

MEMORANDUM TO: The Board of Directors

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SUBJECT: Final Rule: Role of Supervisory Guidance

RECOMMENDATION AND SUMMARY

FDIC staff recommends that the FDIC Board of Directors (the FDIC Board) authorize publication of the attached final rule titled, “Role of Supervisory Guidance” (Final Rule) in the *Federal Register* with a 30-day delayed effective date. The Final Rule would adopt as final, without substantive changes, a notice of proposed rulemaking that was published in the *Federal Register* on November 5, 2020 (NPR) which proposed to clarify, amend, and codify the Interagency Statement Clarifying the Role of Supervisory Guidance issued by the FDIC, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the National Credit Union Administration and the Bureau of Consumer Financial Protection (Bureau) (collectively, the agencies) on September 11, 2018 (2018 Statement). The 2018 Statement states 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 Final Rule, among other clarifications, also clarifies that the 2018 Statement, as amended, is binding on the FDIC.

DISCUSSION

The Final Rule codifies the 2018 Statement, as amended, as an appendix to the Final Rule text. The rule text provides that the 2018 Statement, as amended, is binding on the FDIC.

Background

The agencies issued the 2018 Statement to explain the role of supervisory guidance and describe the agencies’ approach to supervisory guidance. The 2018 Statement expresses the agencies’ understanding that supervisory guidance does not create binding, enforceable legal obligations. The 2018 Statement states 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 efforts to make the role of supervisory guidance clear in communications to examiners and supervised financial institutions; and (4) encourage supervised institutions to discuss their concerns about supervisory guidance with their appropriate agency contact.

On November 5, 2018, the FDIC, OCC, FRB, and Bureau each received a petition for a rulemaking (Petition), as permitted under the Administrative Procedure Act, requesting that the agencies codify the 2018 Statement. The Petition stated that a rule on guidance is necessary to bind future agency leadership and staff to the 2018 Statement's terms. The Petition also suggested there are ambiguities in the 2018 Statement concerning how supervisory guidance is used in connection with matters requiring attention, matters requiring immediate attention, matters requiring board attention, (collectively, MRAs), and other supervisory actions that should be clarified through a rulemaking. Finally, the Petition called for the rulemaking to implement changes in the agencies' standards for issuing MRAs.

The Final Rule responds to the Petition. The Final Rule amends the 2018 Statement by (1) clarifying that references in the Statement to criticisms includes criticisms made through issuances of matters requiring board attention and supervisory recommendations, and (2) adding that supervisory criticisms should 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 NPR

The NPR proposed codifying the 2018 Statement, as amended, with the proposed Statement as an appendix to the proposed rule text, superseding the 2018 Statement, and provided that the proposed Statement would be binding on each respective agency. The NPR sought comment on all aspects of the NPR, including whether (1) examiners should reference supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations when criticizing (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, supervisory recommendations, or otherwise) a supervised financial institution and, if so, are there specific situations where providing such examples would be appropriate, or specific situations where providing such examples would not be appropriate; (2) the NPR is sufficiently clear what types of agency communications constitute supervisory guidance, and if not, what steps could the agencies take to clarify this; (3) any additional clarifications to the 2018 Statement would be helpful; and (4) there are other aspects of the NPR where the public would like to offer comment.

Summary of Comments Received

The five agencies received approximately 30 unique comments concerning the NPR.¹ Comments covered the scope of the NPR, the role of guidance documents, supervisory criticisms and how they relate to guidance, visitorial powers, and the issuance and management of supervisory guidance.

Commenters representing trade associations for banking institutions and other businesses, state bankers' associations, individual financial institutions, and one member of Congress expressed general support for the NPR. These commenters supported codification of the 2018 Statement and the reiteration by the agencies that guidance does not have the force of law and cannot give rise to binding, enforceable legal obligations.

Two commenters, both public interest advocacy groups, opposed the NPR, suggesting that codifying the 2018 Statement may undermine the important role that supervisory guidance can play by informing supervisory criticism, rather than merely clarifying that it will not serve as the basis for enforcement actions.

FDIC staff believes that the Final Rule does not undermine any of the FDIC's safety and soundness or other authorities. Indeed, the Final Rule is designed to support the FDIC's ability to supervise banks effectively. In addition, the FDIC notes the question of the role of guidance has been one of interest to regulated parties and other stakeholders over the past few years. The Petition and the number of comments on the NPR are a sign of this interest. As such, FDIC staff believes it will serve the public interest to reaffirm the appropriate role of supervisory guidance. There are inherent benefits to the supervisory process whenever institutions and examiners have a clear understanding of their roles, including how supervisory guidance can be used effectively within legal limits.

For the reasons discussed above, the Final Rule adopts the NPR without substantive changes. However, the FDIC has decided to issue an individual final rule that is specifically addressed to the FDIC and FDIC-supervised institutions, rather than the joint version that the five agencies included in their joint NPR. Although many of the comments were applicable to all of the agencies, some comments were specific to particular agencies or to groups of agencies. Having separate final rules has enabled agencies to better focus on explaining any agency-specific issues to their respective audiences of supervised institutions and agency employees.

Conclusion

FDIC staff recommends that the FDIC Board approve the attached Final Rule for publication in the *Federal Register* with a 30-day delayed effective date.

¹ Of the comments received, some comments were not submitted to all agencies, and some comments were identical. Note that this total excludes comments that were directed at an unrelated rulemaking by the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN). In this Final Rule, the FDIC discusses those comments that are potentially relevant to the FDIC. This Final Rule does not specifically discuss those comments that are only potentially relevant to other agencies.

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