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Federal Banking Regulatory Agencies Issue Notice of Proposed Rulemaking Re: the Role of Supervisory Guidance

On October 29, the OCC, the Federal Reserve, the FDIC, the NCUA and the CFPB (collectively, the “agencies”) issued a Notice of Proposed Rulemaking (“NPR”) to clarify and make into a rule the prior Interagency Statement Clarifying the Role of Supervisory Guidance issued on September 11, 2018 (“2018 Statement”). Comments on the NPR are due within 60 days of the date the NPR is published in the Federal Register.

The NPR can be found here: https://www.fdic.gov/news/board/2020/2020-10-20-notice-sum-d-fr.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery

The 2018 Statement can be found here: <https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf>

If finalized, the proposed rule would codify the 2018 Statement’s language indicating that, unlike a law or regulation, supervisory guidance does not have the force and effect of law, and that supervisory guidance does not create binding legal obligations for the public. The proposed rule would clarify that the agencies will not formally criticize financial institutions based on “violations” of supervisory guidance. The proposal would also clarify that the 2018 Statement, as amended, is binding on the issuing agencies.

Specific Statements Regarding the Use of Supervisory Guidance

Specifically, the proposed rule would clarify and codify the following policies and practices related to supervisory guidance:

- The agencies intend to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance, with them being exemplary only and not suggestive of requirements.
- Examiners will not utilize matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations, to criticize a supervised financial institution for a “violation” of or “non-compliance” with supervisory guidance. Similarly, agencies will not issue an enforcement action on the basis of a “violation” of or “non-compliance” with supervisory guidance. However, examiners may reference supervisory guidance to provide examples of safe and sound conduct, appropriate

consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations.

- Supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could (1) impact the safety and soundness of the financial institution, (2) cause consumer harm, or (3) cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.
- The agencies may continue to seek public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law.
- The agencies will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.
- The agencies will continue efforts to make the role of supervisory guidance clear in their communications to examiners and to supervised financial institutions.

The agencies are not proposing, as part of this rulemaking, revisions to their respective supervisory practices relating to supervisory criticisms.

Request for Comments

Based on these components of the proposed rule, the NPR sets forth the following specific questions for which the agencies seek comments:

1. The proposed Statement provides that in some situations, examiners may reference (including in writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations. Should examiners reference supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations when criticizing (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, supervisory recommendations, or otherwise) a supervised financial institution? Are there specific situations where providing such examples would be appropriate, or specific situations where providing such examples would not be appropriate?
2. Is it sufficiently clear what types of agency communications constitute supervisory guidance? If not, what steps could the agencies take to clarify this?
3. Are there any additional clarifications to the 2018 Statement that would be helpful?
4. Are there other aspects of the proposal where you would like to offer comment?

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