STATE OF MISSISSIPPI
DEPARTMENT OF BANKING AND CONSUMER FINANCE

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Via Electronic Submission

Mr. James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

RE: Proposed Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More (88 FR 70391)

Dear Mr. Sheesley:

The Mississippi Department of Banking and Consumer Finance ("DBCF") appreciates the opportunity to provide our comments in response to the proposed *Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More* (the "Guidelines"). The DBCF is responsible for supervising state-chartered commercial banks. Mississippi has 56 state-chartered banks, 43 of which are jointly supervised with the Federal Deposit Insurance Corporation (FDIC) and subject to this proposed guidance.

As Commissioner, I agree with the FDIC that a strong corporate governance and risk management framework is vital to the safety and soundness of a financial institution, I disagree that these proposed guidelines will strengthen an institution's framework. These proposed standards fail to consider state authority as it relates to corporate governance, impose unnecessary complexities for directors of banks, create disparity among state member and state nonmember banks, and unfairly differentiate state nonmember banks from similarly sized national banks. The proposed standards also ignore the fundamental components of the dual banking system, are highly prescriptive, and disregard outstanding corporate governance and risk management guidance previously issued by the FDIC. Given these fatal flaws, the proposal should be withdrawn in its entirety.

Conflicts with State Law

A. The proposed guidelines create avoidable conflicts with Mississippi law.

The proposed federal stakeholder standards would create unnecessary conflicts with existing state fiduciary standards. Of note is the Guidelines' unranked list of stakeholders whose interests should be considered by a covered institution's board of directors in exercising its fiduciary responsibilities – *shareholders, depositors, creditors, customers, regulators, and the public.* Under Mississippi laws, officers and directors of banks and bank holding companies are held to stand in a fiduciary relationship to their institutions and stockholders. No other "stakeholders" are identified as entities whose interests should be taken into consideration.[1] The Mississippi Business Corporation Act[2] also mandates that directors act in the best interest of the corporation they oversee, which requires consideration of the best interests of the corporation and its shareholders while allowing the *discretion* to consider the interests of employees, suppliers, creditors, customers, the economy, community and society.[3] Requiring directors of covered institutions to consider the interests of stakeholders other than the institution and its shareholders, and to consider those interests equally, clearly conflicts with Mississippi law and could increase the risk of litigation for covered institutions and the personal liability of individual directors.

Also of concern is the ambiguity of the guidelines. For example, the inclusion of regulators as stakeholders seems unprecedented. Moreover, it is unclear to the DBCF what this responsibility would entail, and it would almost certainly be equally unclear to the institutions required to meet such standards. Additionally, the interests of the public are undefined and are potentially so broad and conflicting as to be impossible for a covered institution to meet. The effects of such provisions could be the opposite of the FDIC's intended result, actually increasing governance and operational risk at covered institutions.

B. The proposed board composition provisions are incompatible with Mississippi laws and introduce unnecessary complexities for directorates.

The Guidelines provide that a board should "consider how the selection of and diversity among board members collectively and individually may best promote effective, independent oversight . . . and satisfy all legal requirements for outside and independent directors." The Guidelines specify that "diversity" could mean social, racial, ethnic, gender, and age differences, as well as differences in skills, experience (professional, educational, community, or charitable service), perspective, and opinion. It is stated that these considerations are to inform the institutions' choices regarding the number of directors and board composition. We have concerns regarding how this would be applied, and what actions might be taken against directors who were found to have insufficiently considered these factors in setting the size and composition of the board. Under Mississippi law, directors do not have carte blanche to make these determinations, as a majority of the shareholders may be empowered to install and remove directors and amend articles of incorporation and bylaws at their will.[4] Furthermore, changing the number of directors may necessitate a change to the articles of incorporation or bylaws of a covered institution, which may, again, require approval by the shareholders.[5] Based on these factors, we are concerned that banks and bank holding companies may face repercussions for failing to institute changes with which the shareholders disagree.

1 Miss. Code Ann. § 81-5-105(1).
2 Miss. Code Ann. § 79-4-1.01, *et seq.*
3 Miss. Code Ann. § 79-4-8.30(f).
4 Miss. Code Ann. §§ 79-4-7.28 and 79-4-8.08.
5 Miss. Code Ann. §§ 79-4-10.03 and 79-4-10.20.

C. The proposed guidelines shoulder the directors with managerial oversight more properly exercised by officers and undermines independent governance.

The Mississippi Business Corporation Act recognizes that the duties of corporate directors differ from those of corporate officers, ascribing to directors the duties to act in good faith and in the best interests of the corporation,[6] but included along with these duties is the additional requirement to act "with the care that a person in a like position would reasonably exercise under similar circumstances."[7] Under Mississippi law, directors are to exercise reasonable care in the same manner as officers in connection with their decision-making and oversight functions,[8] but management and day-to-day operations are generally understood to be the purview of a corporation's officers. Statements in the Guidelines to the effect that directors should "actively oversee" a covered institution's activities, and "question, challenge, and when necessary, oppose recommendations and decisions made by management" indicate an expectation that directors take on a more direct operational role. Such a mandate is in direct opposition to state law.

Moreover, the proposed expectations not only contradict outstanding FDIC guidance outlining the board's responsibility in overseeing the bank's business objectives, but also inappropriately blur the duties of directors and officers. This may lead to confusion and conflict between these two parties and serve to discourage qualified individuals from serving in either capacity at a covered institution. Qualified directors may also be wary of taking on additional duties, not ascribed to them under state law, that could increase the risk of litigation against them for stepping outside of their role and into that of an officer.

Broad and Arbitrary Application

As titled, this proposal applies to large complex institutions; however, a provision included in the proposal subjects any institution regardless of size to these expectations. The proposal states that "the FDIC reserves the authority to apply the proposed guidelines, in whole or in part, to institutions less than $10 billion in total consolidated assets if the FDIC determines that the institution's operations are highly complex or present a higher risk." Determining factors for applicability are not included. Additionally, these factors are subject to FDIC's sole discretion. It is not clear if these factors of "higher risk" or "highly complex operations" will be based on concrete supervisory considerations or more subjective factors.

The overly broad discretion and arbitrary application of this language presents additional challenges to Mississippi state-chartered banks. Because the FDIC could impose these enforceable guidelines on institutions deemed to pose a higher risk in addition to institutions exceeding the $10 billion threshold, 77% percent of our state-chartered banks would potentially be impacted.

Disadvantages the State Charter

The dual banking system should be a parallel banking system in our country; however, creating heightened supervisory standards for state-chartered institutions and excluding federally chartered institutions from these standards erodes the parity between charters.

6 Miss. Code Ann. § 79-4.8.30(a)
7 Miss. Code Ann. § 79-4-8.42(a)
8 Miss. Code Ann. § 79-4-8.30(b)

This proposed guidance would create a disparate impact both operationally and financially for state nonmember banks, consequently reducing the attractiveness of the state charter. Eighty-seven percent, or $148 billion, of Mississippi's chartered assets are state chartered.

It is estimated that covered institutions will expend between 90,365 and 91,375 in additional labor hours at a cost of approximately $12 million annually, to meet the requirements in the guidelines. But these estimates may not effectively capture the full cost of implementation. This additional burden on covered institutions is expected to benefit the system by reducing the likelihood of failure; however, the proposal does not contain data or analysis to suggest that the additional corporate governance and risk management requirements included in the guidelines are warranted and by what degree these standards would reduce failures.

Further, covered institutions at or near the threshold amount of $10 billion in assets will be disproportionately burdened, with these expenses cutting into a greater percentage of their income than larger banks. Smaller institutions that may be deemed "high risk" may not be able to effectively absorb these higher expenses. We do not see that these proposals will benefit or reduce the likelihood of failure for smaller banks, and it may even have the opposite effect.

Conclusion

These Guidelines would serve to create confusion and place a majority of Mississippi state-chartered institutions in conflict with Mississippi law. We also do not agree that the Guidelines, as they would be applied to Mississippi institutions, will serve to reduce risk or the probability of failure. Effective supervision of covered institutions, appropriate utilization of current examination tools, and timely enforcement of supervisory authority are more sustainable solutions to reduce institutional risk and the risk of failure. Therefore, we ask that the Guidelines be withdrawn in their entirety.

We appreciate the opportunity to submit comments on the proposed Guidelines and your consideration thereof.

Sincerely,

Rhoshunda G. Kelly
Commissioner
Mississippi Department of Banking and Consumer Finance