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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1074

[Docket No. CFPB-2020-0033]

RIN 3710-AB02

Role of Supervisory Guidance

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is adopting a final rule that codifies the Interagency Statement Clarifying the Role of Supervisory Guidance, issued by the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and the Bureau (collectively, the agencies) on September 11, 2018 (2018 Statement). By codifying the 2018 Statement, with amendments, the final rule confirms that the Bureau will continue to follow and respect the limits of administrative law in carrying out its supervisory responsibilities. The 2018 Statement reiterated well-established law by stating that, unlike a law or regulation, supervisory guidance does not have the force and effect of law. As such, supervisory guidance does not create binding legal obligations for the public. Because it is incorporated into the final rule, the 2018 Statement, as amended, is binding on the Bureau. The final rule adopts the rule as proposed without substantive change.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

The Bureau recognizes the important distinction between issuances that serve to implement acts of Congress (known as "regulations" or legislative rules") and non-binding supervisory guidance documents.[1] Regulations create binding legal obligations. Supervisory guidance is issued by an agency to "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" and does not create binding legal obligations.[2]

In recognition of the important distinction between rules and guidance, on September 11, 2018, the agencies issued the Interagency Statement Clarifying the Role of Supervisory Guidance (2018 Statement) to explain the role of supervisory guidance and describe the agencies' approach to supervisory guidance.[3] As noted in the 2018 Statement, the agencies issue various types of supervisory guidance to their respective supervised institutions, including, but not limited to, interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions. Supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding practices for a given subject area. Supervisory guidance often provides examples of practices that mitigate risks, or that the agencies

[1] Regulations are commonly referred to as legislative rules because regulations have the "force and effect of law." *Perez v. Mortgage Bankers Association,* 575 U.S. 92, 96 (2015) (citations omitted).
[2] *See Chrysler v. Brown,* 441 U.S. 281, 302 (1979) (quoting the Attorney General's Manual on the Administrative Procedure Act at 30 n.3 (1947) (Attorney General's Manual) and discussing the distinctions between regulations and general statements of policy, of which supervisory guidance is one form).
[3] *See* https://www.consumerfinance.gov/about-us/newsroom/agencies-issue-statement-reaffirming-role-supervisory-guidance/.

generally consider to be consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers.[4] The agencies noted in the 2018 Statement that supervised institutions at times request supervisory guidance and that guidance is important to provide clarity to these institutions, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.[5]

The 2018 Statement restated existing law and reaffirmed the agencies' understanding that supervisory guidance does not create binding, enforceable legal obligations. The 2018 Statement reaffirmed that the agencies do not issue supervisory criticisms for "violations" of supervisory guidance and described the appropriate use of supervisory guidance by the agencies. In the 2018 Statement, the agencies also expressed their intention to (1) limit the use of numerical thresholds in guidance; (2) reduce the issuance of multiple supervisory guidance documents on the same topic; (3) continue efforts to make the role of supervisory guidance clear in communications to examiners and supervised institutions; and (4) encourage supervised institutions to discuss their concerns about supervisory guidance with their agency contact.

On November 5, 2018, the OCC, Board, FDIC, and Bureau each received a petition for a rulemaking (Petition), as permitted under the Administrative Procedure Act (APA),[6] requesting

[4] While supervisory guidance offers guidance to the public on the agencies' approach to supervision under statutes and regulations and safe and sound practices, the issuance of guidance is discretionary and is not a prerequisite to an agency's exercise of its statutory and regulatory authorities. This point reflects the fact that statutes and legislative rules, not statements of policy, set legal requirements.

[5] The Administrative Conference of the United States (ACUS) has recognized the important role of guidance documents and has stated that guidance can "make agency decision-making more predictable and uniform and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk, while promoting compliance with the law." ACUS, Recommendation 2017-5, Agency Guidance Through Policy Statements, 82 FR 61728, 61734 (Dec. 29, 2017). ACUS also suggests that "policy statements are generally better [than legislative rules] for dealing with conditions of uncertainty and often for making agency policy accessible." *Id.* ACUS's reference to "policy statements" refers to the statutory text of the APA, which provides that notice and comment is not required for "general statements of policy." The phrase "general statements of policy" has commonly been viewed by courts, agencies, and administrative law commentators as including a wide range of agency issuances, including guidance documents.

[6] 5 U.S.C. 553(e).

that the agencies codify the 2018 Statement.[7] The Petition argued that a rule on guidance is necessary to bind future agency leadership and staff to the 2018 Statement's terms. The Petition also suggested there are ambiguities in the 2018 Statement concerning how supervisory guidance is used in connection with matters requiring attention, matters requiring immediate attention (collectively, MRAs), as well as in connection with other supervisory actions that should be clarified through a rulemaking. Finally, the Petition called for the rulemaking to implement changes in the agencies' standards for issuing MRAs. Specifically, the Petition requested that the agencies limit the role of MRAs to addressing circumstances in which there is a violation of a statute, regulation, or order, or demonstrably unsafe or unsound practices.

II. The Proposed Rule

On November 5, 2020, the agencies issued a proposed rule (Proposed Rule or Proposal) that would have codified the 2018 Statement, with clarifying changes, as an appendix to proposed rule text.[8] The Proposed Rule would have superseded the 2018 Statement. The rule text would have provided that an amended version of the 2018 Statement is binding on each respective agency.

The Petition expressed support for the 2018 Statement and acknowledged that it addresses many issues of concern for the Petitioners relating to the use of supervisory guidance. The Petition expressed concern, however, that the 2018 Statement's reference to not basing "criticisms" on violations of supervisory guidance has led to confusion about whether MRAs are covered by the 2018 Statement. Accordingly, the agencies proposed to clarify in the Proposed Rule that the term "criticize" includes the issuance of MRAs and other supervisory criticisms, including those

[7] *See* Petition for Rulemaking on the Role of Supervisory Guidance, *available at* https://www.consumerfinance.gov/rules-policy/petitions-rulemaking/bpi-aba-petition/. The Petitioners did not submit a petition to the NCUA, which has no supervisory authority over the financial institutions that are represented by Petitioners. The NCUA chose to join the Proposed Rule on its own initiative. References in the preamble to "agencies" therefore include the NCUA.

[8] 85 FR 70512 (Nov. 5, 2020).

communicated through matters requiring board attention, documents of resolution, and supervisory recommendations (collectively, supervisory criticisms).[9] As such, the agencies reiterated that examiners will not base supervisory criticisms on a "violation" of or "non-compliance with" supervisory guidance. The agencies noted that, 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. The agencies also reiterated that they will not issue an enforcement action on the basis of a "violation" of or "non-compliance" with supervisory guidance. The Proposed Rule reflected these clarifications.[10]

The Petition requested further that these supervisory criticisms should not include "generic" or "conclusory" references to safety and soundness. The agencies agreed that 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. Accordingly, the agencies included language reflecting this practice in the Proposed Rule.

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[9] The agencies use different terms to refer to supervisory actions that are similar to MRAs and Matters Requiring Immediate Attention (MRIAs), including matters requiring board attention, documents of resolution, and supervisory recommendations.

[10] The 2018 Statement contains the following sentence: "Examiners will not criticize a supervised financial institution for a "violation" of supervisory guidance." 2018 Statement at 2. As revised in the Proposed Rule, this sentence read as follows: "Examiners will not criticize *(including 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." Proposed Rule (emphasis added). As discussed *infra* in footnote 11, the Proposed Rule also removed the sentences in the 2018 Statement that referred to "citation," which the Petition suggested had been confusing. These sentences were also removed to clarify that the focus of the Proposed Rule related to the use of guidance, not the standards for MRAs.

The Petition also suggested that MRAs, as well as memoranda of understanding, examination downgrades, and any other formal examination mandate or sanction, should be based only on a violation of a statute, regulation, or order, including a "demonstrably unsafe or unsound practice." As noted in the Proposed Rule, examiners all take steps to identify deficient practices before they rise to violations of law or regulation or before they constitute unsafe or unsound banking practices. The agencies stated that they continue to believe that early identification of deficient practices serves the interest of the public and of supervised institutions. Early identification protects the safety and soundness of banks, promotes consumer protection, and reduces the costs and risk of deterioration of financial condition from deficient practices resulting in violations of laws or regulations, unsafe or unsound conditions, or unsafe or unsound banking practices. The Proposed Rule also noted that the agencies have different supervisory processes, including for issuing supervisory criticisms. For these reasons, the agencies did not propose revisions to their respective supervisory practices relating to supervisory criticisms.

The agencies also noted that the 2018 Statement was intended to focus on the appropriate use of supervisory guidance in the supervisory process, rather than the standards for supervisory criticisms. To address any confusion concerning the scope of the 2018 Statement, the Proposed Rule removed two sentences from the 2018 Statement concerning grounds for "citations" and the handling of deficiencies that do not constitute violations of law.[11]

[11] The following sentences from the 2018 Statement were not present in the Proposed Rule: "Rather, any citations will be for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions. During examinations and other supervisory activities, examiners may identify unsafe or unsound practices or other deficiencies in risk management, including compliance risk management, or other areas that do not constitute violations of law or regulation." 2018 Statement at 2. The agencies did not intend these deletions to indicate a change in supervisory policy.

III. Comments on the Proposed Rule

A. Overview

The five agencies received approximately thirty unique comments concerning the Proposed Rule.[12] The Bureau discusses below those comments that are potentially relevant to the Bureau, rather than those comments that are only potentially relevant to other agencies. As one example, the Bureau notes that the Federal banking agencies (the OCC, Board, and FDIC) received a comment regarding their supervisory authorities, but the Bureau did not. Accordingly, the Bureau does not discuss that subject here.

Commenters representing trade associations for banking institutions and other businesses, State bankers' associations, individual financial institutions, and one member of Congress expressed general support for the Proposed Rule. These commenters supported codification of the 2018 Statement and the reiteration by the agencies that guidance does not have the force of law and cannot give rise to binding, enforceable legal obligations. One of these commenters stated that the Proposal would serve the interests of consumers and competition by clarifying the law for institutions and potentially removing ambiguities that could deter the development of innovative products that serve consumers and business clients, without uncertainty regarding potential regulatory consequences. These commenters expressed strong support as well for the clarification in the Proposed Rule that the agencies will not criticize, including through the issuance of "matters requiring attention," a supervised financial institution for a "violation" of, or "non-compliance" with, supervisory guidance.

[12] Of the comments received, some comments were not submitted to all agencies, and some comments were identical. Note that this total excludes comments that were directed at an unrelated rulemaking by the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN).

One commenter agreed with the agencies that supervisory criticisms should not be limited to violation of statutes, regulations, or orders and that supervisory guidance remains a beneficial tool to communicate supervisory expectations to the industry. The commenter stated that the proactive identification of supervisory criticism or deficiencies that do not constitute violations of law facilitates forward-looking supervision, which helps address problems before they warrant a formal enforcement action. The commenter noted as well that supervisory guidance provides important insight to industry and ensures consistency in the supervisory approach and that supervised institutions frequently request supervisory guidance. The commenter observed that the COVID-19 pandemic has amplified the requests for supervisory guidance and interpretation, and that it is apparent institutions want clarity and guidance from regulators.

Two commenters, both public interest advocacy groups, opposed the Proposed Rule, suggesting that codifying the 2018 Statement may undermine the important role that supervisory guidance can play by informing supervisory criticism, rather than merely clarifying that it will not serve as the basis for enforcement actions. One commenter stated that it is essential for agencies to have the prophylactic authority to base criticisms on imprudent bank practices that may not yet have ripened into violations of law or significant safety and soundness concerns. The commenter stated that this is particularly important with respect to large banks, where delay in addressing concerns could lead to a broader crisis. One commenter stated that the agencies have not explained the benefits that would result from the rule or demonstrated how the rule will promote safety and soundness or consumer protection. The commenter argued that supervision is different from other forms of regulation and requires supervisory discretion, which could be constrained by the rule. One of these commenters argued that the Proposal would send a signal that banking institutions have wider discretion to ignore supervisory guidance.

In a comment that was specifically addressed to the Bureau, a veterans advocacy group expressed concern that the Bureau's participation in the interagency rule would bind the hands of a future administration.

B. Scope of Rule

Several industry commenters requested that the Proposed Rule cover interpretive rules and clarify that interpretive rules do not have the force and effect of law. One commenter stated that the agencies should clarify whether they believe that interpretive rules can be binding. The commenter argued that, under established legal principles, interpretive rules can be binding on the agency that issues but not on the public. Some commenters suggested that the agencies follow Administrative Conference of the United States (ACUS) recommendations for issuing interpretive rules and that the agencies should clarify when particular guidance documents are (or are not) interpretive rules and allow the public to petition to change an interpretation. A number of commenters requested that the agencies expand the statement to address the standards that apply to MRAs and other supervisory criticisms, a suggestion made in the Petition.

One comment that specifically pertained to the Bureau, which was submitted by an association of community banks, recommended that the category of supervisory guidance be expanded to include the "small entity compliance guides" that the Bureau provides for small entities, which the commenter described as extremely helpful. Another comment, from an association in the debt-collection industry, generally encouraged the Bureau to issue small entity compliance guides, frequently asked questions, and advisory opinions to explain compliance expectations.

C. Role of Guidance Documents

Several commenters recommended that the agencies clarify that the practices described in supervisory guidance are merely examples of conduct that may be consistent with statutory and regulations, not expectations that may form the basis for supervisory criticism. One commenter suggested that the agencies state that when supervisory guidance or interpretive rules offers examples of safe and sound conduct, compliance with consumer protection standards, appropriate risk management practices, or acceptable practices through supervisory guidance, the agencies will treat adherence to that supervisory guidance or interpretive rule as providing a safe harbor. One commenter also requested that the agencies make clear that guidance that goes through public comment, as well as any examples used in guidance, are not binding.[13]

One comment that was specifically addressed to the Bureau, from an association of credit unions, stated that the Bureau should refrain from issuing supervisory guidance that adds requirements not explicitly stated in the statute or regulation.

One commenter argued that guidance provides valuable information to supervisors about how their discretion should be exercised and therefore plays an important role in supervision.

D. Supervisory Criticisms

Several commenters addressed supervisory criticisms and how they relate to guidance. Some commenters suggested that supervisory criticisms should be specific as to practices, operations, financial conditions, or other matters that could have a negative effect. These commenters suggested that MRAs, memoranda of understanding and any other formal written mandates or sanctions should be based only on a violation of a statute or regulation. Similarly,

[13] This commenter also requested that the agencies affirm that they will apply statutory factors while processing applications. The Bureau construes this comment, in context, as referring to the application processes that are common at the Federal banking agencies; to the extent it may refer to applications to the Bureau, the Bureau considers it outside the scope of the Bureau's rulemaking.

these commenters argued that there should be no references to guidance in written formal actions and that banking institutions should be reassured that they will not be criticized or cited for a violation of guidance when no law or regulation is cited. One commenter suggested that it would instead be appropriate to discuss supervisory guidance privately, rather than publicly, potentially during the pre-exam meetings or during examination exit meetings. Another commenter suggested that, while referencing guidance in supervisory criticism may be useful at times, agencies should provide safeguards to prevent such references from becoming the de facto basis for supervisory criticisms. One commenter stated that examiners also should not criticize community banks in their final written examination reports for not complying with "best practices" unless the criticism involves a violation of bank policy or regulation. The commenter added that industry best practices should be transparent enough and sufficiently known throughout the industry before being cited in an examination report. One commenter requested that examiners should not apply large bank practices to community banks that have a different, less complex and more conservative business model.

Commenters that opposed the Proposal did not support restricting supervisory criticism or sanctions to explicit violations of law or regulation. One commenter expressed concern that requiring supervisors to wait for an explicit violation of law before issuing criticism would effectively erase the line between supervision and enforcement. According to the commenter, it would eliminate the space for supervision as an intermediate practice of oversight and cooperative problem-solving between banks and the regulators who support and manage the banking system. One commenter emphasized the importance of bank supervisors basing their criticisms on imprudent bank practices that may not yet have ripened into violations of laws or rules but which if left unaddressed could pose harm to consumers.

One commenter argued that the agencies should state clearly that guidance can and will be used by supervisors to inform their assessments of banks' practices and that it may be cited as, and serve as the basis for, criticisms. According to the commenter, even under the legal principles described in the Proposal, it is permissible for guidance to be used as a set of standards that may inform a criticism, provided that application of the guidance is used for corrective purposes, if not to support an enforcement action.

According to one commenter, the Proposal makes fine conceptual distinctions between, for example, issuing supervisory criticisms "on the basis of" guidance and issuing supervisory criticisms that make "reference" to supervisory guidance. The commenter suggested that is a distinction that it may be difficult for regulated entities to parse in practice. According to the commenter, a rule that makes such a distinction is likely to have a chilling effect on supervisors attempting to implement policy in the field. According to another commenter, the language allowing examiners to reference supervisory guidance to provide examples is too vague and threatens to marginalize the role of guidance and significantly reduce its usefulness in the process of issuing criticisms designed to correct deficient bank practices.

E. Issuance and Management of Supervisory Guidance

Several commenters made suggestions about how the agencies should issue and manage supervisory guidance. Some commenters suggested that the agencies should delineate clearly between regulations and supervisory guidance. Commenters encouraged the agencies to regularly review, update, and potentially rescind outstanding guidance. One commenter suggested that the agencies rescind outstanding guidance that functions as rule but has not gone through notice and comment. One commenter suggested that the agencies memorialize their intent to revisit and potentially rescind existing guidance, as well as limit multiple guidance documents on the same

topic. Commenters suggested that supervisory guidance should be easy to find, readily available, online, and in a format that is user-friendly and searchable.

One commenter encouraged the agencies to issue principles-based guidance that avoids the kind of granularity that could be misconstrued as binding expectations. According to this commenter, the agencies can issue separate frequently asked questions with more detailed information but should clearly identify these as non-binding illustrations. This commenter also encouraged the agencies to publish proposed guidance for comment when circumstances allow. Another commenter requested that the agencies issue all "rules" as defined by the Administrative Procedure Act through the notice-and-comment process.

One commenter expressed concern that the agencies will aim to reduce the issuance of multiple supervisory guidance documents and will thereby reduce the availability of guidance in circumstances where guidance would be valuable.

F. Responses to Comments

As stated in the Proposed Rule, the 2018 Statement was intended to focus on the appropriate use of supervisory guidance in the supervisory process, rather than the standards for supervisory criticisms. The standards for issuing MRAs and other supervisory actions were, therefore, outside the scope of this rulemaking. For this reason, and for reasons discussed earlier, the final rule does not address the standards for MRAs or other supervisory actions.

With respect to the comments on coverage of interpretive rules, the Bureau agrees with the commenter that interpretive rules do not, alone, "have the force and effect of law" and must be rooted in, and derived from, a statute or regulation.[14] While interpretive rules and supervisory guidance are similar in lacking the force and effect of law, interpretive rules and supervisory

[14] *See Mortgage Bankers Association,* 575 U.S. at 96.

guidance are distinct under the APA and its jurisprudence and are generally issued for different purposes.[15] Interpretive rules are typically issued by an agency to advise the public of the agency's construction of the statutes and rules that it administers,[16] whereas general statements of policy, such as supervisory guidance, advise the public of how an agency intends to exercise its discretionary powers.[17] To this end, guidance generally reflects an agency's policy views, for example, on risk management practices. On the other hand, interpretive rules generally resolve ambiguities regarding requirements imposed by statutes and regulations. Because supervisory guidance and interpretive rules have different characteristics and serve different purposes, the Bureau has decided that the final rule will continue to cover supervisory guidance only.

With respect to the question of whether to adopt ACUS's procedures for allowing the public to request reconsideration or revision of an interpretive rule, this rulemaking, again, does not address interpretive rules. As such, the Bureau is not adding procedures for challenges to interpretive rules through this rulemaking.

The Bureau is also not adopting the comment from an association of community banks that the category of supervisory guidance be expanded to include the "small entity compliance guides" that the Bureau provides for small entities, which the commenter described as extremely helpful.

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[15] Questions concerning the legal and supervisory nature of interpretive rules are case-specific and have engendered debate among courts and administrative law commentators. The Bureau takes no position in this rulemaking on those specific debates. *See, e.g.,* R. Levin, *Rulemaking and the Guidance Exemption,* 70 Admin. L. Rev. 263 (2018) (discussing the doctrinal differences concerning the status of interpretive rules under the APA); *see also* Nicholas R. Parillo, *Federal Agency Guidance and the Powder to Bind: An Empirical Study of Agencies and Industries,* 36 Yale J. Reg 165, 168 n.6 (2019) ("Whether interpretive rules are supposed to be nonbinding is a question subject to much confusion that is not fully settled."); *see also* ACUS, Recommendation 2019-1: Agency Guidance Through Interpretive Rules, 84 FR 38927 (Aug. 8, 2019) (noting that courts and commentators have different views on whether interpretive rules bind an agency and effectively bind the public through the deference given to agencies' interpretations of their own rules under *Auer v. Robbins,* 519 U.S. 452 (1997)).

[16] *Mortgage Bankers Association,* 575 U.S. at 97 (citing *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995)); *accord* Attorney General's Manual at 30 n.3.

[17] *See Chrysler v. Brown*, 441 U.S. at 302 n.31 (quoting Attorney General's Manual at 30 n.3); *see also*, *e.g.*, *American Mining Congress v. Mine Safety & Health Administration,* 995 F.2d 1106, 1112 (D.C. Cir. 1993) (outlining tests in the D.C. Circuit for assessing whether an agency issuance is an interpretive rule).

The Bureau normally designates its small entity compliance guides as "compliance aids," pursuant to the its Policy Statement on Compliance Aids.[18] Compliance aids do not rise to the level of supervisory guidance, because they are not general statements of policy and they do not concern the Bureau's supervisory powers—neither do they rise to the level of interpretive rules, because they are not interpretive.[19] Instead, the Policy Statement on Compliance Aids outlines how compliance aids simply present the requirements of rules and statutes in a manner that is useful for compliance professionals, other industry stakeholders, and the public; compliance aids also sometimes include practical suggestions for how entities might choose to go about complying with those rules and statutes.[20] Interested parties can consult the Policy Statement on Compliance Aids for a comprehensive explanation of how the Bureau views its compliance aids.

The Bureau also notes the comment from an association in the debt-collection industry that encouraged the Bureau to issue small entity compliance guides, frequently asked questions, and advisory opinions to explain compliance expectations. The Bureau observes that these particular materials are outside the scope of this particular rulemaking. This is because the Bureau's small entity compliance guides and frequently asked questions are generally designated as compliance aids and not supervisory guidance under the Policy Statement on Compliance Aids,[21] while the Bureau's advisory opinions are classified as interpretive rules under the Bureau's Advisory Opinion Policy.[22] However, the Bureau agrees that the appropriate Bureau use of compliance aids

[18] Policy Statement on Compliance Aids, 85 FR 4579 (Jan. 27, 2020).
[19] *Id.* at 4579 n.4 (explaining that Bureau compliance aids that satisfy the policy statement do not rise to the level of "rules" as defined by the Administrative Procedure Act and that general statements of policy and interpretive rules are examples of "rules").
[20] *Id.* at 4579.
[21] *Id.*
[22] Advisory Opinions Policy, 85 FR 77987, 77988 (Dec. 3, 2020) (explaining that Bureau advisory opinions are interpretive rules under the Administrative Procedure Act and explaining limitations on advisory opinions).

and advisory opinions, like supervisory guidance, is useful for helping entities in the debt-collection and other industries to fully comply with Federal consumer financial laws.

In response to the comment that the agencies should treat examples in guidance as "safe harbors," the Bureau agrees that examples offered in supervisory guidance can provide insight about practices that, in general, may lead to compliance with regulations and statutes. The examples in guidance, however, are generalized. When an institution chooses to implement such examples, examiners must consider the facts and circumstances of that institution in assessing the application of those examples. In addition, the underlying legal principle of supervisory guidance is that it does not created binding legal obligation for either the public or an agency. As such, the Bureau does not deem examples in supervisory guidance to categorically establish safe harbors.

The Bureau has also considered the comment that was specifically directed to the Bureau, from an association of credit unions, which stated that the Bureau should refrain from issuing supervisory guidance that adds requirements not explicitly stated in the statute or regulation. Although the Bureau does not agree that it would be appropriate to limit the Bureau's efforts to assist entities in complying with their legal obligations to situations where the law is already explicit, the Bureau fully agrees that it is not the role of supervisory guidance to create legal requirements. Those must be located in a statute or regulation.

In response to the comments that the Proposal may undermine the important role that supervisory guidance can play in informing supervisory criticism and in serving to address conditions before those conditions lead to enforcement actions, the Bureau agrees that the appropriate use of supervisory guidance generates a more collaborative and constructive regulatory process that supports compliance by institutions, thereby diminishing the need for enforcement actions. As noted by ACUS, guidance can make agency decision-making more predictable and

uniform and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk, while promoting compliance with the law. The Bureau does not view the final rule as weakening the role of guidance in the supervisory process and the Bureau will continue to use guidance in a robust way to promote compliance by its supervised institutions.

Further, the Bureau does not agree with one commenter's assertion that the Proposal made an unclear distinction between, on the one hand, inappropriate supervisory criticism for a "violation" of or "non-compliance" with supervisory guidance, and, on the other hand, Bureau examiners' entirely appropriate use of supervisory guidance to reference examples of appropriate consumer protection and risk management practices and other actions for addressing compliance with laws or regulations. This approach appropriately implements the principle that institutions are not required to follow supervisory guidance in itself but may find such guidance useful. The Bureau disagrees with the commenter that institutions and examiners are incapable of understanding this important distinction.

As one example, Bureau examiners regularly examine the compliance management systems (CMS) at supervised institutions. Where examiners identify a deficiency in an institution's CMS, examiners may provide a supervisory recommendation or other supervisory criticism to the institution to correct the deficiency at that institution. It is also appropriate for Bureau examiners to refer to relevant supervisory guidance as an example of appropriate CMS, if the examiners believe that an institution would find such guidance informative.

In response to the comments regarding the role of public comment for supervisory guidance, the Bureau notes that it has made clear through the 2018 Statement and in this final rule that supervisory guidance (including guidance that goes through public comment) does not create binding, enforceable legal obligations. Rather, the Bureau may issue supervisory guidance for

comment in order to improve its understanding of an issue, gather information, or seek ways to achieve a supervisory objective most effectively. Similarly, examples that are included in supervisory guidance (including guidance that goes through public comment) are not binding on institutions. Rather, these examples are intended to be illustrative of ways a supervised institution may implement appropriate consumer protection, prudent risk management, or other actions in furtherance of compliance with laws or regulations. Relatedly, the Bureau does not agree with one comment that it should use notice-and-comment procedures, without exception, to issue all "rules" as defined by the APA, which would include supervisory guidance. Congress has established longstanding exceptions in the APA from the notice-and-comment process for certain rules, including for general statements of policy like supervisory guidance and for interpretive rules. As one court has explained, Congress intended to "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense."[23]

In response to the question raised by some commenters concerning potential confusion between supervisory guidance and interpretive rules, the Bureau notes that interpretive rules are outside the scope of the rulemaking. In addition, as stated earlier, interpretative rules do not, alone, "have the force and effect of law" and must be rooted in, and derived from, the statutes and regulations those rules interpret. While interpretive rules and supervisory guidance are similar in lacking the force and effect of law, interpretive rules and supervisory guidance are distinct under the APA and its jurisprudence and are generally issued for different purposes. The Bureau believes that when it issues an interpretive rule, the fact that it is an interpretive rule is generally clear. In

[23] *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). The specific contours of these exceptions are the subject of an extensive body of case law.

addition, these comments relate to clarity in drafting, rather than a matter that seems suitable for rulemaking.

In response to the two public interest advocacy groups opposing the Proposal, the Bureau does not believe that this final rule would undermine any of the Bureau's authorities. Indeed, the final rule is designed to support the Bureau's ability to supervise. In addition, the Bureau notes the question of the role of guidance has been one of interest to regulated parties and other stakeholders over the past few years. The Petition and the numerous comments on the Proposal are a sign of this interest. As such, the Bureau believes it will serve the public interest to reaffirm the appropriate role of supervisory guidance. There are inherent benefits to the supervisory process whenever institutions and examiners have a clear understanding of their roles, including how supervisory guidance can be used effectively within legal limits. And in response to the concern from the veterans advocacy group that the Bureau's participation in the interagency Proposed Rule would bind the hands of a future administration, the Bureau notes that it is the nature of binding regulations that they bind an agency over time across multiple administrations. Most importantly, it does not believe that there is anything in the final rule that would prevent the Bureau from continuing to vigorously carry out its statutory supervisory functions in the interests of consumers, while respecting legal limits. Therefore, the Bureau is proceeding with the rule as proposed.

In response to the commenter expressing concern that language in the Statement on reducing multiple supervisory guidance documents on the same topic will limit the Bureau's ability to provide valuable guidance, the Bureau assures the commenter that this language will not inhibit the Bureau from issuing new supervisory guidance when appropriate.

Finally, the Bureau appreciates the other comments related to other aspects of guidance or the supervisory process, but the Bureau does not believe that they are best addressed in this rulemaking.

IV. The Final Rule

For the reasons discussed above, the final rule adopts the Proposed Rule without substantive change.

However, the Bureau has decided to issue a final rule that is specifically addressed to the Bureau and Bureau-supervised institutions, rather than the joint version that the five agencies included in their joint Proposal. Although many of the comments were applicable to all of the agencies, some comments were specific to particular agencies or to groups of agencies. Having separate final rules has enabled agencies to better focus on explaining any agency-specific issues to their respective audiences of supervised institutions and agency employees.

Relatedly, the Bureau has omitted from the final rule those specific phrases that are inapplicable to the Bureau, because they pertain to the safety-and-soundness responsibilities of the Federal banking agencies and the NCUA. The Bureau believes that this will provide greater clarity about how the rule applies to the Bureau's supervisory functions.

V. Administrative Law Matters

A. Dodd-Frank Act

The Bureau issues this final rule based on the Bureau's authorities under sections 1012(a)(1) and 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[24] Section 1012(a)(1) authorizes the Bureau to establish rules for conducting the general business of the Bureau, in a manner not inconsistent with title X of the Dodd-Frank Act.[25]

[24] Pub. L. 111-203, 124 Stat. 1376 (2010).
[25] 12 U.S.C. 5492(a)(1).

Section 1022(b)(1) authorizes the Bureau to issue rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws.[26] The Bureau determines that the additional clarity regarding the status of supervisory guidance provided by the final rule will enable the Bureau to carry out its supervisory responsibilities under Federal consumer financial law more effectively.

Consistent with section 1022(b)(2)(B) of the Dodd-Frank Act, in developing the final rule, the Bureau has consulted, or offered to consult with, the prudential regulators and the Federal Trade Commission, including regarding consistency with any prudential, market, or systemic objectives administered by those agencies.[27]

Additionally, consistent with section 1022(b)(2)(A) of the Dodd-Frank Act, the Bureau has considered the potential benefits, costs, and impacts of the final rule.[28] The Bureau requested comment on the preliminary analysis presented in the proposal as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts. Such comments as the Bureau received on this subject are discussed below.

Institutions Affected by the Final Rule. The Bureau's final rule applies to supervisory guidance issued by the Bureau, which is addressed to those institutions that are subject to the Bureau's supervisory authority. Accordingly, the final rule may affect those nondepository institutions that are subject to the Bureau's supervisory authority under section 1024 of the Dodd-Frank Act.[29] It may also affect those insured depository institutions and insured credit unions that

[26] 12 U.S.C. 5512(b)(1).
[27] 12 U.S.C. 5512(b)(2)(B). The prudential regulators are the OCC, Board, FDIC, and NCUA. *See* 12 U.S.C. 5481(24) (defining "prudential regulators").
[28] Section 1022(b)(2)(A) of the Dodd-Frank Act, 12 U.S.C. 5512(b)(2)(A), requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact of the proposed rule on insured depository institutions and credit unions with no more than $10 billion in total assets as described in section 1026 of the Dodd-Frank Act, 12 U.S.C. 5516; and the impact on consumers in rural areas.
[29] 12 U.S.C. 5514.

have more than $10 billion in total assets, together with their affiliates, which are subject to the Bureau's supervisory authority under section 1025 of the Dodd-Frank Act.[30] The final rule may additionally affect service providers that are subject to the Bureau's supervisory authority.[31]

Potential Benefits and Costs to Consumers and Covered Persons. The final rule reiterates the Interagency Statement Clarifying the Role of Supervisory Guidance (2018 Statement), which is already the policy of the Bureau, and makes it binding on the Bureau. The Bureau evaluates the final rule against a baseline in which no such rule is adopted, and the Bureau is therefore less definitively bound to implement the 2018 Statement in all supervisory activities. Accordingly, the final rule provides the relevant institutions with additional assurance that the Bureau's implementation of current and future supervisory guidance will follow the 2018 Statement.

The final rule should provide the relevant institutions with greater certainty about legal obligations that are addressed in supervisory guidance. This in turn may reduce compliance costs. It is not feasible, however, to quantify or monetize this benefit. The Bureau can only speculate on the greater certainty about legal obligations and the reduction in compliance costs due to the final rule. Further, the benefit from the greater certainty about legal obligations pertains to future as well as current supervisory guidance. The Bureau can only speculate on the frequency of future supervisory guidance. Supervisory guidance is issued from time to time as the need arises, and the Bureau cannot forecast the volume and nature of future supervisory guidance with sufficient precision to quantify or monetize this benefit.

The final rule may also indirectly benefit those consumers that are customers of the relevant institutions, if reduced compliance costs translate into better terms or availability of consumer

[30] 12 U.S.C. 5515.
[31] 12 U.S.C. 5514(e), 5515(d), 5516(e).

financial products and services. For the reasons given above, this benefit cannot be quantified or monetized.

A commenter criticized the benefits discussed above and in the Proposal, deeming them implausible and speculative, and argued that there is no link between reduced compliance costs and consumer welfare. The Bureau disagrees with this assessment. While the Bureau does not have data to quantify or monetize the benefit of increased clarity, as a matter of logic and economic theory increased legal clarity can reduce compliance costs of regulated entities. Where there is uncertainty as to the requirements of the law, firms subject to the Bureau's supervisory authority may undertake excess costs to ensure compliance. To the extent that the 2018 Statement has prompted financial institutions to avoid unnecessary compliance costs in cases that comply with applicable laws and regulations and do not harm consumers, but technically contravene the Bureau's supervisory guidance, the final rule will further lower those costs by reducing the uncertainty. With respect to the criticism that compliance costs are not necessarily linked to consumer welfare, the Bureau notes that its burden under section 1022(b)(2)(A) is to consider costs and benefits to covered persons as well as to consumers. Moreover, as noted above, a reduction in unnecessary compliance costs can be passed through to consumers in the form of lower costs of credit.

Finally, the final rule does not impose any new obligations on institutions. Thus, the final rule should have no costs for institutions. A consumer advocate commenter asserted that the rule would impose costs on consumers by reducing the effectiveness of the agencies' supervision operations, leading to potential consumer harm. The commenter argued that ambiguities in the Proposed Rule and the accompanying Statement would make it difficult for supervision staff at the agencies to determine when to issue supervisory criticisms, to the detriment of consumers who may

be affected by practices that would otherwise be subject to a supervisor's criticism. However, the Bureau notes that the 2018 Statement is already the policy of the Bureau. Moreover, the rule is intended to clarify at least some aspects of the 2018 Statement. To the extent that the ambiguities the commenter identifies exist and affect the Bureau's supervision operations, they already exist under the baseline. Thus, as noted in the Proposal, the effects of the rule, as described above, impose no clear costs on any consumers.

Impact on Depository Institutions and Credit Unions With No More Than $10 Billion in Assets. Under section 1026 of the Dodd-Frank Act, the Bureau has only limited supervisory authority with respect to those insured depository institutions and insured credit unions that have no more than $10 billion in total assets,[32] and so the Bureau does not normally address supervisory guidance to these institutions. Accordingly, the Bureau does not expect there to be any appreciable impact on these institutions from the final rule.

Impact on Access to Credit. The Bureau does not expect the final rule to affect consumers' access to credit, except to the extent that reduced compliance costs and additional assurance, relative to the baseline, that the Bureau will follow the 2018 Statement in the future might indirectly make some credit more available, as discussed above.

Impact on Consumers in Rural Areas. The Bureau does not believe that the final rule would have any unique impact on consumers in rural areas, and so the impact on these consumers should be similar to consumers generally.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule

[32] 12 U.S.C. 5516.

subject to notice-and-comment rulemaking requirements, unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[33] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[34] In the Proposal, the Bureau determined that an IRFA and small business review panel was not required because the Director of the Bureau certified the Proposed Rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau explained that the Proposed Rule would not impose any obligations on regulated entities, and regulated entities would not need to take any action in response to this Proposed Rule. The Bureau did not receive comments on its analysis of the impact of the Proposal on small entities. Accordingly, the Director of the Bureau certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Bureau has determined that this final rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[35]

D. Congressional Review Act

Pursuant to the Congressional Review Act[36] the Bureau will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule taking effect.

[33] 5 U.S.C. 601-612.
[34] 5 U.S.C. 609.
[35] 44 U.S.C. 3501-3521.
[36] 5 U.S.C. 801 *et seq.*

The Office of Information and Regulatory Affairs (OIRA) has designated this rule as not a "major rule" as defined by 5 U.S.C. 804(2).

E. Signing Authority

The Director of the Bureau, Kathleen L. Kraninger, having reviewed and approved this document, is delegating the authority to electronically sign this document to Grace Feola, a Bureau Federal Register Liaison, for purposes of publication in the *Federal Register*.

List of Subjects in 12 CFR Part 1074

Administrative practice and procedure.

Authority and Issuance

For the reasons set forth above, the Bureau amends 12 CFR part 1074 as set forth below:

PART 1074—RULEMAKING AND GUIDANCE

1. The authority citation for part 1074 continues to read as follows**:**

Authority: 12 U.S.C. 5492(a)(1), 5512(b).

2. The heading to part 1074 is revised as set forth above.

§ 1074.1 [Designated as Subpart A]

3. Designate § 1074.1 as subpart A and add a heading for newly designated subpart A to read as follows:

Subpart A—Procedure for Issuance of Bureau Rules

4. Add subpart B, consisting of §§ 1074.2 and 1074.3, to read as follows:

Subpart B—Use of Supervisory Guidance

Sec.
1074.2 Purpose.
1074.3 Implementation of the Statement Clarifying the Role of Supervisory Guidance.

§ 1074.2 Purpose.

The Bureau issues regulations and guidance as part of its supervisory function. This subpart reiterates the distinctions between regulations and guidance, as stated in the Statement Clarifying the Role of Supervisory Guidance (appendix A to this part) (Statement), and provides that the Statement is binding on the Bureau.

§ 1074.3 Implementation of the Statement Clarifying the Role of Supervisory Guidance.

The Statement describes the official policy of the Bureau with respect to the use of supervisory guidance in the supervisory process. The Statement is binding on the Bureau.

5. Appendix A to part 1074 is added to read as follows:

APPENDIX A TO PART 1074—STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

Statement Clarifying the Role of Supervisory Guidance

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

Difference between supervisory guidance and laws or regulations

Supervisory agencies like the Bureau issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, or frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law.[37] Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the Bureau does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the Bureau's supervisory expectations or

[37] 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.

priorities and articulates the Bureau's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the Bureau generally considers consistent with 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 efforts to clarify the role of supervisory guidance

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

- The Bureau intends to limit the use of numerical thresholds or other "bright-lines" in describing expectations in supervisory guidance. Where numerical thresholds are used, the Bureau intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The Bureau 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 the Bureau 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 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 or other matters that could cause consumer harm or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.
- The Bureau may decide 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 Bureau 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 Bureau 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 Bureau 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.

Dated: January 19, 2021.

/s/Grace Feola

Grace Feola,

Federal Register Liaison, Bureau of Consumer Financial Protection.