AA|BD The American Association of Bank Directors

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Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
Mail Stop 9W-11, 400 7th Street, SW
Washington, DC 20219

Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC ,20551

Robert E. Feldman, Executive Secretary
Attention: Comments, FDIC
550 17th Street, NW
Washington, DC 20429

Re: Docket ID FFIEC-2014-0001
EGRPRA, Docket No. OP-1491

Dear Ladies and Gentlemen:

This responds on behalf of the American Association of Bank Directors ("AABD")[1] to the request for public comment by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (the "Agencies") regarding a review of their regulations to identify outdated, unnecessary or unduly burdensome regulations for insured depository institutions (the "Notice"). The review is required by section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA").

The Agencies have been through this process once before, in 2006 and the two years that preceded that year. AABD's review of the 2006 effort concluded that it was an unsatisfactory and flawed process and result from the perspective of bank boards of directors. Numerous regulations and regulatory "guidance" that were unnecessary or unduly burdensome were ignored and have remained on the books ever since. Many regulatory burdens have been added since 2006. AABD urges the Agencies this time to take steps to avoid the mistakes made in the 2006 process.

[1] Founded in 1989, the non-profit AABD is the only trade group in the United States solely devoted to bank directors and their advocacy, information and educational needs. AABD recently established the Bank Director Liability Resource Center, which acts as a clearinghouse for developments in bank director liability, including lawsuits by the FDIC against directors of failed banks and savings institutions. The Institute for Bank Director Education, established in 1993 as the educational arm of AABD, acts as a clearinghouse for education programs designed for bank and savings institution directors that support the nationally recognized Director Certification Program.

AABD's Bank Director Regulatory Burden Report (both in the 2012 Edition and updated 2014 Edition) pointed out that the limited scope of the 2006 review was a factor in the failure to address or remedy the regulatory burdens imposed on bank directors. The Agencies gave notice and invited public comment on a very limited, prescribed set of regulations that included only four regulations directly burdening bank directors. A more inclusive public notice process might have engendered a dialogue that could have opened up discussions of the numerous unnecessary or excessively burdensome regulations and regulatory guidance that impose obligations on bank boards of directors.

On July 31, 2007, the FFIEC and its constituent federal banking agencies published the 69-page Joint Report to Congress on EGRPRA, detailing the Agencies' fulfillment of EGRPRA. The Joint Report highlights some of the comments that the Agencies received during the notice and comment period. Some commentators recommended that the Agencies conduct a study of examination reports to evaluate whether examiners were appropriately distinguishing management from board obligations in their examination findings, conclusions, and recommendations. Commentators also suggested that the Agencies review existing regulations that examiners rely on to support their prescriptions that directors undertake more managerial-type responsibilities. However, the Joint Report simply informs Congress that the Agencies received comments relating to the burdens on bank directors, without reference to the actions taken in response to the comments.

Given this history, it is important for the Agencies to state clearly in a future Notice that regulatory burdens on bank boards of directors and their committees are considered burdens on the banks themselves. This arguably is a truism but necessary nonetheless to be reflected in a future Notice so that commenters will know that the Agencies are interested in receiving comments on the regulatory burdens facing bank boards of directors and their committees. It goes without saying that bank boards are integral to the safe and sound operation of those institutions.

The Notice states that the Agencies will review regulations without addressing specifically whether that review will include regulatory guidance. We believe the intent of Congress in passing EGRPRA was to include regulatory guidance tantamount to regulations. However, whether or not the legislation actually requires such a review, the Agencies should want to review regulatory guidance in light of the practical effect of such guidance on the behavior of both bank boards of directors and the Agencies.

Boards of directors of depository institutions are subject to heavy regulatory burdens through the application of regulatory guidance issued by the Agencies. The Agencies routinely accord regulatory guidance the same weight and force as regulation and statute. Reports of Examination typically hold banks and their boards of directors responsible for complying with regulatory guidance and noncompliance with regulatory guidance are cited in the same part of the reports of examination that cite the bank or board for violations of laws and regulation. Enforcement actions can be taken against banks and their boards of directors if the violation of the regulatory guidance represents an unsafe or unsound practice. Because of this, responsible bank boards of directors and bank management will spend resources and time in order for them and their banks to meet the requirements of regulatory guidance as if they were laws or regulations. The burdens placed on bank boards of directors by regulatory guidance are identical in weight and character to those imposed by statute or regulation.

AABD issued the Bank Director Regulatory Burden Report to serve two purposes: i) provide bank directors with a guide to the various requirements applicable to the performance of their duties in one place, rather than spread over numerous regulatory materials and documents; and ii) evaluate the aggregate impact of such laws, regulations and guidance on the ability of bank directors to meet their oversight duties of care and loyalty. AABD did not attempt to address the myriad laws, regulations and guidance imposed under state law that affects directors of state-chartered banks.

AABD's review found a numbing litany of laws, regulations and guidance applicable to bank directors. There are in excess of eight hundred (800) federal banking laws regulations and guidance provisions that impose separate responsibilities on bank boards of directors. There are 143 federal statutory provisions imposing duties on bank directors. There are about 50 provisions in OCC regulations, 38 in FDIC regulations and 37 in Federal Reserve regulation that impose duties on the boards of directors of affected banks. In addition there are over 18 provisions in OTS regulations that have been continued under the aegis of the OCC.

In addition to these statutory and regulatory provisions, there are many issuances of regulatory guidance that impose further duties and responsibilities on bank directors. These are contained in various bank regulatory documents produced by the regulators, such as examination manuals, bulletins, circulars and financial institution letters. Although technically nonbinding, examiners frequently apply guidance as though they are binding regulations or law; as mentioned, if a bank does not meet all of the provisions in the guidance, the examiners may determine that the bank is engaged in "unsafe and unsound" banking practices or hold the board accountable in reports of examination and other regulatory communications. In AABD's review, it found over 225 separate provisions in OCC guidance that directly impose responsibilities on bank directors; approximately 180 provisions in FDIC guidance and about 140 such provisions in Fed guidance with an additional 33 provisions of Fed guidance applicable to boards of bank holding companies; and at least 200 provisions of OTS guidance. Finally, the heavy duties imposed on boards of directors in bank regulatory enforcement actions (more than 1,500 formal enforcement documents issued over the past six years and numerous other informal enforcement documents) are over and above the responsibilities required by the above-described statutory, regulatory and guidance provisions.

The duties and responsibilities of bank directors flowing from all these sources are numerous, burdensome, overwhelming, frustrating, sometimes conflicting, and often unnecessary. They divert the time and attention of bank board of directors and board committees away from the essential role they should play- meeting their fiduciary duties of care and loyalty by overseeing (NOT managing) the institution. Bank directors should be focused on establishing a prudent risk management system, monitoring adherence to that system, establishing and overseeing the strategic plan of the bank and overseeing the performance and compensation of management. Instead bank boards have become overwhelmed with compliance and regulatory matters, so much so that compliance and bank regulatory requirements have become a major line of business replete with administrative minutia and duties falling on the board that rightly should be left to bank management or in some instances dispensed with entirely.

Further, imposing management-like responsibilities on bank directors also confuses and misaligns the appropriate roles of the board of directors and management. Board members typically are not professional bankers. They are not loan officers, financial analysts, or bank regulatory experts - - they are doctors, teachers, attorneys, businesspersons and investors. They typically are not bank professionals and should not be expected to perform management functions. Instead of performing professional management-like responsibilities, the board of directors should be tasked with hiring and supervising individuals that can competently manage the banking institution. The ability of bank boards to delegate management functions to management to rely reasonably on them should be, but has not been, a clearly articulated and accepted facet of bank regulation and supervision.

Finally, the accumulation of so many duties and responsibilities from so many various regulatory sources in a manner that often is overlapping, duplicative and sometimes resulting in the inappropriate imposition of management-like minutia, especially when coupled with the increasing focus of enforcement and liability, negatively impacts the willingness of qualified individuals to serve as bank directors. This is not a consequence that is good for the health of the nation's banking system or the nation's economy.

Earlier this year, AABD reported the results of a survey it conducted that found that almost 25% of the respondent banks, over the past five years, had directors resign or had individuals refuse to accept director positions over fear of personal liability or had directors refuse to serve as members of the directors loan committee. Fear of personal liability was the most common reason given for resignations or refusal to serve; but the second most common reason given was that the director or individual did not have sufficient time to meet the time requirements of being a bank director.

In order to address these adverse effects of the current regulatory system on the Nation's bank board of directors, AABD makes the following recommendations that it requests the Agencies to take into consideration in its ongoing review of regulatory burdens facing banks and bank boards of directors:

i) In their EGRPRA review, the Agencies should evaluate (and provide public notice for) the overall impact of the body of laws, regulations and regulatory guidance on bank directors, their boards of directors and their board committees to: a) eliminate unnecessary and duplicative requirements, b) eliminate those where the burdens outweigh the benefits, and; c) organize the surviving regulations in a way that is easily retrievable and usable by bank boards of directors;

ii) The Agencies should incorporate into their procedures an ongoing requirement that they will thoroughly consider the impact of new proposed rules or guidance on the burdens facing bank directors, including their cumulative effect, and not add to the burdens of bank directors unless the benefits of the proposed rule or guidance clearly outweigh the burdens placed on bank directors;

iii) The Agencies should adopt rules that will clarify that bank boards of directors may delegate management duties to management and rely reasonably on management to perform such duties;

iv) The Agencies should undertake a review of the obligations that they are creating for boards of directors through formal and informal enforcement and administrative actions to determine the extent to which those actions are creating management-like burdens and responsibilities on bank boards, and take steps to assure that in the future, such actions will not force bank boards and board committees to undertake management responsibilities; and

v) In their future solicitations of public comment pursuant to EGRPRA, the Agencies should expand the categories to be reviewed to include regulatory guidance and enforcement documents that impose responsibilities and duties upon bank boards of directors, members and committees;

Thank you for the opportunity to provide AABD's comments on these important issues. Our goal, as should be the goal of the Agencies, is to clarify and streamline the duties and responsibilities of the boards of directors of the Nation's banks so that they can focus on their duties of overseeing financially healthy and competitive institutions that serve their customers and communities. Please feel free to contact us if you have comments or require additional information.

Sincerely,

/s/ David Baris
President

/s/ Richard Whiting
Executive Director