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Via Electronic Submission

January 4, 2021

Chief Counsel's Office,
Attention: Comment Processing
Comptroller of the Currency,
400 7th Street SW, Suite 3E-218,
Washington, DC 20219

Ann Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, D.C. 20551

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

Re: Role of Supervisory Guidance (Docket ID OCC-2020-0005; Federal Reserve Docket No. R-1725 and RIN No. 7100-AF96; FDIC RIN 3064-AF32; and Docket No. CFPB-2020-0033 and RIN 3170-AB02)

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")¹ appreciates this opportunity to respond to the Comptroller of the Currency (OCC), the Federal Reserve Board (Board), the

¹The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, nearly \$4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and

Federal Deposit Insurance Corporation (FDIC) and the Bureau of Consumer Financial Protection (Bureau) (collectively, the “Agencies”) on a proposed rule that would codify the Interagency Statement Clarifying the Role of Supervisory Guidance issued by the Agencies on September 11, 2018 (2018 Statement). The 2018 Statement would be “codified” by adding it as an appendix to the proposed rule. By codifying the 2018 Statement, the proposed rule is intended to confirm that the Agencies will continue to follow and respect the limits of administrative law in carrying out their supervisory responsibilities.

Background

The 2018 Statement restates existing law and the Agencies’ understanding that supervisory guidance does not create binding, enforceable legal obligations. The 2018 Statement reaffirms that the Agencies do not issue supervisory criticisms for “violations” of supervisory guidance and describes the appropriate use of supervisory guidance by the Agencies. It also states that the Agencies recognize the important distinction between issuances that serve to implement acts of Congress (i.e., regulations) and non-binding supervisory guidance, and that the latter is issued by an agency to “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power” and does not create binding legal obligations.

The 2018 Statement was issued following determinations by the Government Accountability Office (GAO) that the Leveraged Lending Guidance issued by the Board, the FDIC and the OCC in 2013 were “rules” for purposes of the Congressional Review Act and, as such, could not take effect until Congress had reviewed them. It also followed a petition (the “Petition”) that was submitted by two trade associations—the Bank Policy Institute and the American Bankers Association—supporting the 2018 Statement but asking that it be part of a formal rulemaking rather than a statement.

ICBA Position

ICBA commends the Agencies for proposing to codify the 2018 Statement. If adopted, it would constitute a formal regulation for administrative law purposes that would bind each of the Agencies. More importantly, it could not be amended or withdrawn without undertaking a new rulemaking process that complied with administrative law requirements.

The proposed rule also clarifies and confirms that supervisory guidance does not have the force and effect of law and should only be used to communicate supervisory expectations. It also states that the term “criticize” includes the issuance of Matters Requiring Attention or MRAs and

neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America.

ICBA is dedicated *exclusively* to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

other supervisory criticisms, including those communicated through matters requiring board attention, documents of resolution, and supervisory recommendations. As such, the new rule reiterates that examiners will not base supervisory criticisms on a violation of or noncompliance with “supervisory guidance.” The Agencies reiterate that they will not issue an enforcement action on the basis of a “violation” of or “non-compliance” with supervisory guidance.

While ICBA believes the codification of the 2018 Statement is an important way for the Agencies to adopt a uniform policy with regard to supervisory guidance, ICBA is still concerned with the subject of supervisory criticisms and how examiners will deal with MRAs. In the proposal, the Agencies appear to reject the request in the Petition that all MRAs as well as memoranda of understanding, examination downgrades, and any other formal examination mandate or sanction be based only on a violation of a statute, regulation or order. Acknowledging that each Agency has different supervisory processes, the Agencies admit that they are not proposing, as part of the rulemaking, revisions to their respective supervisory practices relating to supervisory criticisms.

ICBA believes that the Agencies should further address supervisory processes relating to supervisory criticisms including how they define “supervisory guidance” and the consequences of violations of “supervisory compliance.” The proposed rule acknowledges that supervisory guidance may be issued in a variety of forms including interagency statements, advisories, bulletins, policy statements and questions and answers. However, bankers are often unclear what constitutes “supervisory guidance” and when it can be used as a basis for supervisory criticisms and enforcement actions. ICBA recommends that the Agencies adopt a more uniform supervisory process when it comes to violations of supervisory guidance and define the differences between supervisory guidance and “interpretations.” Community banks still complain that minor violations of safety and soundness are often considered violations of “supervisory guidance” and result in MRAs and even sanctions.

Community banks are also concerned that certain restrictions or practices that apply to the largest banks will come down to their level through the examination process in the form of encouraged or expected “best practices.” Examiners should not apply large bank practices to community banks that have a different, less complex and more conservative business model. Examiners also should not criticize community banks in their final written examination reports for not complying with “best practices” unless the criticism involves a violation of bank policy or regulation. Industry “best practices” should be transparent enough and sufficiently known throughout the industry before they are cited in an examination report.

Conclusion

ICBA commends the Agencies for codifying their 2018 Statement and clarifying that MRAs will not be based on a violation of or noncompliance with “supervisory guidance.” However, ICBA recommends that the proposal go further and define “supervisory guidance” and clarify the

consequences of violations of “supervisory guidance.” Furthermore, community banks should not be criticized for violating “best practices.”

If you have any questions or would like additional information, please do not hesitate to contact me at (202) 821-4431 or Chris.Cole@icba.org.

Sincerely,
/s/ Christopher Cole

Christopher Cole,
Executive Vice President and Senior Regulatory Counsel
Independent Community Bankers of America