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To: Clients and Friends

From: David F. Dulock

Subject: Proposed Interagency Statement Clarifying Supervisory Guidance

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In the November 5, 2020, issue of the *Federal Register* (85 FR 70512, [click here](#)), the OCC, FRB, FDIC NCUA, and CFPB (collectively the “agencies”) published a proposed rule, with a request for public comment, that proposes to amend and codify the “Interagency Statement Clarifying the Role of Supervisory Guidance” issued by the agencies on September 11, 2018 (“2018 Statement”).

The methods for submitting comments to the agencies on the proposed rule are set out in the above hyperlinked section of the *Federal Register*. Comments must be received by January 4, 2021.

The proposed rule would codify the 2018 Statement, with clarifying changes, (“Proposed Interagency Statement”) as Appendix A to the proposed rule text in each agency’s regulations in the Code of Federal Regulations and the Proposed Interagency Statement would supersede the 2018 Statement. The proposed rule text would provide that the Proposed Interagency Statement is binding on each respective agency. The Proposed Interagency Statement would amend the 2018 Statement as follows:

Bullet 2 would be revised to read as follows:

- Examiners will not criticize (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations) a supervised financial institution for, and agencies will not issue an enforcement action on the basis of, a ‘violation’ of or ‘non-compliance’ with supervisory guidance.

A new Bullet 3 is added to read as follows:

- Supervisory criticisms should continue to 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 complete text of the Proposed Interagency Statement is reprinted below.

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## **Interagency Statement Clarifying the Role of Supervisory Guidance**

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the “prudential agencies”) are responsible for promoting safety and soundness and effective consumer protection at supervised institutions. The Bureau of Consumer Financial Protection (“Bureau,” and, with the prudential agencies, the “agencies”) is generally responsible for regulating the offering and provision of consumer financial products or services under the Federal consumer financial laws. The agencies are issuing this statement to explain the role of supervisory guidance and to describe the agencies’ approach to supervisory guidance.

### *Difference Between Supervisory Guidance and Laws or Regulations*

The agencies issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law.<sup>1</sup> Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

### *Ongoing Agency Efforts To Clarify the Role of Supervisory Guidance*

The agencies are clarifying the following policies and practices related to supervisory guidance:

- The agencies intend to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners will not criticize (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations) a supervised financial institution for, and agencies will not issue an enforcement action on the basis of, a “violation” of or “non-compliance” with supervisory guidance. 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.
- Supervisory criticisms should continue to 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 agencies also have at times sought, and may continue to seek, public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the

guidance is intended to be a regulation or have the force and effect of law. The comment process helps 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.

- The agencies will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.

- The agencies will continue efforts to make the role of supervisory guidance clear in their communications to examiners and to supervised financial institutions and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

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<sup>1</sup> Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.