BUSEY BANK
100 W. UNIVERSITY AVE.
CHAMPAIGN, IL 61820

February 8, 2024

Via Email to comments@FDIC.gov

James P. Sheesley, Assistant Executive Secretary
Attention: Comments/Legal OES (RIN 3064–AF94)
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

RE: Busey Bank Comments on the Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More

Dear Mr. Sheesley:

We are writing to provide comments in response to the FDIC's notice of proposed rulemaking entitled Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More (the "Guidelines") issued on October 5, 2023. According to the FDIC's research, these Guidelines would apply to 57 covered institutions. Busey Bank (hereafter, "Busey") is one of these 57 institutions. Busey is a $12.23 billion, state-chartered bank headquartered in Champaign, Illinois, with banking centers throughout Illinois, Indiana, Missouri, and Florida. As a bank that recently crossed the $10 Billion threshold with a publicly traded holding company, we have been developing our corporate governance program using existing principles found in issuances like the OCC's Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Federal Branches (the "Heightened Standards"), the Federal Reserve Bank's Supervisory Guidance on Board of Directors' Effectiveness (the "FRB Supervisory Guidance"), and guidance from our examiners, whether through recommendations in supervisory letters or simply comments in discussions. As such, we currently have a framework generally in line with the Guidelines. However, we wish to comment on the proposal to voice our concerns with the proposed expectations for the board and the blurring of the roles of directors and management.

Scope of Guidelines

The preamble states that the Guidelines were drawn from, and are generally consistent with, the principles and the goals set forth in the Heightened Standards and the FRB Supervisory Guidance and are an attempt to "harmonize corporate governance and risk management requirements." Unfortunately, the Guidelines as proposed do not harmonize standards but instead provide requirements that are prescriptive in nature, rather than the principles-based approach found in the Heightened Standards and FRB Supervisory Guidance. In addition, they impose several additional mandates on directors of state-chartered, nonmember institutions, many of which, like ours, are significantly smaller and less complex than those subject to the Heightened Standards and the FRB Supervisory Guidance. Historically, the supervisory expectation is that banks are expected to maintain risk management processes and systems commensurate with their size and complexity. We find it illogical and contradictory to historical bank supervision to impose more stringent corporate governance and risk management guidelines on a bank with just under $13 billion rather than a bank with assets over $50 billion or a bank with assets over $100 billion solely based on their prudential regulator. Because we are subject to continuous supervision by the FDIC, they will have ample opportunity to observe when our size and complexity and the risk within our bank require the enhanced systems and processes currently required of banks over $50 billion and $100 billion.

Obligations of the Board of Directors

We recognize and respect the long-standing tenet that the board of directors is ultimately responsible for the bank. We also recognize a director's duty to oversee the institution. We are concerned, however, that the language throughout the Guidelines requires the board to "ensure" or "confirm" certain actions that take place, which have historically been responsibilities of management. For example, it should be management's role, rather than the board's, to "confirm that the covered institution operates in a safe and sound manner, in compliance with all laws and regulations." Management has the day-to-day responsibility and expertise to operate the institution and, in doing so, can identify the rare instances when the institution may not be in compliance with a law or a regulation. That day-to-day responsibility and expertise make management the proper body to confirm compliance with laws and regulations. If management does identify noncompliance, it will inform the board, explain the plan to achieve compliance in the future and update progress as necessary.

Along these same lines, the Guidelines task the board with several specific obligations, some of which have been historically implied to be directors' obligations and some of which are new and expanded. For example, the board has historically been responsible for selecting the Chief Executive Officer, but under the Guidelines, the board would now be responsible for selecting qualified executive officers. There is no explanation as to which executive officers this applies. Additionally, the board would now be required to approve and annually review policies that govern and guide the organization's operations in accordance with its risk profile and as required by law and regulation. Although our board annually approves policies requiring such approval by statute or regulations and those we have determined to be significant, the number of policies we currently have and continually add, the review and approval of all policies, becomes overwhelming. It may take time away from reviewing other relevant information. In addition, approval of very technical policies may be better left to management with expertise in the area.

We also have concerns about the new responsibility of the board to "consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators and the public." Although the bank believes it considers all of these parties in operating the institution in a safe and sound manner and in complying with laws and regulations, there are state laws that govern the directors' fiduciary duties. We are concerned that the Guidelines will conflict with state laws and present new litigation risks for the board and the institution.

Independence

The Guidelines require a majority of the directors to be independent; that is, a director can neither (i) be a principal, member, officer, or employee of the bank, nor (ii) be a principal, member, director, officer, or employee of any affiliate or principal shareholder of the institution. We request clarification that this language does not mean prohibiting an independent director of the institution and holding company from serving on the board of an operating subsidiary (an entity that is not an affiliate under Regulation W) of the institution.

Along these same lines, the Guidelines indicate that the institution and its holding company can have an overlapping board if the holding company conducts limited or no additional business operations outside of the bank, assuming the director's independence, as described above. In addition, the institution would be permitted to use all or part of its holding company's risk governance framework if the covered institution has a "substantially similar" risk profile to the holding company and the decisions of the holding company do not jeopardize the institution and the institution's risk profile is "easily distinguished and separate from" that of the holding company. We request clarification on when the risk profile of the institution and its holding company are substantially similar and easily distinguished and separate.

Reporting Breaches of Risk Appetite and Violations of Law

Although our board formally approves our risk appetite annually, it is regularly discussed among management and the board. If the situation arose that necessitated changes to that risk appetite, it would be done expeditiously, whether at the next regularly scheduled board meeting or, if needed, at a special meeting. A mandate to approve the risk appetite quarterly seems unnecessary.

The Guidelines require the board to establish processes that require front-line units and the independent risk management unit to notify management, the Chief Risk Officer, the risk committee, the audit committee, the CEO, and the FDIC in writing of a breach of a risk limit or noncompliance with the risk appetite statement or risk management program. Similarly, the board must establish processes requiring front-line and independent risk management units to identify known or suspected violations of laws or regulations and ensure that known or suspected violations involving dishonesty, or willful disregard are promptly reported to the agency with jurisdiction. Identifying breaches of the risk appetite statement and violations of law or regulation are integral to safe and sound banking. Once again, management familiar with the institution's day-to-day operations should develop such processes. Our concern is that a board may artificially set the risk appetite in such a way, for example, setting the risk appetite extremely high to avoid reporting breaches. Alternatively, we do not want reporting such breaches to become so frequent that the reports may not get the attention they deserve. The processes should describe when and to whom notification should be made with some recognition of the severity of the breach or violation and its effect on the institution.

Conclusion

If the intent is to harmonize corporate governance and risk management requirements, we suggest adopting something more closely aligned with the Heightened Standards, applicable to banks of $50 billion and above. The $10 billion threshold is too small for the increased requirements. Many of these institutions are outside of metropolitan areas. It can be challenging to find directors; adding additional responsibilities and the potential increased risk of litigation and liability will only make that more difficult.

Finally, we request that the Guidelines include a delayed effective date. As mentioned above, we are largely in compliance but will need to make some changes to meet all of the requirements in the Guidelines. As these Guidelines provide the FDIC with the ability to require a written plan if they find an institution fails to comply with the Guidelines, an implementation period permitting institutions to study and make the necessary changes to come into compliance is appropriate.

Thank you for considering our comments.

Very truly yours,

BUSEY BANK

[redacted]

Van A. Dukeman
Chairman, President and CEO