

MEMORANDUM TO: The Board of Directors

FROM: Nicholas J. Podsiadly
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SUBJECT: Notice of Proposed Rulemaking: Role of Supervisory Guidance

RECOMMENDATION AND SUMMARY

FDIC staff recommends that the FDIC Board of Directors (the FDIC Board) authorize publication of the attached notice of proposed rulemaking (NPR) in the *Federal Register* with a 60-day comment period. The NPR would propose 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 proposal would, among other clarifications, also clarify that the 2018 Statement, as amended, is binding on the agencies.

DISCUSSION

The NPR would codify the 2018 Statement, as amended, as an appendix to the proposed rule text. The rule text would provide that the proposed Statement is binding on each respective agency.

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 financial supervised 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 states that a rule on guidance is necessary to bind future agency leadership and staff to the 2018 Statement's terms. The Petition also suggests 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 calls for the rulemaking to implement changes in the agencies' standards for issuing MRAs.

The NPR responds to the Petition. The NPR would amend the 2018 statement by (1) clarifying that references in the Statement to criticisms includes criticisms made through issuances of MRAs, documents of resolution, 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 Proposal

FDIC staff recommends that the FDIC Board adopt the attached NPR to codify the 2018 Statement, as amended, with the proposed Statement as an appendix to the proposed rule text, supersede the 2018 Statement, and provide that the proposed Statement is binding on each respective agency. The NPR seeks 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.

Conclusion

FDIC staff recommends that the FDIC Board approve the attached NPR for publication in the *Federal Register*.

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