



December 22, 2020

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
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Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
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Attention: Comment Processing
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400 7th Street SW
Suite 3E-218
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Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Ann Misback
Secretary
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Role of Supervisory Guidance
Docket No. CFPB-2020-0033; RIN 3170-AB02
Docket ID OCC-2020-0005
Docket No. R-175; RIN No. 7100-AF96
RIN 3064-AF32
Docket ID NCUA-[2020-0098]

To Whom It May Concern:

The Consumer Bankers Association (CBA)¹ is pleased to submit these comments to the Bureau of Consumer Financial Protection, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and National Credit Union Administration (together, the “Agencies”) in response to the Notice of Proposed Rulemaking (NPR) on the role of supervisory guidance.² CBA supports the NPR and efforts by the Agencies to codify the September 11, 2018 Interagency Statement Clarifying the Role of Supervisory Guidance.³

¹ The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

² Role of Supervisory Guidance, 85 Fed. Reg. 70512 (Nov. 5, 2020) (hereinafter, “NPR”).

³ Interagency Statement Clarifying the Role of Supervisory Guidance, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union

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CBA members frequently rely on supervisory guidance in the all too common situations where practice and purpose may differ. Supervisory guidance offers unique and important opportunities for the Agencies to clarify rulemakings when the ever-changing nature of banking warrants further explanation of a rule's impacts. Supervisory guidance is vital for consistent compliance with financial protection laws, and to further improve its use, it should not be used as the basis for regulatory violations.

I. CBA Supports the Agencies Codifying the Interagency Statement

The Interagency Statement and corresponding NPR recognize the value and unique nature of supervisory guidance while understanding its role in the supervisory process. As stated in the Interagency Statement, supervisory guidance does not, and should not have the full force and effect of law. Giving supervisory guidance such power will circumvent the Administrative Procedures Act (APA), remove the opportunity for public feedback, and may negate the intent and purpose of a regulation. CBA further agrees with the Agencies and supports language in the Interagency Statement articulating the Agencies will not take supervisory or enforcement action against institutions based on supervisory guidance.

Codifying the Interagency Statement is an important step in securing its important role for the future. For years prior to the Interagency Statement's release, there was great uncertainty about supervisory guidance's role in examination and rulemaking proceedings, greatly limiting its potential impact. CBA supports the Agencies' effort to codify the Interagency Statement to ensure supervisory guidance's reliability and usability is protected.

As the Interagency Statement was finalized two years prior to the publication of the NPR, and the petition⁴ was filed shortly thereafter in November 2018, CBA urges the Agencies to codify the interagency statement with urgency. CBA believes the Agencies have provided ample public notice consistent with the APA considering the length of time the Interagency Statement has been a matter of public record. As the NPR is largely reflective of the Interagency Statement, and in fact "restates existing law and reaffirms the Agencies' understanding",⁵ it does not constitute a significant change in policy, and therefore should be finalized quickly.

II. CBA Supports Language Clarifying the Use of Supervisory Criticisms

CBA supports the clarification by the Agencies the Interagency Statement is not intended to set standards for supervisory criticisms. Removing the language in the Interagency Statement surrounding grounds for "citations" will further help develop the usefulness of supervisory guidance.⁶ Further, clarifications by the Agencies better outlining that supervisory criticisms may not be based on a violation of, or non-compliance with supervisory guidance will further improve supervisory guidance documents, and regulated institutions' reliance on them.

Administration, Bureau of Consumer Financial Protection (September 11, 2018) (hereinafter, "Interagency Guidance").

⁴ 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/wpcontent/uploads/2018/11/BPI_PFR_on_Role_of_Supervisory_Guidance_Federal_Reserve.pdf.

⁵ NPR at 70514.

⁶ See NPR.

CBA feels the use of supervisory guidance to provide examples of safe and sound conduct can be proper and may assist in providing regulated institutions more certainty when used appropriately. Including supervisory guidance in matters requiring attention, documents of resolution, and other actions provided to regulated institutions has the potential to increase compliance and understanding of the Agencies' various laws and regulations.

However, in an instance where purpose and practice may differ, CBA is concerned references to supervisory guidance could be conveyed as new regulatory standards for regulated institutions. CBA urges the Agencies to clearly state examples of safe and sound conduct should not be construed to create new regulatory requirements for regulated institutions to comply with a novel regulatory standard.

III. The Agencies Should Include Interpretive Rules in the Definition of Supervisory Guidance

CBA appreciates steps taken by the Agencies to further clarify which communications constitute supervisory guidance, including “interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions.”⁷ However, absent from this definition are interpretive rules, which the Agencies state are distinct from general statements of policy under the APA, and as such, are outside the scope of this rulemaking.⁸

As the Agencies note, the APA does not define interpretive rules, and further, refers to interpretive rules and statements of policy separately when discussing notice and comment requirements. However, the distinction between interpretive rules and supervisory guidance remains unclear. Despite the ambiguities between the two, supervisory guidance and interpretive rules are conjoined in one vital element; neither supervisory guidance nor interpretive rules are subject to the notice and comment provisions of the APA. Given this important connection, neither should be treated as a regulation which has the force and effect of law.

By excluding interpretive rules from the definition of supervisory guidance, the Agencies undermine the purpose of the Interagency Statement by reserving the ability to circumvent the restrictions placed on supervisory guidance through the use of interpretive rules. This in turn provides the Agencies the opportunity to give interpretive rules the force and effect of law while potentially ignoring notice and comment requirements under the APA. Most troubling, interpretive rules could therefore serve as the basis for supervisory criticisms, enforcement, and matters requiring attention.

CBA advocates for the Interagency Statement to retain its effectiveness, and to further improve regulatory certainty for regulated entities, the Agencies should clearly include interpretive rules in its definition of supervisory guidance. Expanding the supervisory guidance definition will provide further certainty about the Agencies' various forms of supervisory guidance and will ensure interpretive rules do not hold the force and effect of laws while circumventing notice and comment provisions.

⁷ *Id.*

⁸ NPR at 70514 n.4.

CBA greatly appreciates the Agencies taking steps to codify the Interagency Statement and believes with a few clarifications, the codification will help better define the role of supervisory guidance for regulated entities. Regulatory certainty is vitally important to providing better outcomes for our customers, and for ensuring thorough consumer protection. If you have any additional questions on either the Interagency Statement or the NPR, please do not hesitate to contact the undersigned directly at scongdon@consumerbankers.com.

Sincerely,



Stephen Congdon

Assistant Vice President, Regulatory Counsel

Consumer Bankers Association