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By Email regs.comments@occ.treas.gov
Office of the Comptroller of the Currency
Legislative and Regulatory Activities Division
400 7th Street, SW
Suite 3E-218
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Washington, DC 20219

Re: OCC Document ID OCC-2014-0001, "OCC Guidelines Establishing Heightened Expectations for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of 12 CFR Parts 30 and 170" (the "Guidelines")

Ladies and Gentlemen:

The American Association of Bank Directors ("AABD") submits the following comments on the OCC Guidelines.

AABD is a 501(c)(6) not for profit trade association representing the advocacy, education and informational needs of bank and savings institution directors since 1989.

While the Guidelines have many helpful suggestions for banks and savings institution to consider in managing and overseeing risk management, they are decidedly not guidelines in character. They are enforceable rules that grant extraordinary authority to the OCC to impose, under certain circumstances, an all-encompassing risk management and strategic plan/order on a national or federal savings bank without an independent third party reviewer (an administrative law judge) making findings of fact and the Comptroller of Currency making a final determination.

The powers that the OCC would grant itself under the Guidelines exceed in some respects those that Congress granted the OCC to restrict the activities of significantly and critically undercapitalized national and federal savings banks.

The order that the OCC could impose on a national or federal savings bank could cover just about anything – compensation, systems and controls, audits, personnel, strategic plans, lending and investments; that is, anything that involves risk, which is everything. And the Order is enforceable in Federal District Court or through imposition of civil money penalties.

AABD's first recommendation is that the OCC issue these Guidelines as real guidelines, and not as a part of Part 30 or other "safety or soundness" regulation authorized pursuant to Section 39 of the FDI Act.

The title of the Guidelines states its applicability to banks with "certain large insured" national and federal savings banks (assets of $50 billion or more), but it does not reflect the fact that national and federal savings banks of all sizes could become subject to the Guidelines. All it would take is for the OCC to make that unilateral determination. The Guidelines grant the OCC the power to determine applicability of the Guidelines to any size national or federal savings bank if they "are highly complex or otherwise present a heightened risk as to warrant the application of these Guidelines." That determination is unreviewable by an independent third party. The Guidelines don't define what "heightened risk" means; if it means heightened risk to the bank, then any bank could qualify – perhaps once it has a composite rating of 3 or worse, or perhaps not.

AABD's second recommendation is for the Guidelines to be applicable to only the largest institutions – $50 billion is the current cutoff, but perhaps a higher cutoff is appropriate.

Later in this letter we will point out some provisions in the Guidelines that are not suited to smaller institutions; the risk of the OCC determining that smaller institutions should be subject to the Guidelines' applicability is that those unsuitable and inappropriate provisions will become applicable to those smaller institutions.

The Guidelines hold boards of directors to a standard of ensuring that the bank establish and implement an effective risk governance framework that meets the minimum standards described in the Guidelines. This obligation to guarantee results is inconsistent with the fiduciary standards imposed on bank boards of directors in all fifty states.

In the case of *in re Citigroup Inc. Shareholder Derivative Litigation* (964 A. 2d 106 (Del. Ch. 2009), the Delaware Chancery Court determined that the Citigroup directors were not responsible for the results of their decisions (involving purported deficiencies in risk management or oversight) if they were made in good faith. The Court pointed out that a bank director cannot be held accountable for results because every decision holds some risk, especially in the financial sector.

At the same time, the Guidelines do not acknowledge that bank boards, like other corporate boards, are entitled to rely reasonably on management, board committees, and outside experts.

In absence of such a statement, which is consistent with the law of all fifty states, directors are left with an impossible obligation ("ensuring" effective implementation) without a clear message from the OCC that they may reasonably rely on management, etc. for such implementation.

When the Guidelines (which are really a rule) require a director or a board of directors to "ensure" results, that requirement forces the board to consider more than just being a board exercising its traditional oversight function, but also performing management-like functions. That is not what the OCC should want to happen. Most bank directors are not bankers and were not trained as such, and they are not generally in the bank except for meetings.

AABD's third recommendation is to eliminate any references to the board of directors ensuring an effective risk management framework or other results-oriented obligations. Additionally, the Guidelines need to state that bank directors and boards may rely reasonably on their management, Board committees and outside advisors.

The Guidelines also impose a number of other obligations on bank boards that had not previously been subject to enforceable rules.

Bank boards are already extraordinarily overburdened. The Guidelines increase the burdens without any apparent consideration of the burdens already imposed on bank directors.

AABD's Bank Director Regulatory Burden Report identifies more than 800 provisions in law, regulation, and regulatory guidance that require or recommend that boards or their committees take certain actions, some management in character. Bank boards currently are required to review and approve more than fifty written policies. In October of last year, the OCC issued guidelines on third party relationships that require boards to approve contracts with third party vendors.

Bank boards are not just overburdened, but also subject to undue risk of personal liability. The FDIC's recent suits against former directors of failed banks for having approved a small number of loans resulting in losses at the same time claiming that simple negligence is sufficient to impose personal liability have signaled to some bank directors that serving on a bank board is not as great an honor as it used to be.

To help measure the effect that concerns about personal liability were having on persons willing to serve as bank directors, AABD conducted a survey. The results of the survey will be published next week.

More than 15% of the respondent banks had, within the past five years, either had a director resign over fear of personal liability or a director candidate refuse to serve for that reason, or both.

AABD's fourth recommendation is for the OCC to reconsider the Guidelines in their entirety in order to take account of the cumulative effect the Guidelines may have on the overall burdens on bank directors and to reconsider language in the Guidelines that might be construed as increasing the risk of personal liability of a bank director.

The Guidelines require a bank to have at least two independent directors. "Independent" has a broadened meaning, one that we have not seen before apply to commercial banks or even public companies. The director would need to be independent of the parent company.

There may be conflicts that arise between a bank and its parent company, but these are generally not frequent in our experience and there are corporate governance measures that can avoid or resolve those conflicts without resorting to a blanket rule prohibiting bank directors from serving on the parent board. Where the parent company is a shell or relatively inactive, the reasons for prohibiting bank directors from serving on the parent board become even more problematic.

Since the Guidelines could apply to banks of any size, it is important to note that many community banks with parent companies have identical boards. Forcing those institutions to have bank directors who cannot serve on the parent company does not make much sense. And most of those parent companies are also shell companies so that the chance of a conflict arising is remote.

For many years, AABD has opposed rigid, formulaic rules on corporate governance dictated by outside authorities, whether it be ISS, the credit rating agencies, the national exchanges, the SEC or the banking agencies. We support and encourage individual bank boards to decide questions of how boards govern themselves, including whether to have a separate risk management committee or have directors that do not serve on the parent board. We encourage bank board to conduct a corporate governance review annually to help decide what changes, if any, should be made. Our view is that the Guidelines' blanket requirement to have at least two bank directors who are independent of the parent company does not fit all circumstances and should be abandoned.

AABD's fifth recommendation is for the OCC to eliminate the requirement that there be at least two bank directors who are independent of the parent company.

The Guidelines require formal training of bank directors in subjects relevant to the subject matter of the Guidelines. AABD is not aware of any other federal banking regulation requiring formal training of bank directors, and is opposed to such a requirement.

That is not to say that AABD does not believe that formal training can be valuable for many bank directors. We just do not believe it should be mandated. Not all bank directors need formal training.

The various bank trade associations, including AABD, offer programs designed for bank directors.

In 1994, AABD established a certification program for bank directors through its Institute for Bank Director Education. It includes a six hour core course, and six hours of supplemental education annually. Directors who participate in the program receive certificates of completion,

and in subsequent years, receive certificates of maintenance if they attend at least six hours of annual supplemental training.

AABD's final recommendation is for the formal training requirement to be eliminated from the Guidelines. We believe that training should be voluntary and tailored to the individual needs of bank directors and the banks they serve.

If there are any questions concerning the comments made herein, please call me at 202-463-4888 or email me at dbaris@aabd.org.

Sincerely,

DAVID BARIS
[Electronic Signature]

David Baris
Executive Director