



Summary of Proposed Rulemaking on the Role of Supervisory Guidance October 29, 2020

Background

On September 11, 2018, a group of federal financial regulators, including the Consumer Financial Protection Bureau (CFPB or Bureau), Office of the Comptroller of the Currency, (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (collectively, the federal financial regulators), issued the Interagency Statement Clarifying the Role of Supervisory Guidance (Interagency Statement). The Interagency Statement articulated certain principles concerning the role of supervisory guidance (guidance), most significantly that guidance “does not have the force and effect of law” and therefore “does not create binding legal obligations for the public.”

Following publication of the Interagency Statement, the OCC, Board, FDIC and CFPB received a petition for a rulemaking asking that the Interagency Statement be codified. The petition further requested that the rulemaking clarify how guidance is used in connection “with matters requiring attention, matters requiring immediate attention (collectively, MRAs), and other supervisory actions[.]” as well as clarify that MRAs be issued only in connection with circumstances involving “violation of a statute, regulation, or order, or demonstrably unsafe or unsound practices[.]” In response to this petition for rulemaking, on October 29, 2020, the federal financial regulators issued a notice of [proposed rulemaking](#) to codify the Interagency Statement, with certain clarifying changes.

The Proposed Rule

The proposal includes rule text indicating that the Interagency Statement is binding on each federal regulator, with an amended version of the Interagency Statement included as an appendix to the regulatory text. The Interagency Statement, updated to reflect clarifications requested by the petition for rulemaking, describes the role of guidance and the agencies’ approach to guidance.

Specifically, the proposed rule would explain that guidance does not have the force and effect of law. Rather, guidance “outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area.” Guidance often provides examples for how institutions can comply with the law or

operate in a safe-and-sound manner. Regarding the agencies' policies and practices with respect to guidance, the proposal would clarify:

- That “the agencies intend to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance.” When used, guidance would indicate that such thresholds are exemplary.
- That “[e]xaminers will not criticize (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations) a supervised financial institution for, and agencies will not issue an enforcement action on the basis of, a ‘violation’ of or ‘non-compliance’ with supervisory guidance.”
- That, rather than “generic or ‘conclusory’ references to ‘safety and soundness’[,]” “[s]upervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the financial institution, could cause consumer harm, or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.”
- That, where appropriate, agencies will continue to seek public comment on guidance and that doing so does not alter the material’s status as guidance.
- That the agencies will reduce the issuance of multiple guidance documents and minimize instances where multiple guidance documents, covering the same topic, are issued going forward.
- That the agencies “will continue efforts to make the role of supervisory guidance clear in their communications to examiners and to supervised financial institutions and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.”

Request for Comment

The proposed rule includes several questions on guidance. First, the agencies ask whether there are circumstances where examiners should reference guidance while criticizing an institution (e.g., in supervisory communications such as MRAs, documents of resolution, etc.), as a way to provide examples of compliant or safe and sound conduct. Next, the proposed rule asks whether it is “sufficiently clear what types of agency communications constitute supervisory guidance” and, if it is not clear, how could this be clarified. Finally, the proposal asks whether additional clarifications are needed on any aspect of the proposed rule.

The comment period ends 60 days after the proposed rule is published in the Federal Register. MBA will collaborate with member committees to prepare comments responding to the agencies' proposed rule on guidance.

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If you have any questions, please feel free to contact Justin Wiseman (jwiseman@mba.org), Lucia Jacangelo (ljacangelo@mba.org), or Blake Chavis (bchavis@mba.org).