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June 30, 2023

BY ELECTRONIC SUBMISSION

Superintendent Adrienne A. Harris
New York State Department of Financial Services
One State Street
New York, NY 10004

VIA Electronic Mail: BankingComments@dfs.ny.gov

**Re: Proposed Guidance on Assessment of the Character & Fitness of
Directors, Senior Officers, and Managers**

Dear Superintendent Harris,

The Institute of International Bankers (“IIB”) appreciates the opportunity to respond to the Proposed Guidance on Assessment of the Character and Fitness of Directors, Senior Officers, and Managers (“Proposed Guidance”), issued by the New York State Department of Financial Services (“DFS”) on May 9, 2023.¹

The IIB represents internationally headquartered financial institutions from over thirty-five countries around the world doing business in the United States. The membership consists principally of international banks that operate branches, agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States. The IIB works to ensure a level playing field for these institutions, which are an important source of credit for U.S. borrowers and comprise the majority of U.S. primary dealers. These institutions enhance the depth and liquidity of U.S. financial markets and contribute greatly to the U.S. economy through direct employment of U.S. citizens, as well as through other operating and capital expenditures.

The IIB recognizes the importance of ensuring that individuals in leadership positions at New York State-licensed financial institutions demonstrate the appropriate character and fitness necessary to carry out their responsibilities. We therefore support the objectives of the DFS in strengthening the assessment process, as it is an important

¹ Available at [Industry Letter - May 9, 2023: Proposed Guidance on Assessment of the Character and Fitness of Directors, Senior Officers, and Managers | Department of Financial Services \(ny.gov\)](#) (hereinafter “Proposed Guidance”) (last accessed June 30, 2023).



aspect of protecting the safety and soundness of banks in New York. The IIB also appreciates the risk-based and proportionate approach taken by the DFS that sets forth the expectation that the assessment process be calibrated appropriately to reflect the size, complexity, and risk profile of the Covered Institution. This policy serves to make the most efficient and effective use of a Covered Institution's finite resources.

The Proposed Guidance, however, is not always clear on how it will apply to foreign banking organizations ("FBOs") operating in the United States. Unlike domestic institutions, FBOs face certain challenges in implementing U.S. regulatory requirements because of their unique structure. We believe that the Proposed Guidance could disproportionately impact FBOs to their detriment if the DFS does not resolve the ambiguities identified below. The following comments discuss our specific areas of concern and offer recommendations for addressing them.

I. The DFS should amend the Proposed Guidance to clarify that the requirement to assess boards of directors, trustees, or managers do not apply to New York State-licensed branches, agencies, and representative offices of FBOs because they do not have these bodies locally

The Proposed Guidance states that its terms are applicable to "New York State-regulated banking organizations and non-depository financial institutions licensed or chartered under the New York Banking Law ("Covered Institutions") and will apply to each member of a Covered Institution's board of directors, board of trustees, and/or board of managers, as applicable, and each senior officer of a Covered Institution ("Designated Persons")."² Unlike domestic institutions, however, the branches, agencies, and representative offices of FBOs do not have local boards of directors, trustees, and/or managers. Instead, primary leadership and governance is typically the responsibility of the branch or office manager, and perhaps a deputy branch or deputy office manager. This form of governance is unique to FBOs and the realities of this structure have historically been recognized by regulators. For example, the Office of the Comptroller of the Currency ("OCC") states in the glossary of its Licensing Manual that "[t]he term [Director] does not refer to a director of a foreign bank operating a federal branch. . . ."³ Given this, the IIB recommends that the DFS amend the Proposed Guidance to make clear that the requirement to assess a Covered Institution's "board of directors, board of

² Proposed Guidance, paragraph 2.

³ OCC, "Comptroller's Licensing Manual: Background Investigations," p. 12 (December 2021) (available at [Licensing Manual: Background Investigations | OCC](#) (last accessed June 26, 2023)). See also the glossary definition of director in another section of the Manual that states: "Note: a director of a foreign bank that operates a federal branch is not included in this definition." (OCC, "Comptroller's Licensing Manual: Changes in Directors and Senior Executive Officers," p.11) (June 2019) (available at [Licensing Manual: Changes in Directors and Senior Executive Officers | OCC](#)) (last accessed June 27, 2023).



trustees and/or board of managers” does not apply to NY-licensed branches, agencies, and representative offices of FBOs because they do not have them locally, and it would be inappropriately extraterritorial to require the vetting of the board of directors, board of trustees, and/or board of managers of the foreign parent.

II. The DFS should amend the Proposed Guidance to clarify that the requirement to assess senior officers refers only to the applicable leadership of the New York Branch, Agency, or Representative Office

The Proposed Guidance states that it is applicable to “each senior officer of a Covered Institution” and notes that “[t]he term ‘senior officer’ refers to every officer who participates or has the authority to participate (other than in the capacity of a director) in majority policy-making functions of a Covered Institution.”⁴ It also notes that “[a]n individual who satisfies this criteria will be considered a senior officer regardless of whether they have an official title or whether the individual is serving without salary or other compensation.”⁵ The Proposed Guidance lists a number of positions that fall into this category (i.e., chief executive officer, chief financial officer, chief operations officer, chief compliance officer, chief legal officer, chief risk officer, etc.).⁶

As noted above, the primary leadership and governance of FBO branches, agencies, and representative offices is typically the responsibility of the branch or office manager, and perhaps a deputy branch or deputy office manager. This is particularly the case where the branch, agency, or representative office is small. Given this, the Proposed Guidance should reflect these circumstances more explicitly. There is precedent for this interpretation in the OCC’s Licensing Manual where it addresses the comparable concept of “senior executive officer” in its glossary, with similar parameters. The glossary explains the details of what the term includes, which is “for a federal branch operated by a foreign bank, the individual functioning as the chief managing official of the federal branch.”⁷ Similarly, therefore, the Proposed Guidance should make it clear that the term “senior officer” applies to the branch or office manager of the FBO’s NY-licensed branch, agency, or representative office.

In addition, the branch/office manager should have the discretion to set the criteria to designate which other local leadership positions will be subject to vetting based on the size, complexity, and risk profile of the business. This would be consistent with the language that Covered Institutions “take a risk-based and proportionate approach to

⁴ Proposed Guidance, paragraph 3.

⁵ Ibid.

⁶ Ibid.

⁷ OCC, “Comptroller’s Licensing Manual: Background Investigations,” p.12-13 (December 2021) (available at [Licensing Manual: Background Investigations | OCC](#)) (last accessed June 26, 2023).



implementing this Proposed Guidance.”⁸ The Proposed Guidance should more explicitly empower the branch/office manager with this authority.

III. The DFS should omit the term “manager” as used in the Proposed Guidance because it is ambiguous

The title of the Proposed Guidance includes the word “manager,” and it is used twice in the opening paragraph when referencing the updated expectations that the DFS will have for the review and assessment process, as well as the impact that managers (as well as directors and officers) can have on an organization’s safety and soundness. However, the term “manager” notably is not defined and not used again in the material sentence that sets forth the parameters of Covered Institutions and Designated Persons.

As a result, it is difficult to differentiate its intended meaning from that of a “senior officer” based on the Proposed Guidance’s lengthy definition of the latter term. To avoid confusion and to streamline the text, therefore, the DFS should omit the term “manager” in the Proposed Guidance.

Of course, to the extent that the Proposed Guidance is amended to explicitly recognize branch/office managers as recommended above, we would support the use of the term “manager,” as long as it is used in the context of an FBO branch/office.

IV. FBOs should be allowed under the Proposed Guidance to rely on vetting done at the home office and deference should be given to any applicable information security, privacy restrictions, and any regulations around the disclosure of confidential supervisory information that exist under the laws of the home country

Unlike other types of Covered Institutions, some functions of the NY branches, agencies, and representative offices of FBOs may be carried out at their home offices. This may include the assessment and vetting of employees that are hired at a home office and serve for many years in that foreign jurisdiction, but who then rotate to the NY branch, agency, or representative office for an assignment of limited duration. In these cases, FBOs should be allowed to rely on the vetting that was previously done in the home office. Separately, in its review of a Covered Institution’s vetting process, the DFS should give deference to the information security, privacy restrictions, and any regulations around the disclosure of confidential supervisory information (“CSI”) of the home country that would apply to and may restrict the transfer of sensitive information obtained during the vetting process. Not doing so would put the local leadership of the

⁸ Proposed Guidance, paragraph 7.



NY-Licensed branch, agency, or representative office in the untenable position of potentially conflicting legal requirements.

V. The Proposed Guidance should state more clearly that the vetting questions provided are merely examples and emphasize that leadership has the discretion to ask the questions that they feel are appropriate

We note, approvingly, that the DFS has stated that “Covered Institutions are reminded that any information requested should be made in compliance with all applicable laws.”⁹ In some instances, however, the text and the suggested vetting questions in the Proposed Guidance potentially conflict with other laws and regulations, such as Federal, State, and local employment laws, banking regulations around the disclosure of CSI, and, as noted above, some foreign laws on information sharing cross-border or with other unrelated third parties, including host country regulators.

For example, suggested question Number 4 states “Have you or any financial institution with which you are or were associated been sanctioned and/or censured in any way by a banking or securities regulator during the [year(s)], including any regulatory sanction, consent order, enforcement order, supervisory agreement, civil money penalty, or other administrative penalties?”¹⁰ This question potentially conflicts with the banking regulations regarding the impermissible disclosure of CSI without the express permission of the relevant bank supervisor.¹¹ Additionally, many non-U.S. jurisdictions have similar laws, as well as strict laws prohibiting information sharing cross-border or with other unrelated third parties, including host country regulators, such as the DFS. Furthermore, some of the suggested questions may also potentially conflict with Federal, State, and local employment laws.

Given this, the DFS should amend the Proposed Guidance to state more clearly that the suggested questions are being provided merely as examples and emphasize that leadership has the discretion to ask the questions that they feel are appropriate.

VI. The DFS should omit the phrase “associated with” because it is ambiguous. Otherwise, the DFS should clearly define the phrase in the instructions accompanying the suggested questions

The phrase “associated with” is contained in some of the questions provided in the Proposed Guidance as suggestions of what employers might ask in vetting their staff. See for example Question 16, which asks “Have you or any company with which you

⁹ Proposed Guidance, paragraph 7.

¹⁰ Proposed Guidance, Suggested Question 4.

¹¹ 12 CFR § 261.20(a); 12 CFR § 4.37(b); NY Banking Law, Article 2, § 36.10.



were associated [emphasis added], during [year(s)]: Filed a petition under any chapter of the Bankruptcy Code . . .”¹² This phrase is ambiguous and can mean many different things and potentially cover many different relationships, some of which may not be relevant. Consequently, the DFS should omit the phrase “associated with” in the text to avoid confusion over how it is to be construed.

If the DFS chooses to retain this term, however, it should provide a clear definition of it in the instructions that accompany the suggested questions. For example, the Board of Governors of the Federal Reserve System (“FRS”), the Federal Deposit Insurance Corporation (“FDIC”), and the OCC use this phrase in their Interagency Biographical and Financial Report – FR 2081c. The instructions to that form state that “Associated means associated as an officer, director, organizer, partner, trustee, or principal shareholder or owner.”¹³ This clear definition removes any ambiguity in its use. The IIB recommends that the DFS harmonize its requirements and adopt the definition used by the federal banking agencies in the final guidance.

VII. The frequency and extent of ongoing assessments should be determined by senior leadership of the branch, agency, or representative office, as they deem appropriate, based on the size, complexity, and risk profile of the business

The Proposed Guidance states that the DFS expects that Covered Institutions “update their framework for the review and assessment of the character and fitness of their directors, senior officers, and managers, both upon onboarding and on an ongoing basis.”¹⁴ The frequency and extent of that review and assessment is, appropriately, not specified. The Proposed Guidance should clarify that the frequency and extent of ongoing assessments should be determined by the senior leadership of the branch, agency, or representative office, as they deem appropriate, based on the size, complexity, and risk profile of the business. In this way, Covered Institutions can make the most efficient and effective use of finite resources.

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¹² Proposed Guidance, Suggested Question 16.

¹³ FRS, FDIC, OCC, “Interagency Biographical and Financial Report - FR2081c,” p.2 (available at [Reporting Form FR 2081c \(federalreserve.gov\)](https://www.federalreserve.gov/reporting-form-fr-2081c)) (last accessed June 13, 2023).

¹⁴ Proposed Guidance, paragraph 1.



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We appreciate the opportunity to provide these comments to you for your consideration and stand ready to answer any questions or provide further information. Please contact the undersigned (646-213-1147, bzorc@iib.org) if we can be of assistance.

Sincerely,

Beth Zorc
Chief Executive Officer
Institute of International Bankers