

Proposed Rule Clarifies Role of Supervisory Guidance for Financial Institutions

WRITTEN BY

[James W. Stevens](#) | [Richard P. Eckman](#) | [Kyle F. Whiteman](#)

On October 20, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau (Agencies) jointly issued a [notice of proposed rulemaking \(Notice\)](#) that, if adopted, would codify the Interagency Statement Clarifying the Role of Supervisory Guidance previously issued by the Agencies on September 11, 2018 (2018 Statement or Statement). The 2018 Statement advised that supervisory guidance — such as interagency statements, bulletins, frequently asked questions, among others — issued by the Agencies to supervised institutions does not create binding or enforceable legal obligations, in contrast with regulations or legislative rules issued by the Agencies to implement acts of Congress.

Following the release of the 2018 Statement, the Bank Policy Institute and American Bankers Association submitted a petition seeking the adoption (through formal rulemaking) of the Statement's contents and clarification that various forms of supervisory action may only be based on a violation of statute or regulation — and not on failure to comply with supervisory guidance. The Notice, which contains clarifying amendments to the 2018 Statement, would make the substance of the 2018 Statement binding on the Agencies. It would also codify the principle that supervisory guidance does not have the force and effect of law, and that the Agencies will not take enforcement actions based on supervisory guidance. In addition, the Notice seeks to clarify several policies and practices related to supervisory guidance, including (1) the Agencies' intention to limit the use of numerical thresholds or other "bright lines" in outlining expectations in supervisory guidance, (2) the Agencies' intention to refrain from issuing an enforcement action on the basis of a violation of or noncompliance with supervisory guidance, and (3) the Agencies' intent to reduce the issuance of multiple supervisory guidance documents on the same topic and in general, among other policies and practices.

This formalization of the 2018 Statement is important to imbed these understandings into the Agencies regulation. For many years, the industry criticized the Agencies for adopting what amounted to regulations by issuing guidance not subject to the APA requirements of notice and comment. The notice and comment functions are very important to the industry to avoid Agencies positions that do not have the benefit of industry input as to the consequences of their actions. Adopting this as a regulation will make it more difficult to backtrack on this clarification in the future.

Comments to the Notice are due within 60 days of publication in the Federal Register.

RELATED INDUSTRIES + PRACTICES

- [Community Banking](#)

- Finance + Banking
- Financial Services