January 14, 2019

Via E-mail to prinfo@occ.treas.gov

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218,
Washington, DC 20219

Re: OCC Review of Information Collections Required by 12 C.F.R. Part 9 (1557-0140)

Ladies and Gentlemen:

The Bank Policy Institute1 is writing in response to the request for feedback on the information collections required by Parts 9 and 150 of the OCC’s regulations. The OCC’s stated objectives for requesting feedback include to help identify ways to: (i) minimize the burden of information collections on respondents, and (ii) enhance the quality, utility, and clarity of the information to be collected pursuant Parts 9 and 150. Part 9 contains the regulations that national banks must follow when conducting fiduciary activities, and Part 150 contains the regulations that federal savings associations must follow when conducting fiduciary activities.

Among the topics that the OCC has invited specific comment on is 12 C.F.R. § 9.9 (“Section 9.9”). 12 C.F.R. § 9.9(a)-(b) requires that the results of any audits conducted of the institution’s fiduciary activities (including significant actions taken as a result of the audit) must be included in the minutes of a meeting of the institution’s board of directors. Under 12 C.F.R. § 9.9(b), institutions that adopt a continuous audit system must include the results of discrete audits in the minutes of the board of directors at least once each year.

As described below, as part of the OCC’s efforts to review the burdens placed on institutions under Parts 9 and 150 and to advance the OCC’s ongoing efforts to clarify the roles of the bank’s board of directors and management,2 we believe that the OCC should eliminate the board minutes-related

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation’s leading banks and their customers. BPI’s members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation’s small business loans, and are an engine for financial innovation and economic growth.

2 See, e.g., OCC Bulletins 2018-18 and 2018-49 (stating that 2018 revisions and updates to OCC supervision booklets are intended to, inter alia, “clarify the roles of bank’s board of directors and management”). See also the OCC’s 2014 “Heightened Standards” guidelines for the risk and corporate governance of certain large national banks, addressing, among other things, the appropriate role of the board of directors (the preamble to
requirements of Section 9.9. BPI believes that these requirements are unnecessarily burdensome and overreaching in that they inappropriately prescribe the content and level of detail of information to be included in board minutes and presuppose that the board of directors should discuss the results of every audit conducted pursuant to Part 9 – regardless of materiality to the institution – to effectively carry out its oversight function in furtherance of safety and soundness. Rather than dictate the content of board minutes via a regulation, OCC examiners should be satisfied that appropriate information regarding material audits of fiduciary activities has been provided to the board or, an appropriate board committee, to enable the board and/or committee to effectively oversee the identification, tracking and remediation of significant risk-management or compliance deficiencies.

We believe that our recommendation is consistent with sound and long-established governance principles relating to the role of the board and its adoption should not present supervisory concerns.

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I. Background

The OCC’s review of information collections under Parts 9 and 150 of the OCC’s regulations, and, in particular the board minutes requirements of Section 9.9, is an important opportunity for the OCC to once again:

- help to clarify the important distinction between the respective roles of the board and that of management, and

- reaffirm the well-accepted corporate law principle and practice that, while board minutes reflect board discussions at meetings, they are not intended to be a transcript of proceedings or to serve as lists of information or findings (such as audit findings) provided to the board or a committee.

A. Agency Regulations Should Recognize and Advance the Critical Distinction Between Board Oversight and Management Functions

BPI, like the OCC, places great importance on effective corporate governance, and has strived to serve as a thought leader in the area. BPI is committed to working with industry and governmental groups to enhance effective governance at banking organizations, and in this regard BPI (at the time, The Clearing House Association) published: (i) our Guiding Principles for Enhancing U.S. Banking Organization Corporate Governance (June 2015) (the “Guiding Principles”)3 and (ii) The Role of the Board of Directors in Promoting Effective Governance and Safety and Soundness for Large U.S. Banking Organizations (May

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the final version of the OCC’s “Heightened Standards” guidelines notes that “the OCC did not intend to impose managerial responsibilities on the board of directors, or suggest that the board must guarantee results under the Framework.”).

3 *Available at: https://bpi.com/press-releases/tch-publishes-updated-guiding-principles-on-enhancing-u-s-banks-corporate-governance/.*
2016) (the "Role of the Board Report"). In 2018, BPI provided a detailed comment letter (the "FRB Comment Letter") to the Federal Reserve Board on its 2017 proposed guidance on board effectiveness.

A critical focus of the BPI publications that is particularly relevant in the context of the board minutes-related provisions of Section 9.9 is a recognition of the distinction between the roles and responsibilities of the board of directors and those of senior management, and the related risks of imposing executive and administrative responsibilities on the board or imposing unnecessary compliance obligations in a way that can undermine the board's independence and effectiveness as an oversight body. Indeed:

- while TCH's 2016 Role of the Board Report observes that "an informed and actively engaged board is a core element of effective governance," boards should be actively engaged with respect to their core board oversight functions (i.e., rather than actively engaged in the day-to-day management or operations of the organization),

- in the FRB Comment Letter, we observed that a board's receipt of too much unfiltered information (e.g., in board packages) often can impair board effectiveness to the same extent as receiving too little pertinent information as it could divert attention from a board's focus on core board functions.

Accordingly, as the Role of the Board Report observes, absent special circumstances, at a minimum, materiality standards from a board reporting perspective should be applicable to any audit reports or related information required to be presented to the board under agency regulations or guidance. Mandatory board review of audit reports identifying any and all findings, process issues or weaknesses (i.e., irrespective of the significance of the identified issues or weaknesses) could unnecessarily divert board attention from its critical core functions. The Role of the Board Report states that as part of the board's function to oversee risk management and internal control frameworks, the board should receive sufficient information to effectively oversee, inter alia, emerging risks that may materially impact the overall risk profile and effective identification, tracking and remediation of material risk-management or compliance

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4 Available at: https://www.theclearinghouse.org/advocacy/articles/2016/05/20160505-tch-publishes-the-role-of-the-board-of-directors-report.

5 Available at: https://www.theclearinghouse.org/advocacy/articles/2018/02/20180215-tch-comments-on-fed-board-of-directors-guidance.

6 As described in the 2016 Role of the Board Report, we articulate the core functions as:

- Function 1: Reviewing and approving the strategic objectives and plans
- Function 2: Monitoring financial performance and condition
- Function 3: Talent management for the CEO and other senior executives
- Function 4: Overseeing the risk management and internal control frameworks, including top-tier policies and plans in fundamental areas
- Function 5: Reinforcing, demonstrating, and communicating the "tone at the top" for the values and culture of the organization and overseeing enterprise-wide approaches/programs intended to promote organizational values, culture, and reputation

7 As the 2016 Role of the Board Report notes, reports to the board should be timely, clear and accurate and designed to aid informed board oversight and decision making (e.g., focus on emerging risks or future changes to the business that may materially impact the overall risk profile, or effective oversight of identification, tracking and remediation of risk-management or compliance deficiencies).
deficiencies (the information may be in the form of a summary of material trends and findings, where the board deems this approach to be appropriate).

As indicated in the 2016 Role of the Board Report (see Recommendation 3), we believe that individual agencies should conduct periodic reviews of the board requirements and standards they promulgate to ensure that they continue to retain their relevance and reflect the core board functions and sound governance practices.

B. Agency Regulations Should Reflect Sound and Long-Standing Practices Relating to Board Minute Taking

While board minutes reflect board discussions, they are not intended to serve as a transcript of proceedings or as lists of information (e.g., audit results) provided to the board or a committee (or of information that a regulatory agency believes should be provided to a board or committee).

Moreover, as addressed in OCC guidance as well as The Guiding Principles, the board should decide on the level of detail that it believes is appropriate for the minutes, balancing the need to maintain an adequate record to satisfy legal requirements and the need to avoid chilling discussion among directors. The OCC articulates this concept clearly in its Corporate and Risk Management Handbook (Version 1.0, July 2016) which states that the “board itself should address the level of detail required for minutes and records of board meetings.” Regulatory requirements that mandate that certain information and details be included in board minutes are presumptively overly prescriptive and deviate from sound and long-standing governance practices.

II. Part 9 Should Not Mandate the Inclusion of Audit Findings in Board of Directors Minutes

We believe that there are other important opportunities for the OCC to undertake reviews and, in some cases, modify guidance and regulations to better distinguish between the role of the board and management (see, e.g., OCC supplemental examination procedures suggesting that board minutes should generally indicate that the board “reviews and approves” third-party risk management due diligence results and various methodologies, contracts and management plans (The OCC Supplemental Examination Procedures for Risk Management of Third-Party Relationships (January 2017)).

As important as individual agency review is, we believe that review of the corporate governance legal framework (and in particular inter-agency requirements imposed on the board) on a more holistic, cross-agency level also has great value, because financial institutions are subject to requirements promulgated by multiple authorities (e.g., inter-agency guidance and regulations). For this reason, we greatly encourage the OCC to work together with the Federal Reserve Board and other agencies on a review of inter-agency regulations and guidance. (See Federal Reserve System, Proposed Guidance on Supervisory Expectations for Boards of Directors, 82 Fed. Reg. 37219 (Aug. 9, 2017) (discussing the Federal Reserve’s plans to work with other agencies on a review of inter-agency regulations and guidance that blur the distinction between the respective roles of the board and management).

We would welcome an opportunity to meet with OCC staff to discuss these matters in greater detail.

See also Federal Reserve Board Commercial Banking Manual, Section 5000.1, at 4 (board and committee minutes should constitute an accurate, adequate record of actions taken and should document the boards’ review of regular subjects as well as any other significant subjects discussed at a particular meeting) (emphasis added).
As noted above, Section 9.9 provides that audit results of fiduciary activities conducted pursuant to Part 9 (including significant actions taken as a result of the audit) must be noted in board minutes. We respectfully submit that this prescriptive requirement is unwarranted as it both (i) misconstrues the nature and purpose of board minutes, and (ii) inappropriately encroaches on the distinction between oversight and management, while imposing an unnecessary burden on banking institutions. Accordingly, we recommend that the board minutes-related requirements of Sections 9.9(a) (for annual audits) and 9.9(b) (for continuous audit system) be eliminated.10

More specifically, in view of the considerations set out above, elimination of the board minutes-related requirements of Section 9.9 is particularly appropriate for the following reasons:

- **First**, consistent with longstanding governance practices, board minutes are intended to reflect board discussions. They are not intended to effectively serve as or include a list of mandated information (in this case audit results). Audit results, including “significant actions taken as a result of the audit”, should not be required to be noted in the minutes unless the board discussed such results/actions during a meeting and then only in general terms or the level of detail deemed appropriate by the board (i.e., consistent with other OCC precedent stating that the board itself should address the level of detail required for minutes and records of board meetings).11

- **Second**, to promote safe and sound governance practices and to eliminate unnecessary burdens, information presented to the board—and, especially information required to be presented to the board via a legally enforceable regulation—should meet a **materiality** threshold.12 Section 9.9 requirements add to the long list of matters that boards of directors are expected to review and discuss and therefore risk inundating the board with audit results of routine or less important issues.13 Consistent with its oversight function, the board will not—absent a legal requirement to do so—necessarily discuss every audit in the board materials or every significant action taken as a result of the audit at a meeting (and, as described in the previous paragraph, even if they do, there should not be a prescriptive approach with respect to what appears in the minutes). Instead, as a matter of sound governance, the board in

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10 Corresponding changes should be made to the following Comptroller Handbooks and any other OCC guidance that cross-references Section 9.9: (i) the Comptroller’s Handbook, Internal and External Audits at page 79 (Version 1.0, December 2016) (restating the board minutes-related requirements of Section 9.9), and (ii) the Comptroller’s Handbook, Corporate and Risk Governance at page 27 (Version 1.0, July 2016) (“A bank with fiduciary powers must have an audit of fiduciary activities as well as a fiduciary audit committee . . . . The committee should note results of the audit and actions taken in the minutes of the board or the fiduciary audit committee.” (emphasis added)).

11 The OCC previously modified the regulation to provide that only all “significant actions” (instead of “all actions”) taken as a result of an audit be noted in the board minutes in order to alleviate a concern that the “all actions” could be interpreted to require a board “to note excessive detail”. 61 FR 68543, 68549 (1996). While this was a helpful change to reduce unnecessary burdens, elimination of the requirement is warranted for the reasons discussed above.

12 As noted above, Section 9.9 loosely supports a materiality threshold in part, stating that “audit results (including significant actions taken as a result of the audit)” must be included in the board minutes.

13 A list of U.S. bank regulatory related matters to be addressed by the board or board committee pursuant to statute, regulation or guidance (last updated in May 2016) is set out in Appendix A of the 2016 Role of the Board Report. Available at: https://www.theclearinghouse.org/advocacy/articles/2016/05/20160505-tch-publishes-the-role-of-the-board-of-directors-report.
conjunction with appropriate bank officials should evaluate those material results/actions that may warrant board time during a meeting taking into account various considerations such as relative board priorities. As noted in the Role of the Board Report, “care should be taken to ensure that adequate time on the board agenda is reserved for “deep dives” as new priority issues may arise and warrant the board’s focus.”

- Third, removal of the board minutes-related requirements should reduce unnecessary burden without in any way detracting from board execution of its oversight function in furtherance of safety and soundness and compliance with applicable law. Consistent with the oversight responsibilities of the board (e.g., to oversee effective identification, tracking and remediation of risk-management or compliance deficiencies), a board should remain comfortable that a process is in place to inform it, or an appropriate committee (e.g., the audit committee/fiduciary audit committee) of material audit findings, which may include thematic summaries included in materials provided to the board or a committee. This would remain true irrespective of elimination of the board minutes-related requirements of Section 9.9. Of course, any specific discussion of a particular audit should be reflected in the minutes as per longstanding and customary practice. For example, while a smaller institution may well consider each audit as worthy of board discussion, the board and management of a larger institution with a significant number of audits could reasonably determine to focus board attention and discussion on only those that are material from a risk management and compliance perspective.

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The Bank Policy Institute appreciates the opportunity to comment on this matter. If you have any questions, please contact the undersigned by phone at (646) 736-3960.

14 See Role of the Board Report at 9.

15 OCC examiners regularly review board materials and can assess whether the board has been provided audit-related materials.

With respect to matters that are reported or escalated to the board, it is important for the OCC to recognize and clarify that boards may determine whether these matters are to be addressed by the board or a board committee. Increasingly, agency guidance statements and regulations helpfully explicitly clarify that where board-level attention is warranted, a board committee, rather than the full board, may conduct the relevant review or approval. See, e.g., Comptroller’s Handbook, Corporate and Risk Governance at page 27 (“A bank with fiduciary powers must have an audit of fiduciary activities as well as a fiduciary audit committee . . . . The committee should note results of the audit and actions taken in the minutes of the board or the fiduciary audit committee.” (emphasis added)).

16 Even where the board reviews and discusses reports (e.g., relating to particular audits), there needs to be flexibility to do so in executive session with only limited (or no) minutes.
Respectfully submitted,

[Signature]

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General Counsel  
Bank Policy Institute