American Bankers Association®

November 5, 2018

Via Electronic Mail

Board of Governors of the Federal Reserve System
Attn: Ann Misback, Secretary
20th Street and Constitution Avenue N.W.
Washington, D.C. 20551

Re: Petition for Rulemaking on the Role of Supervisory Guidance

Dear Ms. Misback:

The Bank Policy Institute[1] and the American Bankers Association[2] are writing to petition the Board of Governors of the Federal Reserve System under section 553(e) of the Administrative Procedure Act ("APA") to engage in rulemaking to codify its recent "Interagency Statement Clarifying the Role of Supervisory Guidance"[3] and, in that process, clarify that matters requiring attention ("MRAs"), matters requiring immediate attention ("MRIAs"), and any other adverse supervisory action may only be based on a violation of statute or regulation, and not on a failure to comply with supervisory guidance.[4]

[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

[2] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

[3] Federal Reserve Supervisory Letter SR 18-5 / CA 18-7, *Interagency Statement Clarifying the Role of Supervisory Guidance* (Sept. 12, 2018).

[4] We note that each of BPI (a trade association representing 48 of the nation's leading banks) and the ABA (a trade association representing small, midsize, regional and large banks) is an interested person within the meaning of section 553(e) of the APA.

Background

We commend your agency for issuing the Interagency Statement, which is an important step forward in ensuring that agency guidance is issued and applied in a manner consistent with the APA and the Congressional Review Act and, more broadly, that formal examination criticisms focus on matters material to the financial condition of a bank. Importantly, the Interagency Statement:

- Clarifies that "[u]nlike 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." [5] Rather, it emphasizes that guidance is intended to outline "the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area."[6]

- Explicitly affirms that "[e]xaminers will not criticize a supervised financial institution for a 'violation' of supervisory guidance. Rather, any citations will be for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions."[7] This statement is particularly important in light of supervisors' reported practice in recent years of issuing MRAs, MRIAs, and other examination criticisms on the basis of purported non-compliance with guidance.

- States that "[t]he agencies intend to limit the use of numerical thresholds or other 'bright-lines' in describing expectations in supervisory guidance." The guidance also states that "[w]here numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements."[8] These statements would appear to be directed at, among other things, concerns raised by the agencies' reliance on such thresholds in the context of leveraged lending and other guidance.

- States that the agencies may sometimes issue supervisory guidance for notice and comment (which we strongly support), but also makes clear that this does not mean that such guidance is intended to be a regulation or have the force and effect of law.

We support the Interagency Statement for three main reasons. First, the Statement reflects a clear commitment to the rule of law. The core concept articulated in the Statement – that guidance does not have the force of law, and so cannot form the basis of any legal consequence – is a clear, black letter principle of American administrative law. And while this legal principle is true regardless of whether an agency chooses to acknowledge it, your express affirmation in the Statement signals that institutions and the public will have prior notice of and an opportunity to comment on government mandates that are treated as binding by agency examiners. Second, the Statement serves the interests of consumers and competition by allowing institutions to know what the law is and to develop innovative products that serve consumers and business clients, without uncertainty as to regulatory consequences. Third, the Statement should help protect taxpayer interests by better focusing the examination process on matters material to the financial condition of financial institutions.

Despite the helpful text of the Interagency Statement, we are concerned that it may nevertheless leave room for examiners to continue to base examination criticisms on matters not based in law. For example, some examiners may continue to retain existing MRAs and MRIAs based on agency guidance, on the theory that the Interagency Statement is not retroactive. In addition, there is a concern that examiners might defeat the purpose of the Statement by replacing guidance-based examination criticisms with MRAs and MRIAs grounded in generic and conclusory assertions about "safety and soundness" (as opposed to those that identify specific, demonstrably unsafe

[5] *See* Interagency Statement at 1.

[6] *Id.* at 1.

[7] *Id.* at 2.

[8] *Id.* at 2.

and unsound practices – the actual relevant legal standard). And of course, the Interagency Statement is itself only guidance, and thus may well be viewed by current or future agency staff as non-binding.

Furthermore, the Interagency Statement's general reference to a "criticism" or "citation" has engendered some confusion about whether MRAs, MRIAs, and other adverse supervisory actions are covered by the Statement. Thus, we are concerned that some examiners may believe that they retain authority to issue MRAs and other such mandates on the basis of supervisory guidance. To be sure, it is difficult to imagine what else the Statement had in mind. After all, an MRA is exactly the type of "criticism" that should be solidly grounded in law: compliance with an MRA is clearly treated by the agencies (and thus, the banks) as mandatory, and creates meaningful supervisory consequences, as an unresolved MRA is often grounds for (i) a management downgrade under the CAMELS or RFI rating systems or (ii) restrictions imposed on a bank's ability to expand.[9] Indeed, under written Federal Reserve guidance, the failure to resolve an MRA constitutes grounds for blocking any expansion by the bank; our understanding is that other agencies take the same position.[10]

Petition for Rulemaking

For these reasons, we petition your agency to take two specific rulemaking actions.

First, we respectfully petition you to propose and adopt, through notice and comment rulemaking, the content of the Interagency Statement as a formal expression and acknowledgment of the proper legal status of guidance. Doing so would not only reinforce your agency's commitment in this area, but would also have the important legal effect of binding your agency and its staff to the approach described therein.

Second, we respectfully petition you to include in such a proposed rulemaking a clear statement that MRAs, MRIAs, examination rating downgrades, MOUs, and any other formal examination mandate or sanction will be based only on a violation of a statute, regulation or order – that is, that they are the type of "criticisms" or "citations" at which the guidance is directed. For this purpose, a violation of law includes the identification of a demonstrably unsafe and unsound practice pursuant to 12 U.S.C. 1818(b)(1) (which itself might include significant management or control weaknesses that have contributed to a violation of law, or otherwise pose material financial risk to the firm). But it would *not* include a generic or conclusory reference to "safety and soundness." This is a critical distinction. It is essential that any examination criticisms adhere to the relevant legal standard: the statutory bar on "unsafe and unsound" conduct, as interpreted and binding on the agencies under governing caselaw.

While such a rule would raise the threshold for issuance of MRAs and other adverse supervisory actions, it should not limit the ability of examiners to engage institutions constructively on matters that do not rise to that threshold. For example, a recent bulletin issued by the Bureau of Consumer Financial Protection draws a cogent line between the two categories. The bulletin notes that MRAs will continue to be used by the Bureau going forward, but only to address and correct issues that are "*directly related* to violations of Federal consumer financial law";[11] the Bulletin then establishes a separate and distinct category of communication, the "Supervisory Recommendation" (SR), which will be used "to recommend actions for management to consider taking . . . when the Bureau has not identified a violation of Federal consumer financial law, but has observed weaknesses in CMS."[12] Thus, the BCFP statement allows for an important dialogue to continue between examiners and the institution with respect to non-

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9 *See* Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. U. L. REV. 1101 (2015).

10 *See* Federal Reserve Supervisory Letter SR 14-02 ("The organization also must be responding appropriately to and must have made notable progress in addressing supervisory concerns. …[A]pplicants and notificants are generally expected to resolve their outstanding substantive supervisory issues prior to filing an application or notice with the Federal Reserve.").

11 BCFP Bulletin 2018-01, *Changes to Types of Supervisory Communications* (Sept. 25, 2018) (emphasis added).

12 *Id.*

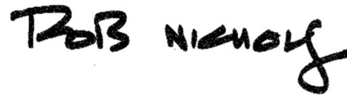
material matters, but without legal sanction. In other words, with respect to matters that do not involve a violation of law, a bank's management is free to design and innovate, while examiners remain free to identify best practices and provide input.

Conclusion

This petition is made pursuant to section 553(e) of the APA, which provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule," a denial of which must be justified by a statement of reasons pursuant to section 555(e) of the APA and can be appealed to the courts under sections 702 and 706 of the APA.[13] We note that the APA requires that "[p]rompt notice … be given of the denial in whole or in part" of any petition under 12 U.S.C. 553, and that any denial shall include a "brief statement of the grounds for denial."[14] Given that this petition seeks only codification and clarification of a policy already adopted as guidance, we look forward to your prompt response.

Respectfully Submitted,

Gregory A. Baer
CEO
Bank Policy Institute



Rob Nichols
President & CEO
American Bankers Association

[13] *See* 12 U.S.C. §§ 553(e), 555(e), 702, and 706; *see also Auer v. Robbins*, 519 U.S.C 452 at 459 (1997).

[14] The D.C. Circuit has opined that while there is "no per se rule as to how long is too long" to wait for an agency action, a reasonable time for agency action is "typically counted in weeks or months, not years." In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004) (quoting Midwest Gas Users Ass'n v. FERC, 833 F.2d 341, 359 (D.C. Cir.1987)).