American Bankers Association
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Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E–218
Washington, DC 20219
Docket ID OCC–2020–0005

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

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 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]

Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552
RIN 3170-AB02

Re: *Notice of Proposed Rulemaking on the Role of Supervisory Guidance*

Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the notice of proposed rulemaking (Proposal)[2] by the OCC, Federal Reserve Board, FDIC, NCUA, and CFPB (the Agencies) to codify the Interagency Statement Clarifying the Role of Supervisory Guidance issued on September 11, 2018 (Interagency Statement).

Among other things, the Interagency Statement expressed the intent of the Agencies to limit the use of "bright-line" numerical thresholds in supervisory guidance and clarified that examiners are not to criticize supervised institutions for a "violation" of or "non-compliance" with supervisory guidance. Rather, the Interagency Statement expressed that examiners must base their criticisms on violations of law or regulation, non-compliance with an enforcement order or some other enforceable condition.

[1] The American Bankers Association is the voice of the nation's $21.1 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $17 trillion in deposits and extend more than $11 trillion in loans. Learn more at www.aba.com.
[2] Role of Supervisory Guidance, 85 Fed. Reg. 70512 (proposed Nov. 5, 2020)(to be codified at 12 C.F.R. pts. 4, 262, 302, 791, and 1074).

This Proposal is in response to a November 2018 joint petition by ABA and the Bank Policy Institute (BPI) seeking codification of the Interagency Statement.[3] This Proposal strengthens the policy objectives of the Interagency Statement, which as we noted previously, "is itself only guidance, and thus may well be viewed by current or future agency staff as non-binding."[4]

ABA appreciates the Agencies' decision to grant much of the ABA-BPI joint petition and supports the Agencies' decision to both codify and clarify their intent with regard to the role of supervisory guidance. We also support many of the thoughtful views found in BPI's letter.[5] ABA believes that finalizing the Proposal will further reinforce the proper use of supervisory guidance in bank supervision.[6] At the outset, we agree with the Agencies that supervised institutions often seek guidance and find guidance to be a helpful tool to clarify Agency expectations. We further recognize the value of communicating supervisory concerns with supervised institutions before such concerns escalate and prompt the use of more severe (and statutorily authorized) supervisory tools.

To further enhance the utility of the Proposal and clarify the role of supervisory guidance, we provide feedback and some recommendations for several aspects of the Proposal below.

QUESTION RESPONSES

Question 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 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?

ABA is concerned that presenting relevant supervisory guidance alongside formal criticisms on the same topic may leave many supervised institutions with the strong impression that meeting supervisory expectations will require strict adherence to the supervisory guidance. Though not

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[3] See ABA-BPI Petition for Rulemaking on the Role of Supervisory Guidance (Nov. 5, 2018) Available at: https://www.aba.com/-/media/documents/letters-to-congress-and-regulators/bpi-aba-joint-pfr-on-supervisory-guidance-fdic.pdf?rev=f6a6a4b7c82c4b2f94005fa67dec51fe.

[4] *Id* at 3.

[5] See BPI's Letter in Response to this Proposal. (Dec. 5, 2020) Available at: https://bpi.com/wp-content/uploads/2020/12/BPI-Comment-Letter-on-Proposed-Rule-on-Guidance-2020.12.05.pdf.

[6] Randal K. Quarles, Vice Chair for Supervision, Federal Reserve Board, *Spontaneity and Order: Transparency, Accountability, and Fairness in Bank Supervision*, Address before the American Bar Association Banking Law Committee Meeting 2020 (January 17, 2020) ("Consistent with the September 2018 interagency statement on guidance, we would affirm the sensible principles that guidance is not binding and "non-compliance" with guidance may not form the basis for an enforcement action [such as a cease-and-desist order] or supervisory criticism [such as a Matter Requiring Attention [MRA]]").

every circumstance will make it possible, supervised institutions generally prefer to discuss supervisory guidance exemplifying good practice with supervisory staff well *before* that discussion escalates and becomes formal written supervisory criticism in an exam report. In any event, we believe it is particularly important to underscore that good practices described in supervisory guidance are, as the Proposal states, examples. Such examples should be very clearly communicated as helpful illustrations for the reader, not expectations that may form the basis for supervisory criticism. Still, supervised institutions can benefit from examples, so long as supervised institutions are free to address supervisory criticism and identified deficiencies in ways tailored to their unique business and risk profile. Supervisory guidance is often informed by industry best practices, but supervisory guidance cannot reasonably be expected to fit the size or business model of every supervised institution.

For instance, we understand that the Agencies are working to enhance and align interagency guidance on third-party risk management. This is an area where the Agencies would be particularly well served by issuing principles-based guidance that does not contain the kind of granularity that could be misconstrued as binding expectations meant to fit every business line or every supervised institution. A principles-based approach to third-party risk management would encourage supervised institutions to exercise judgment and customize their third-party risk management programs to achieve the principles articulated in the guidance.

If there are instances where supervised institutions would benefit from more detailed information on specific topics related to third-party risk management (e.g., due diligence or fintech partnerships), the Agencies could issue FAQs or similar documents that would be separate from this principles-based third-party risk management guidance. Importantly, to the extent that the FAQs discuss examples of leading practices, they should be clearly identified as non-binding illustrations that are informational in nature.

Question 2: Is it sufficiently clear what types of agency communications constitute supervisory guidance? If not, what steps could the agencies take to clarify this?

Unfortunately, the Proposal does not sufficiently clarify to supervised institutions what constitutes supervisory guidance. We share the thoughtful views found in BPI's letter[7] on the difficulty of distinguishing between supervisory guidance subject to this Proposal and interpretive rules excluded by the Proposal's fourth footnote (Footnote)[8] and believe the Proposal would afford greater clarity if the Agencies reconsidered their decision to exclude interpretive rules.

As a practical matter, the Agencies generally do not categorize their issuances as either supervisory guidance or interpretive rules.[9] The Proposal itself makes that point clear by offering a non-exhaustive list of supervisory guidance examples as "including, but not limited to,

[7] See Footnote 5.
[8] See Proposal at 70514.
[9] We note, however, that the Consumer Financial Protection Bureau (CFPB) publishes interpretive rules and marks them as such, including advisory opinions issued under the CFPB's Advisory Opinions Policy, which are issued as interpretive rules. *See, e.g.*, Truth in Lending (Regulation Z); Private Education Loans, 85 Fed. Reg. 79400 (Dec. 10, 2020); Application of Certain Provisions in the TILA-RESPA Integrated Disclosure Rule and Regulation Z Right of Rescission Rules in Light of the COVID-19 Pandemic, 85 Fed. Reg. 26319 (May 4, 2020).

interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions."[10] (emphasis added). Then, the Proposal qualifies these examples in the Footnote by saying that these examples "are not always supervisory guidance. They may, for example, be interpretive rules addressing regulatory requirements."[11] Clearly, the Agencies believe that certain issuances that might appear to be supervisory guidance are, in fact, interpretive rules.

One solution to the practical challenge outlined above would be for the Agencies to prominently label all of their issuances as either supervisory guidance or interpretive rules. ABA appreciates that drawing a line between supervisory guidance and interpretive rules would sometimes be difficult, particularly due to the "commonalities" between these two types of issuances which may be why "government agencies have more recently adopted the umbrella term 'guidance' to refer to both interpretive rules and policy statements (i.e. supervisory guidance)."[12] Still, without any clear way to distinguish between supervisory guidance and interpretive rules, the Proposal's decision to include supervisory guidance but exclude interpretive rules provides supervised institutions with little certainty as to this Proposal's applicability to any particular Agency issuance.

This lack of certainty is compounded by the Footnote's framing of a rigorous debate concerning the binding nature of interpretive rules without any discussion of the Agencies' position on the matter. ABA believes that the Agencies should clarify their thinking and revisit the Footnote's framing in light of the Supreme Court precedent the Footnote itself invokes in *Perez v. Mortgage Bankers Ass'n.*[13] In *Perez*, a majority wrote that "MBA does not explain *how*, precisely, an interpretive rule changes the regulation it interprets, and its assertion is impossible to reconcile with the *longstanding recognition that interpretive rules do not have the force and effect of law*."[14] (emphasis added).

The Administrative Conference of the United States Recommendation 2019-1, *Agency Guidance Through Interpretive Rules* (ACUS Recommendation) cited in the Footnote does discuss a debate about the "binding" nature of interpretive rules. However, it describes that disagreement as one that courts and commenters have about whether interpretive rules "may be binding *on the agency that issues them*." (emphasis added). The ACUS Recommendation does *not* state that interpretive rules should bind members of the public and instead describes a confused use of the term "binding" as *impeding* efforts to "make clear that interpretive rules should remain *nonbinding* in a different sense, i.e., that members of the public should be accorded a fair opportunity to request that such rules be modified, rescinded, or waived." (emphasis added).

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[10] *Id.*
[11] *Id.*
[12] See Administrative Conference of the United States Recommendation 2019-1, *Agency Guidance Through Interpretive Rules* (Adopted June 13, 2019) ("Because of the commonalities between policy statements and interpretive rules, including their advisory function, many scholars and government agencies have more recently adopted the umbrella term "guidance" to refer to both interpretive rules and policy statements.") Available at: https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[13] See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 97 (2015).
[14] *Id* at 103.

For these reasons, ABA believes that the Agencies should: (1) include interpretive rules within the scope of this Proposal when finalized; (2) formally recognize that interpretive rules are not legally binding on supervised institutions; (3) ensure that both the form and intent of Agency issuances are evident to supervised institutions; and (4) follow the best practices for issuing interpretive rules outlined in the ACUS Recommendation.

Question 3: Are there any additional clarifications to the 2018 Statement that would be helpful?

Yes. ABA believes that it would be helpful for the Agencies to clarify that when the Agencies offer supervised institutions examples of safe and sound conduct, compliance with consumer protection standards, appropriate risk management practices, or acceptable practices through supervisory guidance or interpretive rules, the Agencies will treat adherence to that supervisory guidance or interpretive rule as deemed compliance. In other words, when a supervised institution decides to adhere to supervisory guidance or an interpretive rule, that adherence should bind the Agencies and act as a safe harbor.

As a safe harbor, however, no example provided in supervisory guidance or an interpretive rule should be the exclusive means of meeting the relevant standard. If a supervised institution does not follow supervisory guidance or an interpretive rule in some respect, it should not be considered as an indication of a violation of law or an unsafe or unsound banking practice. The Agency in question should still be required to assert a basis (apart from the supervisory guidance or interpretive rule) for criticism of the conduct, and the supervised institution should have the opportunity to justify its approach on any reasonable basis appropriate in the circumstances, again without reference to the guidance or interpretive rule that describes the safe harbor. It will be essential to communicate this framework to field supervisory and legal staff.

The Proposal also notes that the Agencies "have at times sought, and may continue to seek, public comment on supervisory guidance."[15] ABA agrees with the Agencies that seeking public comment on supervisory guidance can help 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."[16]

Open discussion of issues on which the Agencies are considering issuing supervisory guidance may enhance the Agencies' understanding of industry practices and perspectives. Such discussion may also help ensure a more equal regulatory treatment among industry participants by facilitating the transmission of Agency views on interpretive issues of general applicability.

To promote useful dialogue and transparency in considering issues for supervisory guidance, we ask the Agencies to publish proposed guidance for public comment when circumstances allow and to make clear that all guidance is open for feedback, regardless of whether it is formally issued for comment.

[15] Proposal at 70519.
[16] *Id.*

Question 4: Are there other aspects of the proposal where you would like to offer comment?

Yes. As we indicated in the ABA-BPI joint petition and continue to believe, supervisory criticism should be based on a violation of statute, regulation, order, or demonstrably unsafe and unsound practice. ABA does not believe that generic and conclusory examiner references to "safety and soundness" concerns should serve as the sole basis for supervisory criticism. The Proposal declined to grant this aspect of the ABA-BPI joint petition, noting in part that "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."

ABA acknowledges that the Agencies are authorized to examine individual institutions for their safety and soundness and identify deficient practices. However, ABA does not believe that the Agencies have the right to set uniform, general policies on industry practices through their power to examine institutions for their safety and soundness. If certain industry practices are a general "safety and soundness" concern, then the Agencies have the responsibility to set their general expectations and parameters through the formal rulemaking process outlined in the Administrative Procedure Act. This ensures that the Agencies and their examiners do not set broadly applicable public policy without seeking any public input.

For example, we understand that OCC examiners have long relied on general "safety and soundness" concerns to strongly discourage national banks from using modeled income to determine a consumer's ability to repay. This *de facto* prohibition comes despite the CFPB expressly permitting the use of modeled income to determine a consumer's ability to repay under Regulation Z, which implements the Truth in Lending Act (TILA).[17] The OCC's *de facto* prohibition may have innovation and financial inclusion consequences.[18] Moreover, this prohibition unquestionably has competitive consequences since both state bank and nonbank providers can and do use modeled income to determine ability to repay.

The OCC's posture on modeled income appears to be an example of generalized "safety and soundness" concerns taking precedence over established regulations on the matter,[19] recent supervisory guidance that acknowledges the potential benefits of alternative data in credit underwriting,[20] and existing supervisory guidance on model risk validation that appears capable of addressing any relevant safety and soundness concerns.[21]

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[17] See 12 C.F.R. § 1026.51(a)(1)(i)-5.iv.

[18] See CFPB Consumer Credit Card Market Report. Section 4.2.4. (December 2015). ("[o]verall, we found that the number of [proactive credit line increases] granted annually by banks using modeled income is equal to about 28% of their active accounts. For those not using modeled income, however, the same ratio is only about 5%.") Available at: https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

[19] See Footnote 14.

[20] See Interagency Statement on the Use of Alternative Data in Credit Underwriting. (December 2019). ("In addition, the agencies are aware that the use of certain alternative data may present no greater risks than data traditionally used in the credit evaluation process. For example, the agencies are aware that some firms are automating the use of cash flow data to better evaluate borrowers' ability to repay loans. While this is a rapidly developing area of innovation, analysis of cash flow data generally focuses on assessing whether a borrower is able to meet new or existing recurring obligations by evaluating income and expense activity over time.") Available at: https://www.occ.gov/news-issuances/news-releases/2019/nr-ia-2019-142a.pdf.

[21] See OCC Bulletin 2011-12, Supervisory Guidance on Model Risk Management. (April 4, 2011) Available at: https://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-12a.pdf.

As illustrated by our concern on modeled income, ABA continues to believe that the Agencies should only base supervisory criticism on a violation of statute, regulation, order, or demonstrably unsafe and unsound practice. ABA believes that this would help resolve a continuing ambiguity in the Proposal regarding the types of authority upon which supervisory criticism can be based. On one hand, the preamble to the Proposal states:

> [T]he agencies reiterate that examiners will not base supervisory criticisms on a "violation" of or "non-compliance" with supervisory guidance.[22]

This seems to say that MRAs and other supervisory criticism can only issue on the basis of non-compliance with things *other* than "supervisory guidance," *i.e.,* legally binding authorities such as laws, regulations, orders or enforceable conditions. However, on the other hand, the Agencies appear to undercut that reading by rejecting the ABA-BPI Petition's request 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.'"

This ambiguity suggests that there is a third category of authority – neither legally binding nor supervisory guidance – that may provide the basis for supervisory criticism. If this is the Agencies' view, it would be helpful to clarify the nature of that third category of authority and explain why reliance on such authority is consistent with the aim of grounding supervisory criticism in enforceable law.

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ABA appreciates the opportunity to share our views with the Agencies through this request for comment. If you have any questions, please contact Shaun Kern, by phone at (202) 663-5253 or by email at skern@aba.com.

Sincerely,

[redacted]

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[22] Proposal at 70515.