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April 8, 2021

To: Clients and Friends

From: David F. Dulock

Subject: Federal Reserve Board Adopts Statement Clarifying the Role of Supervisory Guidance

In the April 8, 2021 issue of the *Federal Register* (86 FR 18173), the Board of Governors of the Federal Reserve System (Board) 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, National Credit Union Administration, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, and the Board (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.

The Board's final rule is specifically addressed to the Board and Board-supervised institutions, rather than the joint version that the five agencies included in their joint 2018 Statement.

The Board's final rule is effective on May 10, 2021 and is codified in new §262.7, Part 262 to 12 CFR, Chapter II, and Appendix A to Part 262— Statement Clarifying the Role of Supervisory Guidance (Statement). See §262.7(b), which states that the Statement is binding on the Board.

The Statement in Appendix A reads as follows:

Statement Clarifying the Role of Supervisory Guidance

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

Difference Between Supervisory Guidance and Laws or Regulations

The Board issue various types of supervisory guidance, including interagency statements, advisories, letters, 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 Board does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the Board's supervisory expectations or priorities and articulates the Board's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the Board 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 Board is clarifying the following policies and practices related to supervisory guidance:

• The Board intends to limit the use of numerical thresholds or other "bright-lines" in describing expectations in supervisory guidance. Where numerical thresholds are used, the Board intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The Board 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), a supervised financial institution for, and the Board 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 Board 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 Board 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 Board 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 Board 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 Board states that because supervisory guidance and interpretive rules have different characteristics and serve different purposes, the final rule will continue to cover supervisory guidance only.