

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 4**

**[Docket No. OCC-2020-0005]**

**RIN 1557-AE80**

**FEDERAL RESERVE SYSTEM**

**12 CFR Part 262**

**[Docket No. R-XXXX]**

**RIN 7100-AF[X]**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 302**

**RIN 3064-AF32**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 791**

**[Docket No. NCUA-2020-00XX]**

**RIN 3133-AF28**

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Part 1074**

**[Docket No. CFPB-2020-0033]**

**RIN 3710-AB02**

## **Role of Supervisory Guidance**

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); National Credit Union Administration (NCUA); and Bureau of Consumer Financial Protection (Bureau).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The OCC, Board, FDIC, NCUA, and Bureau (collectively, the agencies) are inviting comment 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). 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. The 2018 Statement reiterated well-established law by stating that, unlike a law or regulation, supervisory guidance does not have the force and effect of law. As such, supervisory guidance does not create binding legal obligations for the public. The proposal would also clarify that the 2018 Statement, as amended, is binding on the agencies.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]

### **ADDRESSES:**

**OCC:** You may submit comments to the OCC by any of the methods set forth below.

Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Role of Supervisory Guidance” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- Federal eRulemaking Portal—“Regulations.gov”: Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC-2020-0005” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments.

- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.
- E-mail: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).
- Mail: Chief Counsel’s Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street, SW., suite 3E-218, Washington, DC 20219.
- Hand Delivery/Courier: 400 7th Street, SW., suite 3E-218, Washington, DC 20219.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC-2020-0005” in your comment.

In general, the OCC will enter all comments received into the docket and publish the comments on the Regulations.gov website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by the following method:

- Viewing Comments Electronically: Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC 2020-0005” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

**Board:** You may submit comments, identified by Docket No. R-[ ] and RIN No. **7100-AF[X]**,

by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- *Email:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number in the subject line of the message.
- *Fax:* (202) 452-3819 or (202) 452-3102.
- *Mail:* Ann Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.
- All public comments will be made available on the Board's web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue, NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

**FDIC:**

You may submit comments on the notice of proposed rulemaking using any of the following methods:

- *Agency Web Site:* <https://www.fdic.gov/regulations/laws/federal>. Follow the instructions for submitting comments on the agency website.
- *Email:* [comments@fdic.gov](mailto:comments@fdic.gov). Include RIN 3064-AF32 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17<sup>th</sup> Street, N.W., Washington, D.C. 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550

17<sup>th</sup> Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

- *Public Inspection:* All comments received, including any personal information provided, will be posted generally without change to <https://www.fdic.gov/regulations/laws/federal>.

**NCUA:** You may submit comments to the NCUA by any of the methods set forth below.

Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Role of Supervisory Guidance” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- Federal eRulemaking Portal—“Regulations.gov”: Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID NCUA-[2020-XXXX]” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.
- Mail: Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA. 22314.
- Fax: (703) 518-6319. Include “[Your name]—Comments on Proposed Rule: Role of Supervisory Guidance” with the transmittal.
- Hand Delivery/Courier: Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314. You must include “NCUA” as the agency name and “Docket ID NCUA-[2020-XXXX]” in your comment.

In general, the NCUA will enter all comments received into the docket and publish the comments on the Regulations.gov website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your

comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically:** Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID NCUA-[2020-XXXX]” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. The docket may be viewed after the close of the comment period in the same manner as during the comment period.
- Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA’s law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518-6540 or e-mailing [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**Bureau:** You may submit comments, identified by Docket No. CFPB-2020-0033 or RIN 3170-AB02, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* [2020-NPRM-SupervisoryGuidance@cfpb.gov](mailto:2020-NPRM-SupervisoryGuidance@cfpb.gov). Include Docket No. CFPB-2020-0033 or RIN 3170-AB02 in the subject line of the email.
- *Mail/Hand Delivery /Courier:* Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552. Please note that due to circumstances

associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by hand delivery, mail, or courier.

*Instructions:* The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay and in light of difficulties associated with mail and hand deliveries during the COVID-19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-9169.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary or sensitive personal information, such as account numbers, Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:**

**OCC:** Mitchell Plave, Special Counsel, (202) 649-5490; or Henry Barkhausen, Counsel, Chief Counsel's Office (202) 649-5490; or Steven Key, Associate Deputy Comptroller for Bank Supervision Policy, (202) 649-6770, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY users may contact (202) 649-5597.

**Board:** Laurie Schaffer, Deputy General Counsel, (202) 452-2272, Benjamin McDonough, Associate General Counsel, (202) 452-2036, Steve Bowne, Senior Counsel, (202) 452-3900, Christopher Callanan, Senior Counsel, (202) 452-3594, or Kelley O'Mara, Counsel, (202) 973-

7497, Legal Division; Anna Lee Hewko, Associate Director, (202) 530-6260; David Palmer, Lead Financial Institution and Policy Analyst, (202) 452-2904, or Jinai Holmes, Lead Financial Institution and Policy Analyst, (202) 452-2834, Division of Supervision and Regulation; Suzanne Killian, Senior Associate Director, (202) 452-2090, Jeremy Hochberg, Managing Counsel, (202) 452-6496, or Dana Miller, Senior Counsel, (202) 452-2751, Division of Consumer and Community Affairs; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD), (202) 263-4869.

**FDIC**: William Piervincenzi, Supervisory Counsel, (202) 898-6957, Kathryn Marks, Counsel, (202) 898-3896, Jennifer M. Jones, Counsel, (202) 898-6768, Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (800) 925-4618.

**NCUA**: Ian Marenga, Associate General Counsel, or Marvin Shaw, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6540. National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314

**Bureau**: Bradley Lipton or Christopher Shelton, Senior Counsels, Legal Division, (202) 435-7700. Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552. If you require this document in an alternative electronic format, please contact *CFPB\_Accessibility@cfpb.gov*.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The OCC, Board, FDIC, NCUA, and Bureau (collectively, the agencies) recognize the important distinction between issuances that serve to implement acts of Congress (known as



“regulations” or legislative rules”) and non-binding supervisory guidance documents.<sup>1</sup> Regulations create binding legal obligations. Supervisory guidance 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.<sup>2</sup>

The agencies issued the Interagency Statement Clarifying the Role of Supervisory Guidance on September 11, 2018 (2018 Statement) to explain the role of supervisory guidance and describe the agencies’ approach to supervisory guidance.<sup>3</sup> As noted in the 2018 Statement, the agencies issue various types of supervisory guidance to their respective supervised institutions, including, but not limited to, interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions.<sup>4</sup> Supervisory guidance outlines the agencies’ supervisory

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<sup>1</sup> Regulations are commonly referred to as legislative rules because regulations have the “force and effect of law.” *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 96 (2015) (citations omitted).

<sup>2</sup> See *Chrysler v. Brown*, 441 U.S. 281, 302 (1979) (quoting the Attorney General’s Manual on the Administrative Procedure Act at 30 n.3 (1947) (Attorney General’s Manual) and discussing the distinctions between regulations and general statements of policy, of which supervisory guidance is one form).

<sup>3</sup> See <https://www.federalreserve.gov/supervisionreg/srletters/sr1805a1.pdf>; <https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf>.

<sup>4</sup> These types of materials are not always supervisory guidance. They may, for example, be interpretive rules addressing regulatory requirements. The 2018 Statement does not address interpretive rules, and interpretive rules are outside the scope of this rulemaking, because interpretive rules are distinct from general statements of policy (*i.e.* guidance) under the APA and its jurisprudence. Interpretive rules are “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” *Mortgage Bankers Ass’n*, 575 U.S. at 97 (citing *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). While the APA does not define the term “interpretive rule,” the APA refers to general statements of policy and interpretive rules separately in addressing notice and comment requirements. See 5 U.S.C. 553(b)(A) (providing that notice and comment requirements do not apply to “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice”).

The Attorney General’s Manual also defines policy statements and interpretive rules separately. The Manual defines interpretive rules as rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers, whereas, as outlined earlier, general statements of policy are defined as advising the public of how an agency may exercise its discretionary powers. See Manual at 30 n.3; see also, *e.g.*, *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (outlining tests in the D.C. Circuit for assessing whether an agency issuance is an interpretive rule).

Questions concerning the status of interpretive rules are case-specific and have engendered debate among courts and administrative law commentators. See, *e.g.*, R. Levin, *Rulemaking and the Guidance Exemption*,

expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that mitigate risks, or that the agencies generally consider to be consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers.<sup>5</sup> The agencies noted in the 2018 Statement that supervised institutions at times request supervisory guidance and that guidance is important to provide clarity to these institutions, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.<sup>6</sup>

The 2018 Statement restates existing law and reaffirms 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. In the 2018 Statement, the agencies also expressed their intention to (1) limit the use of numerical thresholds in guidance; (2) reduce the issuance of multiple supervisory guidance on the same topic; (3) continue

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70 Admin. L. Rev. 263 (2018) (discussing the doctrinal differences concerning the status of interpretive rules under the APA); *see also* ACUS, Recommendation 2019-1, *Agency Guidance Through Interpretive Rules* (Adopted June 13, 2019), available at <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules> (discussing the range of opinions concerning the "binding" nature of interpretive rules). For these reasons, the 2018 Statement and this proposed rule do not address interpretive rules.

<sup>5</sup> While policy statements offer guidance to the public on the agencies' approach to supervision under statutes and regulations and safe and sound practices, the issuance of guidance is discretionary and is not a prerequisite to an agency's exercise of its statutory and regulatory authorities. This point reflects the fact that statutes and legislative rules, not statements of policy, set legal requirements.

<sup>6</sup> The Administrative Conference of the United States (ACUS) has recognized the important role of guidance documents and has stated that guidance can "make agency decision-making more predictable and uniform and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk, while promoting compliance with the law." ACUS, Recommendation 2017-5, *Agency Guidance Through Policy Statements* at 2 (adopted December 14, 2017), available at <https://www.acus.gov/recommendation/agency-guidance-through-policy-statements>. ACUS also suggests that "policy statements are generally better [than legislative rules] for dealing with conditions of uncertainty and often for making agency policy accessible." *Id.* ACUS was chartered by Congress and charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure. *See* <https://www.acus.gov/acus>.

efforts to make the role of supervisory guidance clear in communications to examiners and supervised institutions; and (4) encourage supervised institutions to discuss their concerns about supervisory guidance with their appropriate agency contact.

On November 5, 2018, the OCC, Board, FDIC, and Bureau each received a petition for a rulemaking (Petition), as permitted under the Administrative Procedure Act (APA),<sup>7</sup> requesting that the agencies codify the 2018 Statement.<sup>8</sup> The Petition argues that a rule on guidance is necessary to bind future agency leadership and staff to the 2018 Statement’s terms. The Petition also suggests there are ambiguities in the 2018 Statement concerning how supervisory guidance is used in connection with matters requiring attention, matters requiring immediate attention (collectively, MRAs), and other supervisory actions that should be clarified through a rulemaking. Finally, the Petition calls for the rulemaking to implement changes in the agencies’ standards for issuing MRAs. Specifically, the Petition requests that the agencies limit the role of MRAs to addressing circumstances in which there is a violation of a statute, regulation, or order, or demonstrably unsafe or unsound practices.

## **II. The Proposed Rule**

The 2018 Statement’s description of the appropriate parameters concerning the use of supervisory guidance continues to reflect accurately the agencies’ policies concerning the use of supervisory guidance. The proposed rule, therefore, would codify the 2018 Statement, with clarifying changes, as an appendix to the proposed rule text (proposed Statement), and would supersede the 2018 Statement. The rule text would provide that the proposed Statement is binding on each respective agency.

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<sup>7</sup> 5 U.S.C. 553(e).

<sup>8</sup> See Petition for Rulemaking on the Role of Supervisory Guidance, available at [https://bpi.com/wp-content/uploads/2018/11/BPI\\_PFR\\_on\\_Role\\_of\\_Supervisory\\_Guidance\\_Federal\\_Reserve.pdf](https://bpi.com/wp-content/uploads/2018/11/BPI_PFR_on_Role_of_Supervisory_Guidance_Federal_Reserve.pdf). The Petitioners did not submit a petition to the NCUA, which has no supervisory authority over the financial institutions that are represented by Petitioners. The NCUA has chosen to join this rulemaking on its own initiative. References in the preamble to “agencies” therefore include the NCUA.

### *Clarification of the 2018 Statement*

The Petition expressed support for the 2018 Statement and acknowledged that it addresses many issues of concern for the Petitioners relating to the use of supervisory guidance. The Petition expressed concern, however, that the 2018 Statement’s reference to not basing “criticisms” on violations of supervisory guidance has led to confusion about whether MRAs are covered by the 2018 Statement. Accordingly, the agencies are clarifying in the proposed Statement that the term “criticize” includes the issuance of MRAs and other supervisory criticisms, including those communicated through matters requiring board attention, documents of resolution, and supervisory recommendations (collectively, supervisory criticisms).<sup>9</sup> As such, the agencies reiterate that examiners will not base supervisory criticisms on a “violation” of or “non-compliance with” supervisory guidance.<sup>10</sup> The agencies note 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. The agencies also reiterate that they will not issue an enforcement action on the basis of a “violation” of or “non-compliance” with supervisory guidance. The proposed Statement reflects these clarifications.<sup>11</sup>

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<sup>9</sup> The agencies use different terms to refer to supervisory actions that are similar to MRAs and Matters Requiring Immediate Attention (MRIAs), including matters requiring board attention, documents of resolution, and supervisory recommendations.

<sup>10</sup> For the sake of clarification, one source of law among many that can serve as a basis for a supervisory criticism is the *Interagency Guidelines Establishing Standards for Safety and Soundness*, see 12 CFR part 30, Appendix A and 12 CFR part. 208, Appendix D-1. These Interagency Guidelines were issued using notice and comment and pursuant to express statutory authority in 12 U.S.C. 1831p-1(d)(1) to adopt safety and soundness standards either by “regulation or guideline.”

<sup>11</sup> The 2018 Statement contains the following sentence:

Examiners will not criticize a supervised financial institution for a “violation” of supervisory guidance.

2018 Statement at 2. As revised in the proposed Statement, this sentence reads as follows:

The Petition requests further that these supervisory criticisms should not include “generic” or “conclusory” references to safety and soundness. The agencies agree that supervisory 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. Accordingly, the agencies have included language reflecting this practice in the proposed Statement.

The Petition also suggests that MRAs, as well as memoranda of understanding, examination downgrades, and any other formal examination mandate or sanction, should be based only on a violation of a statute, regulations, or order, including a “demonstrably unsafe or unsound practice.”<sup>12</sup> The agencies’ examiners all take steps to identify deficient practices before they rise to violations of law or regulation or before they constitute unsafe or unsound banking practices. The agencies continue to believe that early identification of deficient practices serves the interest of the public and of supervised institutions. Doing so protects the safety and soundness of banks,

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Examiners will not criticize (*including 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.

Proposed Statement (emphasis added). As discussed *infra* in footnote [18], the proposed Statement also removes the sentences in the 2018 Statement that referred to “citation,” which the Petition suggested had been confusing. These sentences were also removed to clarify that the focus of the proposed Statement relates to the use of guidance, not the standards for MRAs.

<sup>12</sup> The Petition asserts that the federal banking agencies rely on 12 U.S.C. 1818(b)(1) when issuing MRAs based on safety-and-soundness matters. Through statutory examination and reporting authorities, Congress has conferred upon the agencies the authority to exercise visitorial powers with respect to supervised institutions. The Supreme Court has indicated support for a broad reading of the agencies’ visitorial powers. *See, e.g., Cuomo v. Clearing House Assn L.L.C.*, 557 U.S. 519 (2009); *United States v. Gaubert*, 499 U.S. 315 (1991); and *United States v. Philadelphia Nat. Bank*, 374 U.S. 321 (1963). The visitorial powers facilitate early identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound banking practice, or breach of fiduciary duty under 12 U.S.C. 1818.

promotes consumer protection, and reduces the costs and risk of deterioration of financial condition from deficient practices resulting in violations of laws or regulations, unsafe or unsound conditions, or unsafe or unsound banking practices. Additionally, the agencies have different supervisory processes, including for issuing supervisory criticisms. For these reasons, the agencies are not proposing, as part of this rulemaking, revisions to their respective supervisory practices relating to supervisory criticisms.

The agencies also note that the 2018 Statement was intended to focus on the appropriate use of supervisory guidance in the supervisory process, rather than the standards for supervisory criticisms. To address any confusion concerning the scope of the 2018 Statement, the agencies have removed two sentences from the 2018 Statement concerning grounds for “citations” and the handling of deficiencies that do not constitute violations of law.<sup>13</sup>

### **III. Request for Comment**

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

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<sup>13</sup> The following sentences from the 2018 Statement are not present in the proposed Statement:

Rather, any citations will be for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions. During examinations and other supervisory activities, examiners may identify unsafe or unsound practices or other deficiencies in risk management, including compliance risk management, or other areas that do not constitute violations of law or regulation.

2018 Statement at 2. The agencies do not intend these deletions to indicate a change in supervisory policy.

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?

#### **IV. Administrative Law Matters**

##### *A. Solicitation of comments and use of plain language*

Section 722 of the Gramm-Leach-Bliley Act<sup>14</sup> requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies have sought to present the proposed rule in a simple and straightforward manner and invite comment on the use of plain language. For example:

- Have the agencies organized the material to suit your needs? If not, how could they present the proposed rule more clearly?
- Are the requirements in the proposed rule clearly stated? If not, how could the proposed rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would achieve that?

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<sup>14</sup> Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (1999), 12 U.S.C. 4809.

- Would more, but shorter, sections be better? If so, which sections should be changed?
- What other changes can the agencies incorporate to make the regulation easier to understand?

### *B. Paperwork Reduction Act analysis*

The Paperwork Reduction Act of 1995<sup>15</sup> (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The agencies have reviewed this notice of proposed rulemaking and determined that it does not contain any information collection requirements subject to the PRA. Accordingly, no submissions to OMB will be made with respect to this proposed rule.

### *C. Regulatory Flexibility Act analysis*

*OCC:* In general, the Regulatory Flexibility Act<sup>16</sup> (RFA) requires that in connection with a rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities. Under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a brief explanatory statement in the **Federal Register** along with its rule.

The OCC currently supervises approximately 782 small entities.<sup>17</sup> Because the proposed rule would apply to all OCC-supervised depository institutions, the proposed rule would affect a

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<sup>15</sup> 44 U.S.C. 3501–3521.

<sup>16</sup> 5 U.S.C. 601, *et seq.*

<sup>17</sup> We base our estimate of the number of small entities on the SBA’s size thresholds for commercial banks and savings institutions, and trust companies, which are \$600 million and \$41.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR 121.103(a), we count the assets of affiliated financial institutions when determining if we should classify an OCC-supervised institution as a small entity. We use December 31, 2018, to determine size because a “financial institution's assets are determined



substantial number of OCC-supervised entities. While the proposed rule does clarify that the Statement is binding on the agencies, it would not impose any new mandates on the banking industry. As such, we estimate that the costs, if any, associated with the proposal would be negligible. For these reasons, the OCC certifies that the proposed rule will not have a significant economic impact significant economic impact on a substantial number of small entities.

*Board:* The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.<sup>18</sup> This proposed rule would not impose any obligations on regulated entities, and regulated entities would not need to take any action in response to this proposed rule. The Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.<sup>19</sup> The Board requests comments on this analysis and any relevant data.

*FDIC:* The Regulatory Flexibility Act (RFA) generally requires that, in connection with a proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities.<sup>20</sup> However, a regulatory flexibility analysis is not required if the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets of less than or equal to \$600 million that are independently owned and operated or

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by averaging the assets reported on its four quarterly financial statements for the preceding year.” See footnote 8 of the U.S. Small Business Administration’s *Table of Size Standards*.

<sup>18</sup> 5 U.S.C. 601-612.

<sup>19</sup> 5 U.S.C. 605(b).

<sup>20</sup> 5 U.S.C. 601 et seq.

owned by a holding company with less than or equal to \$600 million in total assets.<sup>21</sup> Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions.

As of June 30, 2020, the FDIC supervised 3,270 institutions, of which 2,492 were considered small for purposes of RFA.<sup>22</sup> This proposed rule, if adopted, would not impose any obligations on FDIC-supervised entities, and FDIC-supervised entities would not need to take any action in response to this proposed rule. For these reasons, and under section 605(b) of the RFA, the FDIC certifies that the proposed rule will not have a significant economic impact on a substantial number of small FDIC-supervised institutions. The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this proposed rule have any significant effects on small entities that the FDIC has not identified?

*NCUA*: The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined by the NCUA for purposes of the RFA to include federally insured credit unions with assets less than

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<sup>21</sup> The SBA defines a small banking organization as having \$600 million or less in assets, where an organization's "assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

\$100 million)<sup>23</sup> and publishes its certification and a short, explanatory statement in the Federal Register together with the rule. This proposed rule would not impose any obligations on federally insured credit unions, and regulated entities would not need to take any action in response to this proposed rule. The NCUA certifies that the rule will not have a significant economic impact on a substantial number of small entities. The NCUA requests comments on this analysis and any relevant data.

*Bureau:* The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.<sup>24</sup> The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.<sup>25</sup> This proposed rule would not impose any obligations on regulated entities, and regulated entities would not need to take any action in response to this proposed rule. Accordingly, the Director of the Bureau certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel is required for this proposed rule. The Bureau requests comments on this analysis and any relevant data.

#### *E. OCC Unfunded Mandates Reform Act of 1995 Determination*

The OCC analyzed the proposed rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA)<sup>26</sup>. Under this analysis, the OCC considered whether the proposed

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<sup>23</sup> NCUA Interpretive Ruling and Policy Statement (IRPS) 87-2, as amended by IRPS 03-2 and 15-1, available at <https://www.ncua.gov/files/publications/irps/IRPS1987-2.pdf>.

<sup>24</sup> 5 U.S.C. 601-612.

<sup>25</sup> 5 U.S.C. 609.

<sup>26</sup> 2 U.S.C. 1532.

rule includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$157 million or more in any one year (adjusted for inflation). The OCC has determined that the proposal, if implemented, would not impose new mandates on the banking industry. Therefore, we conclude that if implemented, the proposal would not result in an expenditure of \$157 million or more annually by State, local, and Tribal governments, or by the private sector.

*F. Riegle Community Development and Regulatory Improvement Act of 1994*

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>27</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.<sup>28</sup> Each Federal banking agency has determined that the proposed rule would not impose additional reporting, disclosure, or other requirements on IDIs; therefore, the requirements of the RCDRIA do not apply. However, the agencies invite comments that will further inform their consideration of RCDRIA.

*G. Bureau Matters*

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<sup>27</sup> 12 U.S.C. 4802(a).

<sup>28</sup> 12 U.S.C. 4802.

The Bureau issues its portion of the proposed rule based on the Bureau’s authorities under sections 1012(a)(1) and 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>29</sup> Section 1012(a)(1) authorizes the Bureau to establish rules for conducting the general business of the Bureau, in a manner not inconsistent with title X of the Dodd-Frank Act.<sup>30</sup> Section 1022(b)(1) authorizes the Bureau to issue rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws.<sup>31</sup> The Bureau preliminarily believes that the additional clarity regarding the status of supervisory guidance provided by the proposed rule will enable the Bureau to carry out its supervisory responsibilities under Federal consumer financial law more effectively.

Consistent with section 1022(b)(2)(B) of the Dodd-Frank Act, in developing the proposed rule, the Bureau has consulted, or offered to consult with, the prudential regulators and the Federal Trade Commission, including regarding consistency with any prudential, market, or systemic objectives administered by those agencies.<sup>32</sup>

Additionally, consistent with section 1022(b)(2)(A) of the Dodd-Frank Act, the Bureau has considered the potential benefits, costs, and impacts of the Bureau’s portion of the proposed rule.<sup>33</sup>

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<sup>29</sup> Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>30</sup> 12 U.S.C. 5492(a)(1).

<sup>31</sup> 12 U.S.C. 5512(b)(1).

<sup>32</sup> 12 U.S.C. 5512(b)(2)(B). The prudential regulators are the OCC, Board, FDIC, and NCUA. *See* 12 U.S.C. 5481(24) (defining “prudential regulators”).

<sup>33</sup> Section 1022(b)(2)(A) of the Dodd-Frank Act, 12 U.S.C. 5512(b)(2)(A), requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact of the proposed rule on insured depository institutions and credit unions with no more than \$10 billion in total assets as described in section 1026 of the Dodd-Frank Act, 12 U.S.C. 5516; and the impact on consumers in rural areas.

The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts.

*Institutions Affected by the Proposed Rule.* The Bureau's portion of the proposed rule applies to supervisory guidance issued by the Bureau, which is addressed to those institutions that are examined by the Bureau. Accordingly, the Bureau's portion of the proposed rule may affect those nondepository institutions that are subject to the Bureau's examination authority under section 1024 of the Dodd-Frank Act.<sup>34</sup> It may also affect those insured depository institutions and insured credit unions that have more than \$10 billion in total assets, together with their affiliates, which are subject to the Bureau's examination authority under section 1025 of the Dodd-Frank Act.<sup>35</sup> The Bureau's portion of the proposed rule may additionally affect service providers that are subject to the Bureau's examination authority.<sup>36</sup>

*Potential Benefits and Costs to Consumers and Covered Persons.* The proposed rule would reiterate the Interagency Statement Clarifying the Role of Supervisory Guidance, which is already the policy of the Bureau, and make it binding on the Bureau. The Bureau evaluates its portion of the proposed rule against a baseline in which no such rule is adopted, and the Bureau is therefore less definitively bound to implement the Interagency Statement in all supervisory activities. Accordingly, the Bureau's portion of the proposed rule provides the relevant institutions with additional assurance that the Bureau's implementation of current and future supervisory guidance will follow the Interagency Statement.

The proposed rule should provide the relevant institutions with greater certainty about legal obligations that are addressed in supervisory guidance. This in turn may reduce compliance costs. It is not feasible, however, to quantify or monetize this benefit. The Bureau can only speculate on

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<sup>34</sup> 12 U.S.C. 5514.

<sup>35</sup> 12 U.S.C. 5515.

<sup>36</sup> 12 U.S.C. 5514(e), 5515(d), 5516(e).

the greater certainty about legal obligations and the reduction in compliance costs if the rule is adopted as proposed. Further, the benefit from the greater certainty about legal obligations pertains to future as well as current supervisory guidance. The Bureau can only speculate on the frequency of future supervisory guidance. Supervisory guidance is issued from time to time as the need arises, and the Bureau cannot forecast the volume and nature of future supervisory guidance with sufficient precision to quantify or monetize this benefit.

The Bureau's portion of the proposed rule may also indirectly benefit those consumers that are customers of the relevant institutions, if reduced compliance costs translate into better terms or availability of consumer financial products and services. For the reasons given above, this benefit cannot be quantified or monetized.

Finally, the Bureau's portion of the proposed rule does not impose any new obligations on institutions. Thus, the proposed rule should have no costs for institutions. The effects of the rule, as described above, impose no clear costs on any consumers.

*Impact on Depository Institutions and Credit Unions With No More Than \$10 Billion in Assets.* Under section 1026 of the Dodd-Frank Act, the Bureau has only limited examination authority with respect to those insured depository institutions and insured credit unions that have no more than \$10 billion in total assets,<sup>37</sup> and so the Bureau does not normally address supervisory guidance to these institutions. Accordingly, the Bureau does not expect there to be any appreciable impact on these institutions from the Bureau's portion of the proposed rule.

*Impact on Access to Credit.* The Bureau does not expect the Bureau's portion of the proposed rule to affect consumers' access to credit, except to the extent that reduced compliance costs and additional assurance, relative to the baseline, that the Bureau will follow the Interagency Statement in the future might indirectly make some credit more available, as discussed above.

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<sup>37</sup> 12 U.S.C. 5516.

*Impact on Consumers in Rural Areas.* The Bureau does not believe that the Bureau's portion of the proposed rule would have any unique impact on consumers in rural areas, and so the impact on these consumers should be similar to consumers generally.

## **List of Subjects**

### **12 CFR Part 4**

Administrative practice and procedure, Freedom of Information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

### **12 CFR 262**

Administrative practice and procedure, Banks, banking, Federal Reserve System. **12 CFR**

### **Part 302**

Use of supervisory guidance.

### **12 CFR Part 791**

Administrative practice and procedure, Sunshine Act.

### **12 CFR Part 1074**

Administrative practice and procedure.

## **Department of the Treasury**

### **Office of the Comptroller of the Currency**

#### **12 CFR Chapter I**

#### **Authority and Issuance**

For the reasons stated in the Supplementary Information, chapter I of title 12 of the Code of Federal Regulations is proposed to be amended as follows:



**PART 4 - ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS**

1. The authority citation for part 4 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552; 12 U.S.C. 1, 93a, 161, 481, 482, 484(a), 1442, 1462a, 1463, 1464 1817(a), 1818, 1820, 1821, 1831m, 1831p-1, 1831o, 1833e, 1867, 1951 et seq., 2601 et seq., 2801 et seq., 2901 et seq., 3101 et seq., 3401 et seq., 5321, 5412, 5414; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510; E.O. 12600 (3 CFR, 1987 Comp., p. 235).

2. Subpart F is added to part 4 to read as follows:

**Subpart F—Use of Supervisory Guidance**

Sec.

4.81 Purpose.

4.82 Implementation of the Interagency Statement.

4.83 Rule of construction.

**APPENDIX A TO SUBPART F—INTERAGENCY STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE**

**§ 4.81. Purpose.**

The OCC issues regulations and guidance as part of its supervisory function. This subpart reiterates the distinctions between regulations and guidance, as stated in the Interagency Statement Clarifying the Role of Supervisory Guidance (Appendix A) (Interagency Statement).

**§ 4.82 Implementation of the Interagency Statement.**

The Interagency Statement describes the official policy of the OCC with respect to the use of supervisory guidance in the supervisory process. The Interagency Statement is binding on the OCC.

**§ 4.83. Rule of construction.**

This subpart does not alter the legal status of guidelines authorized by statute, including but not limited to, 12 U.S.C. 1831p-1, to create binding legal obligations.

**APPENDIX A TO SUBPART F—INTERAGENCY STATEMENT CLARIFYING THE  
ROLE OF SUPERVISORY GUIDANCE**

**Interagency Statement Clarifying the Role of Supervisory Guidance**

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the “prudential agencies”) are responsible for promoting safety and soundness and effective consumer protection at supervised institutions. The Bureau of Consumer Financial Protection (“Bureau,” and, with the prudential agencies, the “agencies”) is generally responsible for regulating the offering and provision of consumer financial products or services under the federal consumer financial laws. The agencies are issuing this statement to explain the role of supervisory guidance and to describe the agencies’ approach to supervisory guidance.

***Difference between supervisory guidance and laws or regulations***

The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect

of law.<sup>38</sup> Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

### ***Ongoing agency efforts to clarify the role of supervisory guidance***

The agencies are clarifying 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. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners 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. In some situations, examiners may reference (including in

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<sup>38</sup> Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.

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.

- Supervisory 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.
- The agencies also have at times sought, and 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 comment process helps the agencies to improve their understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.
- 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 and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

## **Board of Governors of the Federal Reserve System**

### **12 CFR Chapter II**

#### **Authority and Issuance**

For the reasons set forth in the preamble, the Board of Governors of the Federal Reserve System revises part 262 to 12 CFR chapter II as follows:

1. The authority citation for part 262 is amended to read as follows:

AUTHORITY: 5. U.S.C. 552; 12 U.S.C. 248, 321, 325, 326, 483, 602, 611a, 625, 1467a, 1828(c), 1842, 1844, 1850a, 1867, 3105, 3106, 3108, 5361, 5368, 5467, and 5469.

2. A new section 262.7 is added to read as follows:

**§ 262.7 Use of Supervisory Guidance.**

- (a) *Purpose.* The Board issues regulations and guidance as part of its supervisory function.

This subpart reiterates the distinctions between regulations and guidance, as stated in the Interagency Statement Clarifying the Role of Supervisory Guidance (Appendix A) (Interagency Statement).

- (b) *Implementation of the Interagency Statement.* The Interagency Statement describes the official policy of the Board with respect to the use of supervisory guidance in the supervisory process. The Interagency Statement is binding on the Board.

- (c) *Rule of construction.* This subpart does not alter the legal status of guidelines authorized by statute, including but not limited to, 12 U.S.C. 1831p-1, to create binding legal obligations.

**APPENDIX A TO Part 262—INTERAGENCY STATEMENT CLARIFYING THE ROLE  
OF SUPERVISORY GUIDANCE**

**Interagency Statement Clarifying the Role of Supervisory Guidance**

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the “prudential agencies”) are responsible for promoting safety and soundness and effective consumer protection at supervised institutions. The Bureau of Consumer Financial Protection (“Bureau,” and, with the prudential agencies, the “agencies”) is

generally responsible for regulating the offering and provision of consumer financial products or services under the federal consumer financial laws. The agencies are issuing this statement to explain the role of supervisory guidance and to describe the agencies' approach to supervisory guidance.

### ***Difference between supervisory guidance and laws or regulations***

The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law.<sup>39</sup> Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

### ***Ongoing agency efforts to clarify the role of supervisory guidance***

The agencies are clarifying 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. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive

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<sup>39</sup> Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.

of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.

- Examiners 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. 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.
- Supervisory 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.
- The agencies also have at times sought, and 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 comment process helps the agencies to improve their understanding of an issue, to gather information on institutions’ risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.
- 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 and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

## **Federal Deposit Insurance Corporation**

### **12 CFR Chapter III**

#### **Authority and Issuance**

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation proposes to revise part 302 to 12 CFR chapter III, subchapter A, as follows:

#### **PART 302 – USE OF SUPERVISORY GUIDANCE**

Sec.

302.1 Purpose.

302.2 Implementation of the interagency statement.

302.3 Rule of construction.

#### **APPENDIX A TO PART 302—INTERAGENCY STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE**

**AUTHORITY:** 5. U.S.C. 552; Sections 8, 9, and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1818, 1819(a) (Seventh and Tenth), 1831p--1).

##### **§ 302.1 Purpose.**

The FDIC issues regulations and guidance as part of its supervisory function. This subpart reiterates the distinctions between regulations and guidance, as stated in the Interagency Statement Clarifying the Role of Supervisory Guidance (Appendix A) (Interagency Statement).

##### **§ 302.2 Implementation of the interagency statement.**



The Interagency Statement describes the official policy of the FDIC with respect to the use of supervisory guidance in the supervisory process. The Interagency Statement is binding on the FDIC.

### **§ 302.3 Rule of construction.**

This subpart does not alter the legal status of guidelines authorized by statute, including but not limited to, 12 U.S.C. 1831p-1, to create binding legal obligations.

## **APPENDIX A TO PART 302—INTERAGENCY STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE**

### **Interagency Statement Clarifying the Role of Supervisory Guidance**

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the “prudential agencies”) are responsible for promoting safety and soundness and effective consumer protection at supervised institutions. The Bureau of Consumer Financial Protection (“Bureau,” and, with the prudential agencies, the “agencies”) is generally responsible for regulating the offering and provision of consumer financial products or services under the federal consumer financial laws. The agencies are issuing this statement to explain the role of supervisory guidance and to describe the agencies’ approach to supervisory guidance.

#### ***Difference between supervisory guidance and laws or regulations***

The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect

of law.<sup>40</sup> Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

### ***Ongoing agency efforts to clarify the role of supervisory guidance***

The agencies are clarifying 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. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners 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. In some situations, examiners may reference (including in

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<sup>40</sup> Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.

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.

- Supervisory 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.
- The agencies also have at times sought, and 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 comment process helps the agencies to improve their understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.
- 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 and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

## **National Credit Union Administration**

### **12 CFR Chapter VII**

#### **Authority and Issuance**

For the reasons stated in the Supplementary Information, Chapter VII of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 791 - RULES OF NCUA BOARD PROCEDURE; PROMULGATION OF NCUA RULES AND REGULATIONS; OBSERVANCE OF NCUA BOARD MEETINGS**

1. The authority citation for part 791 is revised to read as follows:

**Authority:** 12 U.S.C. 1766, 1781, 1786, 1787, 1789, and 5 U.S.C. 552b.

2. Subpart D is added to part 791 to read as follows:

**Subpart D—Use of Supervisory Guidance**

Sec.

791.19 Purpose.

791.20 Implementation of the Interagency Statement.

791.21 Rule of construction.

**APPENDIX A TO SUBPART D—INTERAGENCY STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE**

**§ 791.19 Purpose.**

The NCUA issues regulations and guidance as part of its supervisory function. This subpart reiterates the distinctions between regulations and guidance, as stated in the Interagency Statement Clarifying the Role of Supervisory Guidance (Interagency Statement) and provides that the Statement is binding on the NCUA.

**§ 791.20. Implementation of the Interagency Statement.**

The Interagency Statement describes the official policy of the NCUA with respect to the use of supervisory guidance in the supervisory process. The Interagency Statement is binding on the NCUA.

**§ 791.21. Rule of Construction.**

This Appendix does not alter the legal status of guidance that is authorized by statute, including but not limited to 12 U.S.C. 1781, 1786, and 1789, to create binding legal obligations.

## **APPENDIX A TO PART 791—INTERAGENCY STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE**

### **Interagency Statement Clarifying the Role of Supervisory Guidance**

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the “prudential agencies”) are responsible for promoting safety and soundness and effective consumer protection at supervised institutions. The Bureau of Consumer Financial Protection (“Bureau,” and, with the prudential agencies, the “agencies”) is generally responsible for regulating the offering and provision of consumer financial products or services under the federal consumer financial laws. The agencies are issuing this statement to explain the role of supervisory guidance and to describe the agencies’ approach to supervisory guidance.

#### ***Difference between supervisory guidance and laws or regulations***

The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law.<sup>41</sup> Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent

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<sup>41</sup> Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.

with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

***Ongoing agency efforts to clarify the role of supervisory guidance***

The agencies are clarifying 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. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners 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. 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.
- Supervisory 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.

- The agencies also have at times sought, and 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 comment process helps the agencies to improve their understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.
- 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 and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

## **BUREAU OF CONSUMER FINANCIAL PROTECTION**

### **Authority and Issuance**

For the reasons set forth above, the Bureau proposes to revise 12 CFR part 1074, as set forth below:

### **PART 1074—RULEMAKING AND GUIDANCE**

1. The authority citation for part 1074 continues to read as follows:

Authority: 12 U.S.C. 5492(a)(1), 5512(b).

2. The heading to part 1074 is revised as set forth above.
3. Designate § 1074.1 as subpart A under the following heading:

#### **Subpart A—Procedure for Issuance of Bureau Rules**

4. Add subpart B, consisting of §§ 1074.2 and 1074.3, to read as follows:

#### **Subpart B—Use of Supervisory Guidance**

## **§ 1074.2 Purpose.**

The Bureau issues regulations and guidance as part of its supervisory function. This subpart reiterates the distinctions between regulations and guidance, as stated in the Interagency Statement Clarifying the Role of Supervisory Guidance (Appendix A) (Interagency Statement) and provides that the Statement is binding on the Bureau.

## **§ 1074.3 Implementation of the Interagency Statement.**

The Interagency Statement describes the official policy of the Bureau with respect to the use of supervisory guidance in the supervisory process. The Interagency Statement is binding on the Bureau.

5. Appendix A to Part 1074 is added to read as follows:

### **APPENDIX A TO PART 1074—INTERAGENCY STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE**

#### **Interagency Statement Clarifying the Role of Supervisory Guidance**

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the “prudential agencies”) are responsible for promoting safety and soundness and effective consumer protection at supervised institutions. The Bureau of Consumer Financial Protection (“Bureau,” and, with the prudential agencies, the “agencies”) is generally responsible for regulating the offering and provision of consumer financial products or services under the federal consumer financial laws. The agencies are issuing this statement to explain the role of supervisory guidance and to describe the agencies’ approach to supervisory guidance.

#### ***Difference between supervisory guidance and laws or regulations***

The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked



questions, to their respective supervised institutions. A law or regulation has the force and effect of law.<sup>42</sup> Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

### ***Ongoing agency efforts to clarify the role of supervisory guidance***

The agencies are clarifying 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. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners 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”

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with supervisory guidance. 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.

- Supervisory 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.
- The agencies also have at times sought, and 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 comment process helps the agencies to improve their understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.
- 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 and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

Dated:

**Brian P. Brooks**

*Acting Comptroller of the Currency*

By order of the Board of Governors of the Federal Reserve System, [DATE]

**Ann E. Misback**

*Secretary of the Board.*

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, D.C. on [date], 2020.

**James P. Sheesley,**

*Assistant Executive Secretary.*

By the National Credit Union Administration Board on [DATE]

**Melane Conyers-Ausbrooks**

*Secretary of the Board*

**Kathleen L. Kraninger,**

*Director, Bureau of Consumer Financial Protection.*

Dated: \_\_\_\_\_, 2020.

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