>6</sup> The bulletin regards the OCC’s “draft principles designed to support the identification and management of climate-related financial risks by banks with more than \$100 billion in total consolidated assets.”<sup>7</sup> The bulletin links to a document entitled “Principles for Climate-Related Financial Risk Management for Large Bank (“OCC Proposed Principles”).”<sup>8</sup> The OCC Proposed Principals include the following general principles: (A) Governance; (B) Policies, Procedures, and Limits; (C) Strategic Planning; (D) Risk Management; (E) Data, Risk Measurement, and Reporting; and (F) Scenario Analysis.<sup>9</sup> The OCC Proposed Principles also included the following topics under Management of Risk Areas: (A) Credit Risk; (B) Liquidity Risk; (C) Other Financial Risk; (D) Operational Risk; (E) Legal/Compliance Risk; and (F) Other Nonfinancial Risk.<sup>10</sup> The State of Utah commented on the OCC Proposed Principals.

The FDIC’s Proposed Principals include the following general principles: (A) Governance; (B) Policies, Procedures, and Limits; (C) Strategic Planning; (D) Risk Management; (E) Data, Risk Measurement, and Reporting; and (F) Scenario Analysis.<sup>11</sup> The FDIC’s Proposed Principles also included the following topics under Management of Risk Areas: (A) Credit Risk; (B) Liquidity Risk; (C) Other Financial Risk; (D) Operational Risk; (E) Legal/Compliance Risk; and (F) Other Nonfinancial Risk.<sup>12</sup>

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<sup>2</sup> Executive Office of the President, *Climate-Related Financial Risk*, Executive Order 14030, 86 FR 27967 (May 20, 2021), <https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk>.

<sup>3</sup> *See id.*

<sup>4</sup> See FACT SHEET: Biden Administration Roadmap to Build an Economy Resilient to Climate Change Impacts | The White House (available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/15/fact-sheet-biden-administration-roadmap-to-build-an-economy-resilient-to-climate-change-impacts/>) (Oct. 14, 2021).

<sup>5</sup> *See id.*

<sup>6</sup> OCC Bulletin 2021-62 (December 16, 2021), *Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback* (Docket Number OCC-2021-0023), <https://www.occ.treas.gov/news-issuances/bulletins/2021/bulletin-2021-62.html>.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064-ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>.

<sup>12</sup> *See id.*

The FDIC starts the Introduction section of the Proposed Principles by stating that “The effects of climate change and the transition to a low carbon economy present emerging economic and financial risks that threaten the safety and soundness of financial institutions and the stability of the financial system. Financial institutions are likely to be affected by both the physical risks and transition risks associated with climate change (referred to in these draft principles as climate-related financial risks).”<sup>13</sup> The FDIC differentiates between climate-related physical risks (e.g., hurricanes, floods, wildfires) and transition risks (e.g., “stresses to certain banks or sectors”), both of which are referred to in the Proposed Principles “as climate-related financial risks.”<sup>14</sup>

The FDIC requested feedback on the Proposed Principles, including fourteen specific questions.<sup>15</sup>

## **DISCUSSION**

### **Proposed Principles Irrationally Single Out Climate-Related Risk for Special Treatment**

The Proposed Principles, if finalized, would irrationally single out climate-related risk for special treatment. Under existing law and regulations, banks are already obligated to achieve safety and soundness through monitoring and responding to risk from lending, operations, changes in law and policy, etc.<sup>16</sup> And many banks already take climate-related risk into account.<sup>17</sup> The Proposed Principles go a big step further: they single out climate-related risk for unnecessary special treatment. Regulated banks no longer may simply treat climate-related risk as any other risk. Instead, banks must specifically focus on climate-related risk in a variety of ways. For instance:

- The Proposed Principles directs that banks must communicate about climate-related risks in particular and must specially assign responsibilities for them “throughout the organization.”<sup>18</sup>

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<sup>13</sup> See *id.* at p. 19508.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* at pp. 19511 - 19512.

<sup>16</sup> See, e.g., 12 C.F.R. pt. 30.

<sup>17</sup> See, e.g., Bank of America, “Task force on climate-related financial disclosures report,”

<https://about.bankofamerica.com/en/making-an-impact/task-force-on-climate-related-financial-disclosures-report> (“As one of the world’s largest financial institutions, we are committed to ensuring that climate-related risks and opportunities are properly managed within our business.”).

<sup>18</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064-ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>, at p. 19509.

- Climate-related risk is singled out as the subject of mandatory reporting by bank management to the board.<sup>19</sup>
- Climate-related risk is singled out for assessment with regard to “stakeholders’ expectations, the bank’s reputation, and ... disadvantaged households and communities.”<sup>20</sup>
- Banks must “incorporate climate-related risks into their internal control frameworks, including internal audit,”<sup>21</sup> regardless of whether those risks would qualify for control or audit coverage under the procedures that the banks have reasonably adopted for other sorts of risk.
- Bank management must “develop and implement ... scenario analysis frameworks”<sup>22</sup> for climate-related risks but not for other risks.
- Banks are to “consider climate-related financial risks as part of the underwriting and ongoing monitoring of portfolios.”<sup>23</sup>

Singling-out climate-related risk is unjustifiable. Climate-related eventualities do not pose greater risk than, for example, technological disruption, economic downturns, domestic political changes, foreign conflicts, civic unrest, changing consumer tastes, non-climatic natural disasters, and public health crises such as the one ravaging the globe today. Even if climate-related risk were among the most important for some banks, there is no reason to believe that is true for all or most banks. Yet the Proposed Principles singles out only climate-related risk, and for all large banks.

The Proposed Principles’ defenders may argue that the Proposed Principles only requires banks to monitor and respond to material climate-related risk, which they ought to do anyway under current law. This contention must be rejected for three reasons.

First, the Proposed Principles does not limit its commands to material climate-related risk. For instance, management is directed to “regularly report[]”<sup>24</sup> to the board on climate-related financial risks—without regard to whether such risks are regularly material. Similarly, banks are directed to “consider climate-related financial risks as part of the underwriting and ongoing monitoring of portfolios”<sup>25</sup>—without regard to whether those risks are material for particular portfolios. The result of the Proposed Principles would require banks to give climate-related risks a special place in their consideration without first determining that those risks are

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<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at p. 19510.

<sup>21</sup> *See id.* at p. 19510.

<sup>22</sup> *See id.*

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at p. 19509.

<sup>25</sup> *See id.* at p. 19510.

material.

Second, the Proposed Principles irrationally singles out climate-related risk for special procedures that are not required even for other material risks. For instance, the Proposed Principles demands scenario analysis for climate-related risks.<sup>26</sup> But banks are not required to conduct scenario analysis for other eventualities that pose material, and even greater, risk.

Third, if the Proposed Principles' only point is that banks should take material climate-related risk into account on the same terms and in the same ways as other risk, it should just say so, in the form of a simple reminder that the same requirements of assessing material risk with a view to safety and soundness apply to all kinds of risk.

The largest banks, to which the Proposed Principles are directed, do not need more prompting to pay attention to climate-related risk as compared to other sorts of risk. Just the opposite is true. Such a reminder would in fact be unnecessary because the largest banks have shown a pronounced propensity to engage on issues surrounding climate-related risk.<sup>27</sup> Because no guidance is needed to remind banks and examiners of existing legal requirements, there is no need for the Proposed Principles, and their issuance would therefore be arbitrary and capricious.

If the FDIC is determined to act in this space, it should prepare guidance for every type of eventuality that poses a level of risk similar to that assertedly presented by climate change and should present a reasoned basis for singling out these types of eventualities as presenting higher degrees of risk than other types. The FDIC's failure even to ask whether singling out climate-related risk is needed, let alone to answer that question in the affirmative, is the essence of arbitrary decision-making. The Proposed Principles' irrationality is exacerbated by the fact that, as we establish below, its directives are mandatory, although the Proposed Principles would be irrational even if optional. At the very least, the FDIC should add to the text making clear that banks are not required to treat climate-related risk differently than any other sort of risk.

### **FDIC Must Consider the Negative Effects**

The Proposed Principles will have considerable negative effects. FDIC must consider these before adopting the Proposed Principles. A regulation that fails to weigh its benefits against its costs is irrational.<sup>28</sup> Yet the Proposed Principles fails even to identify its costs, let alone assess whether the benefits it purports to achieve justify them. The Proposed Principles would impose serious real-world costs on banks, on the businesses to whom they lend, and on American citizens who depend on those businesses for their livelihoods and for goods and services and on

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<sup>26</sup> See *id.*

<sup>27</sup> See, e.g., JPMorgan Chase & Co., Sustainability, <https://www.jpmorganchase.com/impact/sustainability/es-commitments>; Citigroup, Taskforce on Climate-Related Financial Disclosures Report 2021, <https://www.citigroup.com/citi/sustainability/data/taskforce-on-climate-related-financial-disclosures-report-2021.pdf?linkId=148731631>; Wells Fargo, Taskforce for Climate-Related Financial Disclosures, <https://www08.wellsfargomedia.com/assets/pdf/about/corporate-responsibility/climate-disclosure.pdf>.

<sup>28</sup> *Michigan v. EPA*, 576 U.S. 743 (2015).

the banks.

By singling out climate-related risk for special treatment the Proposed Principles would force banks to implement procedures that are not justified by the prevention of financial harm—as indicated by the fact that the FDIC does not require those procedures for comparable risk of other types. This may also empower litigation by activists and others seeking to influence or claim against the banks. This would pointlessly increase operating costs for banks, which will pass on these costs to customers. All these costs would be most heavily borne by small businesses, who will more often lack the resources to absorb an increase in the cost of credit or to modify their operations to cater to the demands of banks to avoid activities that generate climate-related risk.

By requiring banks to treat climate-related risk more sensitively than risks of other types, the Proposed Principles would drive banks to assemble portfolios that are inefficient. Indeed, by driving banks to assemble portfolios weighted toward businesses that putatively represent low climate risk, the Proposed Principles would make portfolios less diverse and hence will increase risk in the banking system. Moreover, while the Proposed Principles purport to only target large banks they will inevitably affect community banks and credit unions.

Banks would be encouraged to exclude areas of the economy. By singling out climate-related risk for special caution in the provision of credit, the Proposed Principles would prompt banks to deny credit, or offer credit on worse terms, to businesses that might be alleged to pose climate-related risk. This includes businesses such as mining and electric power companies, as well as others that may be alleged to be at risk from possible changes in law or public opinion regarding climate change. Because the Proposed Principles directs banks to consider climate-related risks to “the bank’s reputation,”<sup>29</sup> banks would be forced to consider whether loan applicants are in favor with green activists or are green enough. Banks may (in good faith or otherwise) interpret the Proposed Principles to require that they lend only to businesses that make certain green commitments (net zero emissions by 2050, etc.). Businesses that are accused of or perceived as harming the climate may find it hard to obtain credit and/or reasonable loan terms. Banks may even believe they must refuse standard transactional services, such as banking accounts, to businesses that are in disfavor with green activists.

Businesses that operate in regions that may be alleged to be exposed to climate risk, such as coastal or forested areas, would also find it harder and more expensive to obtain credit. Indeed, the Proposed Principles suggests that banks should “determine ... lending limits” by reference to geographic location.<sup>30</sup> This harm would extend to states whose economies rely on energy generation.

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<sup>29</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064-ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>, at p. 19511.

<sup>30</sup> *See id.*

The Proposed Principles will also hurt American citizens. As credit for businesses posing “climate risk” dries up, the Americans who work for those businesses or for other businesses who depend on them for goods or services would find their livelihoods in peril. Americans would find it harder to start small businesses alleged to pose such risks. Further, under the Proposed Principles, Americans who happen to live in areas that the banks may believe are at higher climate risk would find it harder to get home and business loans. And Americans would face higher charges for essential goods like electricity as the cost of credit for such goods increases. Americans would also suffer as towns—especially in rural America—lose businesses on which they depend for jobs that sustain a viable community life. Americans would further suffer from the broader societal risks inherent in the green policies that the Proposed Principles are meant to further. These policies risk creating economic downturns, undermining grid reliability, and impeding American trade competitiveness, to name just a few. But the Proposed Principles do not even acknowledge, let alone attempt to fathom, these risks, or to offset them against the asserted risks it addresses.

The Proposed Principles fail to assess not just costs, but also benefits. It claims that its approach will enhance bank safety and soundness, but it does not establish a baseline of current bank practices with respect to climate-related risk or show how the approach taken in the Proposed Principles differ from that approach. Without such information, it is impossible to know whether the Proposed Principles mark any advance over current levels of safety and soundness and hence whether it is necessary. A regulation aiming at a problem is “highly capricious if that problem does not exist.”<sup>31</sup>

Any rational approach to climate-related risk requires a robust cost-benefit analysis relying on rigorous economic, industrial, and consumer studies. But among its many questions, the Proposed Principles fail to ask about the costs and benefits of its mandates. If the FDIC mistakenly elects to continue with this rulemaking, it should before finalization issue a request for information seeking the data it needs to assess and compare costs and benefits, then give careful heed to that data in any eventual finalization.

### **Proposed Principles Force Banks to Account for Immaterial and Speculative Risk**

The Proposed Principles force banks to monitor and account even for speculative and immaterial risks. Despite having a stated purpose of helping banks manage risk arising from climate change, the Proposed Principles do not explain the nature and scope of that risk, leaving banks to feel their way blindly on this decisive question, or to guess what will best keep them out of regulatory audits and litigation.

Predictions about the physical risks of climate change vary wildly, ranging from increasing numbers of hurricanes and wildfires to destruction from climate-driven great-power

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<sup>31</sup> *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).



conflict or even more speculative claims.<sup>32</sup> And predictive climate science is in its infancy. The Proposed Principles admit that climate “[d]ata, risk measurement, modeling methodologies, and reporting continue to evolve at a rapid pace.”<sup>33</sup> For these reasons the obstacles to understanding the risk of various climate eventualities, especially decades into the future, are immense. Yet the Proposed Principles fail to offer principles by which banks can determine which asserted physical risks are realistic in the FDIC’s view and therefore should be considered.

Further, the Proposed Principles demand that banks monitor and account for risk arising from climate-driven changes to the legal framework. But regulatory and (especially) legislative action is notoriously difficult to predict, and the Proposed Principles do not offer any means by which banks may weed out probable from speculative future regulatory and legislative developments or any safe harbors on which banks may rely in making judgments about such future government action. Faced with the Proposed Principles’ demand that banks monitor and respond to climate-related risk and the FDIC’s refusal to explain which sorts of alleged risk are of concern, banks will have no choice but to err on the side of caution. Rather than run afoul of the FDIC, they will take an unwarrantably and unpredictably expansive view of the risks of climate change, exacerbating the harms to the banking system, small businesses, and Americans discussed in the preceding section. Indeed, the Proposed Principles sanction this approach: it urges banks to adopt “measures of conservatism” in the face of uncertainty.<sup>34</sup>

For this reason, too, the FDIC should not finalize this Proposed Principles. The FDIC “is an independent agency created by Congress to maintain stability and public confidence in the nation's financial system. To accomplish this mission, the FDIC insures deposits; examines and supervises financial institutions for safety, soundness, and consumer protection; makes large and complex financial institutions resolvable; and manages receiverships.”<sup>35</sup> If the FDIC does choose to finalize the Proposed Principles then it should make clear that banks may form their own judgments about the likelihood and magnitude of various asserted climate-driven eventualities and that the FDIC will not second-guess those judgments.

### **This is Rulemaking, Not Guidance**

The Proposed Principles are legislative rules masquerading as guidance. The FDIC must treat it as a legislative rule. The “hallmark of legislative rules” is “[e]xpanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms

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<sup>32</sup> See Elizabeth Kolbert, “Three Scenarios for the Future of Climate Change,” *New Yorker* (Oct. 5, 2020).

<sup>33</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064-ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>, at p. 19510.

<sup>34</sup> See *id.*, at p. 19511.

<sup>35</sup> <https://www.fdic.gov/about/>

Congress or the agency itself has previously created.”<sup>36</sup>

The Proposed Principles expand the regulatory footprint in two ways. First, it decides once and for all that climate-related financial risk poses a graver risk to bank safety and soundness than other sorts of risk and therefore warrants special treatment. Regulated banks are no longer free to make their own prudential assessment in this area, as they do in others; they *must* act as though climate-related risk is of especially great concern. Second, the Proposed Principles establish several concrete new requirements for regulated banks. *See supra*.

Neither of the above represents a mere interpretation of existing legal duties.<sup>37</sup> Indeed, the Proposed Principles do not cite a statute or regulation. It appears to deduce the new requirements from the general duty of safety and soundness,<sup>38</sup> but that general standard neither singles out climate-related risk for special treatment nor creates the particular duties the Proposed Principles demand.

The Proposed Principles, if finalized, would have binding force. The Proposed Principles bind banks to single out climate-related risk as an area of special concern. The Proposed Principles declare the FDIC’s position that climate-related financial risk implicates safety and soundness in an especially serious way.<sup>39</sup> Banks are no longer free to reach their own conclusions on this issue. This determination from the FDIC controls the actions of the financial institutions that it regulates. The Proposed Principles leave the FDIC and the financial institutions no opportunity for reaching different conclusions about climate-related risk; indeed, the Proposed Principles make clear that the staff’s “supervisory expectations” will be shaped by the framework offered in the Proposed Principles.<sup>40</sup> The FDIC must therefore *require* the financial institutions they supervise to treat climate-related risk as the Proposed Principles demands.

Because regulated banks know this, they must accept the Proposed Principles’ determination about climate-related risk if they do not wish for adverse action by their examiners. This is why the Proposed Principles simply assume that banks will “incorporate[e]

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<sup>36</sup> *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013); *see also Gen. Motors Corp. v. Ruckelshaus*, 742 F.3d 1561, 1565 (D.C. Cir. 1984) (rule is legislative when it “create[s] ... new rights or duties”).

<sup>37</sup> *See, e.g., Iowa League of Cities*, 711 F.3d at 875 (legislative rule exists where no “preexisting ... legislative rule ... supplies the basis for the prohibition” in guidance).

<sup>38</sup> Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, <https://www.FDIC.treas.gov/news-issuances/news-releases/2021/nr-FDIC-2021-138a.pdf>, at p. 2.

<sup>39</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064-ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>, at p. 19509.

<sup>40</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064-ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>, at p. 19509. *See also Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (explaining that the fact that a document constrains an agency’s discretion tends to show it is a legislative rule).

these principles [of the Proposed Principles] into their risk management systems.”<sup>41</sup> It does not even consider whether banks might decline to accept this purported “guidance.”

The Proposed Principles therefore resemble the EPA guidance found binding in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), and *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), both of which committed agency staff—and therefore by extension the public regulated by those staff—to the positions taken by guidance. Indeed, the Proposed Principles presents the concerns in these cases in an aggravated form, for the FDIC’s supervisory power is broad and powerful.

The Proposed Principles also bind banks to implement its particular demands. The Proposed Principles states that an “effective risk governance framework is *essential* to a bank’s safe and sound operation,”<sup>42</sup> and that such governance “includes” certain specific climate-related measures such as “assigning climate-related financial risk responsibilities throughout the organization.” Per the Proposed Principles, regulated banks that treat climate-related risk like other risks, rather than singling it out for, e.g., “assign[ment] ... throughout the organization,” will fail at an “*essential*” element of safety and soundness.

Similarly, the Proposed Principles often assert that banks “should” comply with its demands. While this word can sometimes merely recommend, here the Proposed Principles make clear that banks “should” undertake the demanded measures if they want to remain safe and sound—and they are required by law to remain safe and sound. The guidance does not disclaim that it is binding or anywhere inform banks or the public that it does not bind.

The FDIC should therefore admit that the Proposed Principles, if finalized, would constitute a legislative rule subject to the procedural requirements of the Administrative Procedures Act (APA). The FDIC should withdraw the Proposed Principles and (if it mistakenly chooses to proceed with the rulemaking) should reissue it with the full set of findings and analyses that ordinarily accompany a rulemaking. Further, the FDIC should explain why a binding rulemaking, rather than optional guidance, is appropriate in these circumstances. Nothing in the Proposed Principles addresses this question, but a rulemaking that fails to engage whether a rulemaking (rather than guidance) is necessary at all is arbitrary and capricious.

### **As Guidance, the Proposed Principles Violate FDIC Regulations**

The Proposed Principles, if finalized, would violate the FDIC’s own regulations because they would create a binding rule through purported guidance. The FDIC adopted the Interagency

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<sup>41</sup> Federal Deposit Insurance Corporation, Notice of Proposed Policy Statement; Request For Comment. 2021-62 (April 4, 2022), Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (RIN 3064-ZA32), Federal Register Vol. 87, No. 64, <https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf>, at p. 19511.

<sup>42</sup> See *id.*, at p. 19509 (emphasis added).

Statement Clarifying the Role of Supervisory Guidance as a rule.<sup>43</sup> The FDIC issued a regulation providing that “supervisory guidance does not have the force and effect of law.”<sup>44</sup> In the preamble to that regulation, the FDIC explained that “examples ... included in supervisory guidance (including guidance that goes through public comment) are not binding on institutions,” but are “intended to be illustrative.”<sup>45</sup>

Yet, as explained above, the Proposed Principles if finalized would create a binding rule, and the examples it gives of practices banks must undertake to protect against climate-related risk are mandatory rather than illustrative.

Moreover, the Proposed Principles if finalized would be arbitrary and capricious, because the creation of a binding rule through guidance would constitute an unexplained departure from the agency’s own past practice, as codified in the agency’s own regulation on guidance.<sup>46</sup> That the Proposed Principles passed through a comment period changes nothing because the FDIC’s rule on guidance commits the agency not to issue binding guidance even through notice and comment.

## CONCLUSION

The FDIC should not adopt the Proposed Principles. Climate-related financial risk is not the gravest threat to our banking system and should not be elevated to that status over economic downturns, foreign wars, or public health crises. The direct costs of compliance and indirect cost to businesses and consumers may be devastating, increasing already high inflation but curtailing credit to the energy sector and further burdening low-income Americans. The Proposed Principles favor and elevate social and political issues to the detriment of states, businesses, consumers, and our banking system.

Moreover, the Proposed Principles are labeled guidance, but will be treated and enforced as rules. The FDIC should withdraw the Proposed Principles and proceed with rulemaking.

Thank you for the opportunity to provide comments. If you have any questions, please contact the Utah Office of State Treasurer or the Utah Office of the State Auditor.

Respectfully submitted,



Marlo M. Oaks, CFA, CAIA  
Treasurer, State of Utah



John Dougall  
Utah State Auditor

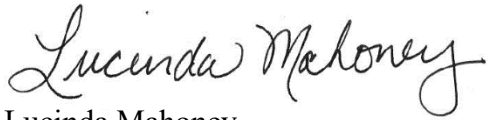
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<sup>43</sup> Federal Deposit Insurance Corporation, *Role of Supervisory Guidance* (RIN 3064–AF32), Federal Register Vol. 86, No. 39, <https://www.fdic.gov/news/board-matters/2021/2021-01-19-notice-sum-b-fr.pdf>. See also 12 CFR Part 302.

<sup>44</sup> See *id.* at p. 12079.

<sup>45</sup> See *id.* at p. 12084.

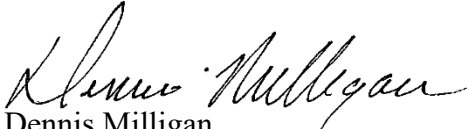
<sup>46</sup> See, e.g., *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).



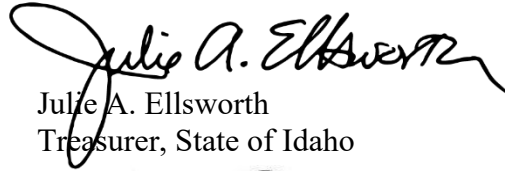
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Commissioner of Revenue, State of Alaska



Kimberly Yee  
Treasurer, State of Arizona



Dennis Milligan  
Treasurer, State of Arkansas



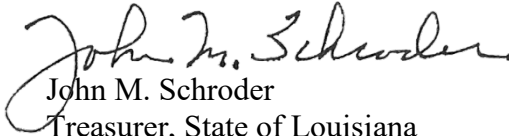
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Treasurer, State of Idaho



Allison Ball  
Treasurer, State of Kentucky



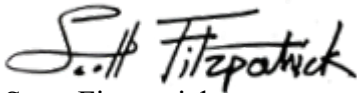
Mike Harmon  
Auditor of Public Accounts, State of Kentucky



John M. Schroder  
Treasurer, State of Louisiana



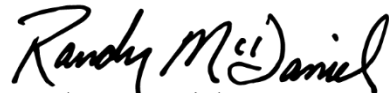
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Treasurer, State of Mississippi



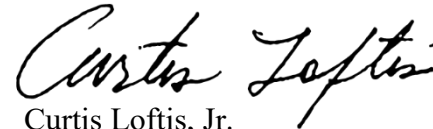
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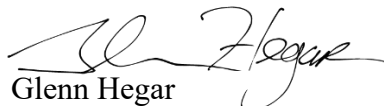
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Curtis Loftis, Jr.  
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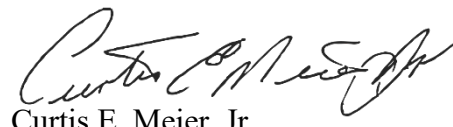
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