



MORTGAGE BANKERS ASSOCIATION

January 4, 2021

Comment Intake  
Bureau of Consumer Financial Protection  
1700 G Street NW  
Washington, DC 20552

**Re: Role of Supervisory Guidance  
Docket No. CFPB-2020-0033**

Dear Director Kraninger,

The Mortgage Bankers Association (MBA)<sup>1</sup> appreciates the opportunity to comment on the proposed rule on supervisory guidance issued by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Bureau of Consumer Financial Protection (individually as “Agency,” and collectively, the “Agencies”). As proposed, the rulemaking would codify the role and permissible uses of supervisory guidance (or “guidance”) as articulated in the Interagency Statement Clarifying the Role of Supervisory Guidance, issued on September 11, 2018. MBA strongly supports the principles described in the Interagency Statement and applauds the Agencies for initiating this rulemaking.

#### **I. The Proposed Rule Reflects the Appropriate Role for Supervisory Guidance**

As MBA has consistently advocated, guidance should not be used to impose binding requirements. It follows that a regulated entity’s failure to comply with guidance should not form the basis for an enforcement action or supervisory action (*e.g.*, matters requiring attention, matters requiring board attention, matters requiring immediate action, documents of resolution, and supervisory recommendations). Instead, when used

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation’s residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA’s website: [www.mba.org](http://www.mba.org).

appropriately, guidance fulfills a complimentary role in helping regulated entities satisfy the requirements of applicable laws and regulations by articulating paths to compliance and communicating supervisory expectations.

MBA supports Agencies' efforts to codify these guidance principles through formal rulemaking. We also support sections of the proposed rule which seek to clarify certain Agency policies and practices related to guidance and supervisory processes. These include:

- Expressing the Agencies' intent to "limit the use of numerical thresholds or other "bright-lines" in describing expectations in supervisory guidance[;]"
- Reaffirming that "supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on [safety and soundness], could cause consumer harm, or [violate a legal requirement][;]" and
- And indicating the Agencies' continued commitment to making the appropriate role and use of guidance clear to examiners and regulated entities.<sup>2</sup>

## II. MBA Recommendations

While we believe the proposed rule should be adopted, we offer the following two recommendations to improve its effectiveness.

- a. Clarify the scope of the proposed rule by addressing the uncertainty concerning which Agency issuances constitute "supervisory guidance" as opposed to "interpretive rules."*

The proposal makes clear that supervisory guidance does not have the force and effect of law, and thus cannot be used to support an enforcement action. Unfortunately, the proposed rule does not define supervisory guidance. While various types of supervisory guidance are listed, including "interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions[,]" the proposal indicates that such labels are not determinative as to whether a particular item constitutes supervisory guidance. Specifically, a footnote in the proposed rule's preamble explains that "[t]hese types of materials are not always supervisory guidance."<sup>3</sup> Rather, "[t]hey may, for example, be interpretive rules addressing regulatory requirements."<sup>4</sup> The rulemaking does not address the status of interpretive rules, explaining that "interpretive rules are outside

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<sup>2</sup> *Role of Supervisory Guidance*, 85 Fed. Reg. 70512 (proposed Nov. 5, 2020).

<sup>3</sup> 85 Fed. Reg. 70512, 70514 n. 4.

<sup>4</sup> *Id.*

the scope of this rulemaking[.]”<sup>5</sup> Thus, it is reasonable to assume that interagency statements, advisories, bulletins, policy statements, questions and answers, frequently asked questions or other Agency issuances that qualify as interpretive rules would remain valid basis for enforcement actions.

These omissions add significant uncertainty to the proposed rule. Without a definition for what constitutes supervisory guidance, regulated entities have no way to determine whether a particular item (*e.g.*, interagency statement, advisory, frequently asked questions, etc.) qualifies as supervisory guidance or an interpretive rule. If the item is determined to be supervisory guidance, the proposed rule is clear that it would not have the force and effect of law and couldn’t form the basis of an enforcement action. If, on the other hand, the item is found to be an interpretive rule, it is unclear whether it would be treated as binding. In response to this uncertainty, regulated entities can be expected to err on the side of caution and treat all materials as potentially binding interpretive rules. Such a result is clearly inconsistent with the rulemaking’s purpose, which is to clarify the roll of supervisory guidance.

To resolve this uncertainty, MBA encourages the Agencies to include in the proposed rule a commitment to classifying materials as either supervisory guidance or interpretive rules, so as to clarify the materials’ legal status.<sup>6</sup> This requirement should extend to all existing and future Agency issuances. Alternatively, the Agencies could ensure the proposed rule includes a clear definition or analytical framework to allow regulated entities to determine with reasonable confidence whether an Agency document is supervisory guidance or an interpretive rule.

*b. Commit to issuing guidance when necessary.*

Though lacking the force and effect of law, guidance nonetheless plays an important role clarifying the requirements of applicable laws and regulations. As the proposed rule explains, guidance “articulates the agencies’ general views regarding appropriate practices for a given subject area[.]” including by providing “examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and

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<sup>5</sup> *Id.*

<sup>6</sup> For example, the Consumer Financial Protection Bureau’s bulletin on mortgage servicing transfers clearly indicates the legal status of the guidance. It states that “[t]his Compliance Bulletin and Policy Guidance is a non-binding compliance bulletin and policy guidance articulating considerations relevant to the CFPB’s exercise of its supervisory authority under Regulation X and RESPA and reciting certain requirements of Regulation X and other Federal consumer financial laws applicable to servicing transfers. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b).” CFPB Bulletin 2020-02, *Compliance Bulletin and Policy Guidance: Handling of Information and Documents During Mortgage Servicing Transfers* (May 1, 2020).

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regulations, including those designed to protect consumers.”<sup>7</sup> MBA supports such uses of guidance. Our members recognize that timely, reliable guidance is crucial to ensuring compliance with the numerous, often technical laws and regulations governing mortgage lending and servicing.

Given the importance of guidance, we are concerned that certain language in the proposed rule may unnecessarily discourage Agencies from issuing guidance. Specifically, we worry that the statement that “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” may have the unintended effect of reducing the availability of guidance in circumstances where guidance would be valuable.<sup>8</sup> While multiple supervisory guidance issuances on the same topic may cause confusion, this is not always the case. For example, technological innovations or other developments in the marketplace may cause new compliance uncertainty, which would justify the issuance of additional supervisory guidance. For this reason, we encourage the Agencies to commit to issuing guidance when guidance is necessary, even when doing so would result in multiple issuances on the same topic.

One way to ensure necessary guidance is available is to adopt a process through which important guidance is regularly reviewed and, when necessary, updated to address current issues. For example, prior to the transfer of Truth in Lending Act (Regulation Z) rulemaking authority to the Bureau of Consumer Financial Protection Board, the Federal Reserve Board of Governors performed annual reviews to the official staff commentary to Regulation Z and other critical rules. These reviews benefited industry and consumers by clarifying the rule’s application to novel issues. The Agencies should consider adopting similar processes with respect to the laws within their rulemaking authorities.

## **I. Conclusion**

MBA appreciates the opportunity to offer feedback on the Agencies’ proposed rule on the role of supervisory guidance. We welcome the opportunity to discuss the rulemaking and our recommendations further. Please feel free to direct any questions or comments to me directly ([jwiseman@mba.org](mailto:jwiseman@mba.org)).

Sincerely,

Justin Wiseman  
Associate Vice President, Managing Regulatory Counsel  
Mortgage Bankers Association

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<sup>7</sup> 85 Fed. Reg. 70512, 70522.

<sup>8</sup> 85 Fed. Reg. 70512, 70523.