



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS.

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Ann E. Misback
Secretary of the Board of Governors of the
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Melane Conyers-Ausbrooks,
Secretary of the Board
National Credit Union Administration
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Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
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Comment Intake,
Consumer Financial Protection
Bureau
1700 G Street NW
Washington, DC 20552

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

Re: Role of Supervisory Guidance – [Docket No. OCC-2020-0005] RIN 1557-AE80 (OCC); [Docket No. R-1725] RIN 7100-AF96 (Federal Reserve Board); RIN 3064-AF32 (FDIC); [Docket No. NCUA-2020-0098] RIN 3133-AF28 (NCUA); [Docket No. CFPB-2020-0033] RIN 3710-AB02 (CFPB)

To Whom It May Concern:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the Proposed Rule ("Proposal") issued by the Office of the Comptroller of the Currency ("OCC"), the Federal Reserve Board ("FRB"), Federal Deposit Insurance Corporation ("FDIC"), National Credit Union Administration ("NCUA"), and the Consumer Financial Protection Bureau ("CFPB") (collectively, "the Agencies") on "The Role of Supervisory Guidance."

The Proposal 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 Proposal is intended to confirm that the Agencies will continue to follow and respect the limits of administrative law in carrying out their supervisory responsibilities. Notably, the 2018 Statement underscores that supervisory guidance does not have the force and effect of law, and as such does not create binding legal obligations for the public. The Chamber supports the 2018 Statement and supports the Proposal from the Agencies to codify it.

The difference between regulation and guidance, including the legal authority and appropriate use, have in practice, in some instances, been confused or conflated. To address these issues, in October 2019, the president issued Executive Order 13891 on “Promoting the Rule of Law Through Improved Agency Guidance Documents.” Executive Order 13891 states, “Agencies may clarify existing obligations through non-binding guidance documents, which the Administrative Procedure Act (APA) exempts from notice-and-comment requirements. Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the [APA].”¹ The Proposal rightfully states that “**regulations**” or “legislative rules” serve to implement acts of Congress and 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.² Appropriately distinguishing “regulation” and “supervisory guidance” is paramount to the appropriate application of administrative law.

The Chamber offers the following recommendations to improve the effectiveness of the Proposal:

- I. Agencies Should Codify the 2018 Statement**
- II. Interpretive Rules Should be Included in the Definition of Supervisory Guidance**
- III. Distinguish Between “Supervisory Guidance” and “Regulations” when Seeking Public Comment**
- IV. Finalize the Rulemaking as Soon as Practicable**

I. Agencies Should Codify the 2018 Statement

The Agencies should codify the 2018 Statement regarding the role of supervisory guidance. The Bank Policy Institute and American Bankers Association filed a petition under section 553(e) of the Administrative Procedure Act (APA) for the Agencies to engage in rulemaking to codify the 2018 Statement and, in that process, clarify that matters requiring attention (“MRAs”), matters requiring immediate attention (“MRIAs”), and any other adverse supervisory action may only be based on a violation of state or regulation, and not on a failure to comply with supervisory guidance (the “Petition”). Importantly, codifying the guidance, as stated by the Petition, “would not only reinforce your agency’s commitment in this area, but would also

¹ Exec. Order No. 13891, 3 C.F.R. (2019), available at <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>

² See Proposed Rule, The Role of Supervisory Guidance, 85 Fed. Reg. 70514 (November 5, 2020)

have the important legal effect of binding your agency and its staff to the approach described therein.”³

The Chamber agrees with the Petition’s assertion about the importance of legally binding staff of the Agencies via regulation. According to the Proposal, “The rule text would provide that the proposed Statement is binding on each respective agency.”⁴ Most importantly, instituting a rule that is legally binding on the staff of Agencies provides greater long-term certainty about the role of supervisory guidance. Principals of Agencies often make statements that are not exactly followed by staff – this principal-agent problem could manifest even after publication of the 2018 Statement unless it is codified. Additionally, codifying the 2018 Statement would also help ensure that the policy persists through changes in principal leadership of the Agencies.

II. Interpretive Rules Should be Included in the Definition of Supervisory Guidance

The Chamber believes the Proposal should incorporate “interpretive rules” in the scope of its definition of “supervisory guidance.” Importantly, the Proposal expressly includes “interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions.”⁵ Footnote 4 states troublesome opinions about the scope of the definition for “supervisory guidance” noting that “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.”⁶ The proposal concedes that the APA does not define “interpretive rule” but there is also significant ambiguity, as noted by the citations of jurisprudence, about any practical distinction between “interpretive rule” and “supervisory guidance.” The Administrative Conference of the United States has also found there is a lack of consensus, but has also overtly stated it will avoid using the phrase “binding on the public” when discussing interpretive rules.⁷ Therefore, if “interpretive guidance” is not “binding on the public” it should logically be concluded that it is in fact guidance.

It would appear the Agencies could circumnavigate the bindings on the use of “supervisory guidance” by classifying it as an “interpretive rule,” which would significantly frustrate, if not undermine, the intent of the Proposal. At minimum, the Agencies should clearly distinguish “supervisory guidance” from an “interpretive rule,” including all such documents that have already been issued by the Agencies, to make clear to the public if an “interpretive rule” could potentially be interpreted as a “regulation.”

If the Proposal does not include “interpretive rules” within the scope of “supervisory guidance” then the public should have the opportunity to petition the Agencies to eliminate the guidance or to change the Agencies’ interpretation. The Administrative Conference of the United States has recommended, “as a matter of best practice, when interested persons disagree with the

³ See Petition for Rulemaking on the Role of Supervisory Guidance, filed by the Bank Policy Institute and the American Bankers Association (November 5, 2018), available at https://bpi.com/wp-content/uploads/2018/11/BPI_PFR_on_Role_of_Supervisory_Guidance_Federal_Reserve.pdf

⁴ See Proposed Rule, The Role of Supervisory Guidance, 85 Fed. Reg. 70515 (November 5, 2020)

⁵ Ibid.

⁶ Ibid.

⁷ Administrative Conference of the United States Recommendation 2019-1, “Agency Guidance Through Interpretive Rules” (June 13, 2019), available at <https://www.acus.gov/sites/default/files/documents/Agency%20Guidance%20Through%20Interpretive%20Rules%20CLEAN%20FINAL%20POSTED.pdf>

views expressed in an interpretive rule, the agency should allow them a fair opportunity to try to persuade the agency to revise or reconsider its interpretation.”⁸ Enactment of this recommendation by the Agencies via the Proposal will provide proper resource to the public about the ambiguous interpretation and treatment of “interpretive rules” if it is excluded from the definition of “supervisory guidance.”

III. Distinguish Between “Supervisory Guidance” and “Regulations” when Seeking Public Comment

The Agencies should clearly distinguish between a “regulation” and “supervisory guidance” when seeking public comment on either. The use of notice and comment for supervisory guidance, while oftentimes helpful, does not automatically convert it to a “regulation.” If this intent is not clearly stated at the time of public notice and comment, it may leave room for Agency staff to attempt to reinterpret “supervisory guidance” as “regulation” somewhere down the line. Clear labeling of the document noticed to the public with a request for comment that distinguishes between “regulation” and “supervisory guidance” should limit any possible confusion about the Agency’s intent.

IV. Finalize the Rulemaking as Soon as Practicable

The Chamber believes ample notice was provided to the public consistent with the APA for the Agencies to finalize the Proposal. The 2018 Statement was finalized in September 2018. The Petition was filed via a formal process under section 553(e) of the APA and has therefore been a matter of public record since November 2018. Both documents have been a matter of public record for over two years. The Proposal would codify the 2018 Statement, with some clarifications, and is therefore not a significant change in policy other than providing more certainty to the public about future actions of the Agencies: “The 2018 Statement restates existing law and reaffirms the Agencies’ understanding that supervisory guidance does not create binding, enforceable legal obligations.”⁹

The Chamber appreciates the Agencies granting, in part, the Petition’s request to codify the 2018 Statement. The Agencies should finalize the Proposal expeditiously. The public would benefit from the increased certainty about the treatment of supervisory guidance.

Sincerely,



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⁸ Ibid.

⁹ See Proposed Rule, The Role of Supervisory Guidance, 85 Fed. Reg. 70514 (November 5, 2020)