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Counterpoint: Why Sane People Serve as Bank Directors

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Bank directors have played a crucial role in the turnaround of the banking industry, an accomplishment that deserves recognition in light of the fact that it has been done under tremendous regulatory burden and tepid economic growth. Given that, why do we continue to question why the country's most respected business people would be willing to serve as bank directors? Respected attorney and industry commentator Thomas Vartanian recently asked in an opinion piece in *The Wall Street Journal*, "**Why would anyone sane be a bank director?**" Well, sane people are serving as bank directors every day, and in doing so they are benefiting the economy without exposing themselves to undue risk.

The regulatory environment for bank directors is clearly improving. The Federal Reserve's recent proposal to reassess the way in which it interacts with boards is appropriate if overdue, and the other banking agencies should follow the path that the Federal Reserve has set forth. We also witnessed the FDIC acting very aggressively in pursuing lawsuits against directors of failed banks in the wake of the financial crisis. However, suggesting that the FDIC relax its standards for pursuing cases against bank directors is not only unrealistic, it misses the greater point for the industry in that it needs to continue to refine its governance practices in order to provide for better decision-making by bank directors and to enhance protections from liability for individual directors.

In order to fully understand the point of this position, it is important to clear up a couple of commonly-held misconceptions. First, when the FDIC sues a bank director after a bank failure, it does so for the benefit of the Deposit Insurance Fund, which is essentially an insurance cooperative for the banking industry. As a result, the FDIC should be viewed as a purely economic actor, no different from any other plaintiff's firm in the business of suing corporate directors. Lawsuits by FDIC should not be given any higher profile or greater credibility than any number of other suits against corporate directors that inevitability occur during market downturns. There should be no additional stigma, and certainly no additional fear, with regard to a claim by the FDIC on the basis that it is "the government."

Second, there is a misconception that bank directors have unique risks when their business fails. While the FDIC may be a better organized plaintiff than many creditors, shareholders or bankruptcy trustees, directors of failed non-banks face risks of being sued for mismanagement just as bank directors do, and suits against bank directors are litigated under state law just as the cases against directors of non-banks are (subject to certain floors for liability standards prescribed by federal law). FDIC litigation receives a higher degree of media attention, but directors of banks face litigation risks that are no more significant than those faced by directors of public companies, as an example.

There are of course legitimate issues to discuss in determining when a director should have liability for business decisions that go wrong. In the wake of the financial crisis, judicial decisions revealed that Georgia law was rather unfriendly to directors as it related to their decision-making process. As a business-friendly state, the Georgia General Assembly acted to correct that legal flaw, thus restoring an appropriate balance for directors to make decisions.

Most importantly, however, bank directors should not read opinion pieces and believe it is irrational to serve on a bank board. Instead, their reaction should be to drive an appropriate governance structure, one that allows the board to focus on important strategic and oversight functions. Moreover, directors should focus on obtaining appropriate information and outside assistance in making these important decisions. Directors should ensure that their banks maintain appropriate liability insurance that will allow them to defend themselves against attacks on their business judgment. Finally, if their decisions are ultimately challenged by the FDIC or otherwise, directors should be willing to stand their ground and defend their actions.

The banking industry is fortunate to have a vast array of men and women who commit their time and talents to serve as bank directors. In my experience, most of them do it not for financial gain, but because they recognize the important and trusted position that banks have in their local and national economies. Bankers and bank directors who adopt appropriate governance practices should serve with confidence, knowing that even decisions that go wrong can and should be defended vigorously, even against a government agency.