

## Federal Financial Regulatory Agencies Propose New Rule Clarifying the Role of Supervisory Guidance

By [Margaret E. Tahyar](#), [Randall D. Guynn](#) & [Ryan Johansen](#) on October 23, 2020

POSTED IN [BANK REGULATION](#), [FDIC](#), [FEDERAL RESERVE](#), [GUIDANCE & FAQs](#), [OCC](#), [PROPOSED RULE](#)

The banking sector is both regulated and supervised, a key difference between banking and the rest of the regulated sectors in the economy. Supervision happens behind the veil of confidential supervisory information in ways that are both appropriate and concerning.<sup>[1]</sup> The scope of what is appropriate and what is concerning has been a topic of discussion in recent years.<sup>[2]</sup> One of those topics has involved clarification of the distinction between laws and regulations, which are binding on organizations under their supervision, and supervisory guidance, which is not. Before this week, most notable among these efforts was a 2018 [Interagency Statement Clarifying the Role of Supervisory Guidance](#) (the **2018 Interagency Statement**). As we said in our [blog post](#) at the time, “guidance is guidance, and rules are rules,” and the 2018 Interagency Statement was helpful in clarifying that distinction. That said, there is a key difference between guidance on guidance and a final regulation: unlike guidance, a regulation explicitly, in our republic based on the rule of law, binds that agency and its staff to follow the rule of law.

This week, the federal financial regulators<sup>[3]</sup> took another helpful step in bringing transparency and accountability to supervisory practice by proposing to codify in their regulations, with certain clarifying edits, the 2018 Interagency Statement (the **Proposal**). The Proposal comes as a result of a [petition](#) filed under the Administrative Procedure Act by the Bank Policy Institute and the American Bankers Association, in which the trade associations requested that the agencies give the effect of law to the 2018 Interagency Statement.

With minimal but key changes, the agencies have proposed to do just that. Like the 2018 Interagency Statement, the Proposal confirms the agencies’ clear commitment to respecting the distinction between supervisory guidance and laws or regulations. Supervisory guidance consists of, among other things, interagency statements, advisories, bulletins, policy statements, questions and answers, and

frequently asked questions, all of which do *not* create binding, enforceable legal obligations. Only laws or regulations do.

As shown by this [blackline](#) against the 2018 Interagency Statement, the Proposal also includes two helpful clarifications not included in the 2018 Interagency Statement. Most importantly, the Proposal would make clear that the term “criticize” as used in the 2018 Interagency Statement includes the issuance of matters requiring attention (**MRAs**) or matters requiring immediate attention (**MRIsAs**).<sup>141</sup> As such, when the agencies state that they will not base supervisory criticisms on “violation” of or “non-compliance with” supervisory guidance they commit that MRIsAs and MRAs will also not be issued on this basis.

In addition, the Proposal, wisely, takes into account the role of supervisory discretion and the need for supervisory criticism to guide regulated entities while at the same time making clear that such criticisms should be as specific as possible. The Proposal explains that supervisory criticisms should center on practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the organization, could cause consumer harm, or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.

Comments on the Proposal will be due 60 days after its publication in the Federal Register. We expect that banking organizations and other interested parties may seek further clarifications from the agencies, including with respect to statements made by the agencies in the preamble to the Proposal.

*Law Clerk Boaz B. Goldwater contributed to this post.*

---

<sup>141</sup> See Statement of Margaret E. Tahyar, Guidance, Supervisory Expectations, and the Rule of Law: How Do the Banking Agencies Regulate and Supervise Institutions?, Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs (Apr. 30, 2019) ([link](#)).

<sup>142</sup> See, e.g., Mark J. Flannery, Transparency and Model Evolution in Stress Testing, Presentation at Federal Reserve Conference—Stress Testing: Discussion and Review (July 9, 2019) ([link](#)); Randall D. Guynn, A Case for Full Model, Scenario and Results Transparency in the Federal Reserve’s Stress Testing Process,

Presentation at Federal Reserve Conference—Stress Testing: Discussion and Review (July 9, 2019) ([link](#)).

<sup>[3]</sup> The Proposal will be issued by the Federal Reserve, OCC, FDIC, NCUA and CFPB. The FDIC approved the Proposal on Tuesday, the other federal financial regulators are expected to do so in the coming days.

<sup>[4]</sup> MRAs and MRIAs may be the terms with which many banking organizations are most familiar, but as explained by the agencies in the Proposal supervisory actions such as the issuance of matters requiring board attention (used by the FDIC), documents of resolution (used by the NCUA), and supervisory recommendations (used by multiple agencies) are also encompassed by the Proposal's reference to supervisory criticisms.