

January 4, 2021

By Electronic Submission

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2020-0005

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue NW
Washington, DC 20551
Docket No. R-1725; RIN 7100-AF96

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429
RIN 3064-AF32

Melane Conyers-Ausbrooks, Secretary of the
Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314
Docket ID NCUA-[2020-0098]

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552
Docket No. CFPB-2020-0033; RIN 3170-AB02

RE: ROLE OF SUPERVISORY GUIDANCE

Ladies and Gentlemen:

The Loan Syndications and Trading Association (“LSTA”)¹ appreciates the opportunity to provide comments to the Agencies² on the notice of proposed rulemaking, which would codify in regulation the

¹ The LSTA is a not-for-profit trade association that is made up of a broad and diverse membership involved in the origination, syndication, and trading of commercial loans. The over 500 members of the LSTA include commercial banks, investment banks, broker-dealers, hedge funds, mutual funds, insurance companies, fund managers, and other institutional lenders, as well as service providers and vendors. The LSTA undertakes a wide variety of activities to foster the development of policies and market practices designed to promote just and equitable marketplace principles and to encourage cooperation and coordination with firms facilitating transactions in loans. Since 1995, the LSTA has developed standardized practices, procedures, and documentation to enhance market efficiency, transparency, and certainty.

² “Agencies” refers to the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Bureau of Consumer Financial Protection.

Agencies’ policies concerning their use of supervisory guidance.³ The LSTA believes the Proposed Rulemaking provides important clarifications to the *Interagency Statement Clarifying the Role of Supervisory Guidance* (“2018 Statement”), which the Agencies issued in 2018, while ensuring that the important principles embodied in the 2018 Statement will be binding on the Agencies.

I. We strongly support the Agencies’ reaffirmation of the non-binding nature of supervisory guidance and the codification of the Agencies’ policies concerning the use of supervisory guidance.

We appreciate the Agencies’ proposal to issue and codify a statement explaining the purpose of supervisory guidance and highlighting the critical distinction between Agency regulations, which are binding legal obligations, and supervisory guidance, which does not have the force of law or give rise to binding, enforceable legal obligations. The Agencies appropriately recognize in the Proposed Rulemaking that while supervisory guidance should not form the basis of supervisory criticism, it serves the important purpose of articulating the Agencies’ supervisory expectations, priorities, and general views regarding appropriate practices, 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.”⁴

By clarifying that a “violation” of or “non-compliance” with supervisory guidance cannot be used as the basis for supervisory criticism or enforcement action, the Agencies remove ambiguity that could deter supervised financial institutions from innovations and developments that may not fit squarely within existing guidance and could discourage them from engaging with examiners. In particular, we applaud the Agencies for specifying that supervisory criticism includes the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations, and that supervisory criticism 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.”⁵ We believe the Proposed Rulemaking is a timely and valuable reinforcement of the bank regulatory framework consistent with principles of administrative law.

³ Role of Supervisory Guidance, 85 Fed. Reg. 70512 (Nov. 5, 2020) (to be codified at 12 C.F.R. pt. 4, 262, 302, 791, and 1074) (“Proposed Rulemaking”).

⁴ Proposed Rulemaking at 70520.

⁵ Proposed Rulemaking at 70519.

II. We urge the Agencies to provide additional clarity regarding the types of agency communications that constitute supervisory guidance within the scope of the Proposed Rulemaking.

In response to the Agencies’ request for comment on whether the types of agency communications that constitute supervisory guidance are sufficiently clear, we strongly urge the Agencies to provide more clarity as to the universe of guidance documents that fall within the scope of the Proposed Rulemaking.⁶ In particular, we are concerned that the Proposed Rulemaking’s reference to certain types of materials, such as interpretive rules, that the Agencies believe are not supervisory guidance creates significant confusion. On the one hand, the Proposed Rulemaking observes expansively that the Agencies “issue various types of supervisory guidance . . . *including, but not limited to*, interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions.”⁷ Yet in a footnote, the Proposed Rulemaking states that “[t]hese types of material are not always supervisory guidance [and] may, *for example*, be interpretive rules addressing regulatory requirements.”⁸ Even if interpretive rules were the only exception contemplated by the Agencies, the distinction between interpretive rules and supervisory guidance is vague because supervisory guidance that articulates “appropriate practices for a given subject area” will necessarily reflect an agency’s interpretation or construction of the regulations that apply to that subject area.⁹ Without a clear and practical way of determining the universe of supervisory guidance, we are concerned that the Proposed Rulemaking will be limited by endless disagreements as to its scope.

III. We request that the Agencies limit the extent to which examiners are permitted to reference supervisory guidance in written criticism.

In response to the Agencies’ request for comment on whether examiners should reference supervisory guidance when criticizing a supervised financial institution, we urge the Agencies to carefully circumscribe the extent to which examiners may be permitted to reference supervisory guidance in writing.¹⁰ While we appreciate the Agencies’ strong statement in the Proposed Rulemaking that examiners will not issue supervisory criticism on the basis of supervisory guidance, we believe that permitting examiners to reference supervisory guidance in supervisory criticism will inevitably create the impression that non-compliance with such supervisory guidance has led to the supervisory criticism. Because we understand that there may be circumstances where such references may be useful, for example, where the references are included by way of analogy to the relevant circumstances, we request that the Agencies consider safeguards to prevent such references

⁶ Proposed Rulemaking at 70516 (Question 2).

⁷ Proposed Rulemaking at 70514 (emphasis added).

⁸ Proposed Rulemaking at 70514, n. 4 (emphasis added).

⁹ Proposed Rulemaking at 70514 (“Supervisory guidance outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area”).

¹⁰ Proposed Rulemaking at 70516 (Question 1).

from becoming the de facto basis for supervisory criticisms and thereby undermining the purpose of the Proposed Rulemaking.

Conclusion

We endorse the Proposed Rulemaking's clarification and codification of the Agencies' policies concerning the use of supervisory guidance. We thank you for your consideration of our comments and concerns and stand ready to provide any additional information you believe might be useful. Please feel free to contact me at (212) 880-3003 if you have any questions regarding this letter.

Sincerely,



Elliot Ganz
General Counsel