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**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** FDIC Adopts Statement Clarifying the Role of Supervisory Guidance

In the March 2, 2021 issue of the *Federal Register* ([86 FR 12079](#)), the Federal Deposit Insurance Corporation (FDIC) adopted a final rule that codifies the Interagency Statement Clarifying the Role of Supervisory Guidance, issued by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, National Credit Union Administration, Consumer Financial Protection Bureau, and the FDIC (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 and, as such, does not create binding legal obligations.

However, the FDIC has decided to issue a final rule that is specifically addressed to the FDIC and FDIC supervised institutions, rather than the joint version that the five agencies included in their joint 2018 Statement.

The FDIC's final rule is effective on April 1, 2021 and is codified in new Part 302 to 12 CFR, Chapter III, Subchapter A, consisting of §§302.1, 302.2, 302.3 and Appendix A—Statement Clarifying the Role of Supervisory Guidance (Statement). See §302.2, which states that the Statement is binding on the FDIC.

The Statement in Appendix A reads as follows:

**Statement Clarifying the Role of Supervisory Guidance**

The FDIC is issuing this statement to explain the role of supervisory guidance and to describe the FDIC's approach to supervisory guidance.

*Difference Between Supervisory Guidance and Laws or Regulations*

The FDIC issue various types of supervisory guidance, including interagency statements, advisories, policy statements, questions and answers, and frequently asked questions, to its supervised institutions. A law or regulation has the force and effect of law. Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the FDIC does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the FDIC's supervisory expectations or priorities and articulates the FDIC's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the FDIC generally considers 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.

(2 pages)

*Ongoing Efforts To Clarify the Role of Supervisory Guidance*

The FDIC is clarifying the following policies and practices related to supervisory guidance:

- The FDIC intends to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance. Where numerical thresholds are used, the FDIC intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The FDIC 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 supervisory recommendations (including matters requiring board attention) a supervised financial institution for, and the FDIC 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 FDIC also has 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 FDIC to improve its 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 FDIC 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 FDIC will continue efforts to make the role of supervisory guidance clear in communications to examiners and to supervised financial institutions and encourages supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

In the preamble to the final rule, the FDIC states that because supervisory guidance and interpretive rules have different characteristics and serve different purposes, the FDIC has decided that the final rule will continue to cover supervisory guidance only.

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