

The Banking Agencies' Proposed Rule on Supervisory Guidance: Six Things To Know



On Tuesday, October 20, 2020, the Federal Deposit Insurance Corporation issued a [proposed rule](#) that would supersede and codify, with certain changes described below, a [2018 Interagency Statement Clarifying the Role of Supervisory Guidance](#) (the “2018 Statement”). Like the 2018 Statement, the proposed rule would be adopted on an interagency basis with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Bureau of Consumer Financial Protection (the “Agencies”). We have prepared a [blackline](#) of the changes in the proposed rule compared to the 2018 Statement.

The proposed rule would make the 2018 Statement, as amended, binding on the Agencies, and thus require the Agencies to observe the administrative law principle that supervisory guidance does not have the force and effect of law. It would also expressly prohibit the issuance of supervisory criticisms on the basis of non-compliance with supervisory guidance.

1

The proposed rule would largely codify the 2018 Statement on the role of supervisory guidance, subject to several changes.

As we described in [our blog post](#) at the time, the 2018 Statement explained that, rather than creating binding rules with the force and effect of law, supervisory guidance “outlines supervisory expectations or priorities” and/or provides examples of practices that the Agencies consider acceptable under applicable legal standards, such as safety and soundness standards. As discussed below, the proposed rule would largely codify the 2018 Statement into regulation, subject to certain adjustments. In so doing, the proposed rule would formally bind the Agencies to comply with the policies articulated in the regulation.

2

The proposed rule would expressly clarify that the Agencies will not issue a wide range of supervisory criticisms, including matters requiring attention (“MRAs”), on the basis of a “violation” of or “non-compliance” with supervisory guidance.

The proposed rule would address a potential ambiguity in the 2018 Statement, which stated that the Agencies will not “criticize institutions for a ‘violation’ of guidance,” and in the process raised questions as to the scope of examiner criticisms to which this statement applied. The proposed rule would clarify that examiners will not base a wide range of supervisory criticisms – including MRAs, matters requiring immediate attention, matters requiring board attention, documents of resolution, supervisory recommendations, and related supervisory actions – on a “violation” of or “non-compliance” with supervisory guidance. The proposed rule would note, however, that Agency examiners in some situations may reference supervisory guidance to provide examples of safe and sound conduct.

3

The proposed rule would restate and codify other aspects of the 2018 Statement.

The proposed rule would generally restate and codify, without change, four other elements of the 2018 Statement:

- *Numerical thresholds.* The Agencies will limit the use of numerical thresholds and bright-line tests in guidance (although numerical thresholds, such as an institution's asset size, will continue to be used to tailor the applicability of guidance).
- *Role of public comment.* Although the Agencies may continue to seek public comment on some guidance documents, seeking comment does not transform guidance into a rule.
- *Duplicative guidance.* The Agencies will limit the issuance of multiple guidance documents on the same topic.
- *Agency communications.* The Agencies will make further efforts to clarify the role of supervisory guidance when communicating both with examiners and supervised institutions, and also encourage supervised institutions to contact the appropriate Agency if they have questions about guidance.

4

The proposed rule would also clarify that supervisory criticisms should continue to be specific in nature, rather than make general or conclusory references to safety and soundness.

In the preamble to the proposed rule, the Agencies note that this clarification would affirm the Agencies' stated practice of only issuing supervisory criticism that is 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.

5

The scope of supervisory guidance that would be subject to the proposed rule is broad.

Similar to the 2018 Statement, the proposed rule would define supervisory guidance for purposes of the rule in an inclusive manner, encompassing interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions.

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Comments are due 60 days after the proposed rule is published in the Federal Register.

As a result, and based on typical Federal Register processing times, the comment period is likely to end in the final days of December 2020.

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