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FEDERAL DEPOSIT INSURANCE CORPORATION

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RIN 3064–AF32

Role of Supervisory Guidance

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is adopting a final rule that codifies the Interagency Statement Clarifying the Role of Supervisory Guidance, issued by the FDIC, Board of Governors of the Federal Reserve System (Board), Office of the Comptroller of the Currency, Treasury (OCC), National Credit Union Administration (NCUA), and Bureau of Consumer Financial Protection (Bureau) (collectively, the agencies) on September 11, 2018 (2018 Statement). By codifying the 2018 Statement, with amendments, the final rule confirms that the FDIC 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 FDIC. The final rule adopts the rule as proposed without substantive changes.

DATES: The final rule is effective on April 1, 2021.

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SUPPLEMENTARY INFORMATION:

I. Background

The FDIC 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 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

[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.fdic.gov/news/financial-institution-letters/2018/fil18049.html.*

[4] While supervisory guidance offers guidance to the public on the FDIC's approach to supervision under statutes and regulations and safe and sound practices, the issuance of guidance is discretionary and is not a prerequisite to the FDIC'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* at 2 (adopted December 14, 2017), *available at https://www.acus.gov/recommendation/agency-guidance-through-policy-statements.* 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.

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 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 and Comments Received

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.

Clarification of the 2018 Statement

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 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.[10] 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.[11]

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.

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.''[12] 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.[13]

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

[7] *See* Petition for Rulemaking on the Role of Supervisory Guidance, *available at https://bpi.com/wp-content/uploads/2018/11/BPI_PFR_on_Role_of_Supervisory_Guidance_Federal_Reserve.pdf.* 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.

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

[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 (MRBAs), documents of resolution, and supervisory recommendations.

[10] For the sake of clarification, one source of law among many that can serve as a basis for a supervisory criticism is the *Interagency Guidelines Establishing Standards for Safety and Soundness, see* 12 CFR part 30, appendix A, 12 CFR part. 208, appendix D–1, and 12 CFR part 364, appendix A. These Interagency Guidelines were issued using notice and comment and pursuant to express statutory authority in 12 U.S.C. 1831p–1(d)(1) to adopt safety and soundness standards either by ''regulation or guideline.''

[11] 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 13, 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.

[12] The Petition asserted that the federal banking agencies rely on 12 U.S.C. 1818(b)(1) when issuing MRAs based on safety-and-soundness matters. Through statutory examination and reporting authorities, Congress has conferred upon the agencies the authority to exercise visitorial powers with respect to supervised institutions. The Supreme Court has indicated support for a broad reading of the agencies' visitorial powers. *See, e.g., Cuomo* v. *Clearing House Assn L.L.C.,* 557 U.S. 519 (2009); *United States* v. *Gaubert,* 499 U.S. 315 (1991); and *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321 (1963). The visitorial powers facilitate early identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound banking practice, or breach of fiduciary duty under 12 U.S.C. 1818.

[13] 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

Comments on the Proposed Rule

A. Overview

The five agencies received approximately 30 unique comments concerning the Proposed Rule.[14] The FDIC discusses below those comments that are potentially relevant to the FDIC.[15] 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.

One commenter agreed with the agencies that supervisory criticisms should not be limited to violation of statutes, regulations, or orders, including a ''demonstrable unsafe or unsound practice'' 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 the 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.

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 them but not on the public. Some commenters suggested that the agencies follow 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.

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 regulatory compliance, not expectations that may form the basis for supervisory criticism. One commenter suggested that the agencies state that when agencies offer examples of safe and sound conduct, compliance with consumer protection standards, appropriate risk management practices, or acceptable practices through supervisory guidance or interpretive rules, the agencies will treat adherence to practices outlined in that supervisory guidance or interpretive rule as a safe harbor from supervisory criticism. One commenter also requested that the agencies make clear that guidance that goes through public comment, as well as any examples used in guidance, is not binding. The commenter also requested that the agencies affirm that they will apply statutory factors while processing applications.

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. As an example, according to this commenter, 12 U.S.C. 1831p–1 and 12 U.S.C. 1818 recognize the discretionary power conferred on the Federal banking agencies[16] which is separate from the power to issue regulations. The commenter noted that, pursuant to these statutes, regulators may issue cease and desist orders based on reasonable cause to believe that an institution has engaged, is engaging, or is about to engage in an unsafe and unsound practice, separately and apart from whether the institution has technically violated a law or regulation. The commenter added that Congress entrusted the Federal banking agencies with the power to determine whether practices are unsafe and unsound and attempt to halt such practices through supervision, even if a specific case may not constitute a violation of a written law or regulation.

D. Supervisory Criticisms

Several commenters addressed supervisory criticisms and how they relate to guidance. These commenters suggested that supervisory criticisms

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.

[14] 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). This final rule does not specifically discuss those comments that are only potentially relevant to other agencies.

[15] This final rule does not specifically discuss those comments that are only potentially relevant to other agencies.

[16] The Federal banking agencies are the OCC, Board, and FDIC. 12 U.S.C. 1813.

should be specific as to practices, operations, financial conditions, or other matters that could have a negative effect. These commenters also 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, 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. One commenter asserted that MRAs should not be based on ''reputational risk,'' but rather on the underlying conduct giving rise to concerns and asked the agencies to address this in the final rule.

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 and would also clearly violate the intent of the law in 12 U.S.C. 1818(b). 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 could undermine safety and soundness or pose harm to consumers if left unaddressed.

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 ''human beings 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. Legal Authority and Visitorial Powers

One commenter questioned the Federal banking agencies' reference in the Proposal to visitorial powers as an additional authority for early identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound banking practice, or breach of fiduciary duty under 12 U.S.C. 1818.

F. 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 APA 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.

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 or 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 and other supervisory actions. Similarly, because the FDIC is not addressing its approach to supervisory criticism in the final rule, including any criticism related to reputation risk, the final rule does not address supervisory criticisms relating to ''reputation risk.'' Nonetheless, the FDIC affirms that it does not issue supervisory recommendations, including MRBAs [17] solely based on reputation risk.

[17] The FDIC does not issue MRAs or MRIAs. Rather, the FDIC issues MRBAs, which are a subset of supervisory recommendations. *See Statement of the FDIC Board of Directors on the Development and Communication of Supervisory Recommendations* available at *https://www.fdic.gov/about/governance/recommendations.html.*

With respect to the comments on coverage of interpretive rules, the FDIC 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.[18] 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.[19] 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,[20] whereas general statements of policy, such as supervisory guidance, advise the public of how an agency intends to exercise its discretionary powers.[21] To this end, guidance generally reflects an agency's policy views, for example, on safe and sound 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 FDIC 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 FDIC is not adding procedures for challenges to interpretive rules through this rulemaking.

In response to the comment that the agencies treat examples in guidance as ''safe harbors'' from supervisory criticism, the FDIC agrees that examples offered in supervisory guidance can provide insight about practices that, in general, may lead to safe and sound operation and compliance with regulations and statutes. The examples in guidance, however, are generalized. When an institution implements 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 create binding legal obligation for either the public or an agency. As such, the FDIC does not deem examples used in supervisory guidance to categorically establish safe harbors from supervisory criticism.

In response to the comments that the Proposal may undermine the important role that supervisory guidance can play in informing supervisory criticism and by serving to address conditions before those conditions lead to enforcement actions, the FDIC agrees that the appropriate use of supervisory guidance generates a more collaborative and constructive regulatory process that supports the safety and soundness and compliance of 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 FDIC intends, therefore, to continue using guidance as part of the supervisory process. The FDIC does not view the final rule as weakening the role of guidance in the supervisory process and the FDIC will continue to use guidance to support the safety and soundness of banks and promote compliance with consumer protection laws and regulations.

Further, the FDIC 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, FDIC examiners' use of supervisory guidance to reference examples of safe and sound conduct, 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.

With respect to the comment that visitorial powers do not provide the Federal banking agencies with authority to issue MRAs or other supervisory criticisms, the FDIC disagrees. The FDIC's visitorial powers are well-established. The Supreme Court's decision in *Cuomo* v. *Clearing House Assn L.L.C.* explained that the visitation included the ''exercise of supervisory power.''[22] The Court ruled that the ''power to enforce the law exists separate and apart from the power of visitation.''[23] While the *Cuomo* decision involved the question of which powers may be exercised by state governments (and ruled that states could exercise law enforcement powers, but could not exercise visitorial powers), the decision did not dispute that the Federal banking agencies possess both these powers. The Court in *Cuomo* explained that visitorial powers entailed ''oversight and supervision,'' while the Court's earlier decision in *Watters* v. *Wachovia Bank, N.A.* explained that visitorial powers entailed ''general supervision and control.''[24] Accordingly, visitorial powers include the power to issue supervisory criticisms independent of the agencies' authority to enforce applicable laws or ensure safety and soundness. For these reasons, the FDIC reaffirms the statement in the preamble to the Proposed Rule that such visitorial powers have been conferred through statutory examination and reporting authorities, which facilitate the FDIC's identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound practice, or breach of fiduciary duty under 12 U.S.C. 1818. These statutory examination and reporting authorities pre-existed 12 U.S.C. 1818, which neither superseded nor replaced such authorities. The FDIC has been vested with statutory examination and reporting authorities with respect to banks under its supervision.[25]

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

[19] Questions concerning the legal and supervisory nature of interpretive rules are case-specific and have engendered debate among courts and administrative law commentators. The FDIC 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) (''[w]hether 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* (Adopted June 13, 2019), *available at https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules* (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)).

[20] *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.

[21] *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).

[23] *Cuomo* v. *Clearing House Assn L.L.C.*, 557 U.S. 519,536 (2009).

[23] *Id.* at 533.

[24] *Watters* v. *Wachovia Bank, N.A.,* 550 U.S. 1, 127 (2007).

[25] The commenter's reading of the agencies' examination and reporting authorities would assert that the agencies may examine supervised institutions and require reports, but not make findings based on such examinations and reporting,

Continued

In response to comments regarding the role of public comment for supervisory guidance, the FDIC 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 FDIC in some instances issues 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 safe and sound practices, appropriate consumer protection, prudent risk management, or other actions in furtherance of compliance with laws or regulations. Relatedly, the FDIC 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.'' [26]

With respect to the commenter's request that the agencies affirm that they will apply statutory factors while processing applications, the FDIC affirms that the agency will continue to consider and apply all applicable statutory factors when processing applications.

In response to the question raised by some commenters concerning potential confusion between supervisory guidance and interpretive rules, the FDIC notes that interpretive rules are outside the scope of the rulemaking. In addition, as stated earlier, interpretive rules do not, alone, ''have the force and effect of law'' and must be rooted in, and derived from, a statute or regulation. 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 FDIC believes that when it issues an interpretive rule, the fact that it is an interpretive rule is generally clear. In addition, these comments relate to clarity in drafting, rather than a matter that seems suitable for rulemaking.

In response to the two commenters opposing the Proposal, this final rule does not undermine any of the FDIC's safety and soundness or other authorities. Indeed, the final rule is designed to support the FDIC's ability to supervise banks effectively. In addition, the FDIC 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 number of comments on the Proposal are a sign of this interest. As such, the FDIC 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. Therefore, the FDIC 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 FDIC's ability to provide valuable guidance, the FDIC assures the commenter that this language will not inhibit the FDIC from issuing new supervisory guidance when appropriate.

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

III. The Final Rule

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

IV. Administrative Law Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 [27] (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC has reviewed this final rule and determined that it does not contain any information collection requirements subject to the PRA. Accordingly, no submissions to OMB will be made with respect to this final rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the final rule on small entities.[28] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[29] The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million that are independently owned and operated or owned by a holding company with less than or equal to $600 million in total assets.[30] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions.

As of September 30, 2020, the FDIC supervised 3,245 institutions, of which

unless the finding is sufficient to warrant a formal enforcement action under the standard set out in 12 U.S.C. 1818. This reading is inconsistent with the history of federal banking supervision, including as described in the cases cited in the Proposed Rule.

[26] *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.

[27] 44 U.S.C. 3501–3521.

[28] 5 U.S.C. 601 *et seq.*

[29] 5 U.S.C. 605(b).

[30] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

2,434 were considered small for purposes of RFA.[31] This final rule does not impose any obligations on FDIC-supervised entities, and FDIC-supervised entities do not need to take any action in response to this rule. For these reasons, and under section 605(b) of the RFA, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small FDIC-supervised institutions.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act [32] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language in the Proposed Rule.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[33] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[34] The FDIC has determined that the final rule will not impose additional reporting, disclosure, or other requirements on IDIs; therefore, the requirements of the RCDRIA do not apply.

E. Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a ''major'' rule.[35] If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[36]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[37] As required by the Congressional Review Act, the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

List of Subjects in 12 CFR Part 302

Administrative practice and procedure, Banks, banking.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Authority and Issuance

■ For the reasons set forth in the preamble, the FDIC adds part 302 to 12 CFR chapter III, subchapter A, to read as follows:

PART 302—USE OF SUPERVISORY GUIDANCE

Sec.
302.1 Purpose.
302.2 Implementation of the Statement Clarifying the Role of Supervisory Guidance.
302.3 Rule of construction.
Appendix A to Part 302—Statement Clarifying the Role of Supervisory Guidance

Authority: 5 U.S.C. 552; 12 U.S.C. 1818, 1819(a) (Seventh and Tenth), 1831p–1.

§ 302.1 Purpose.

The FDIC 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).

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

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

§ 302.3 Rule of construction.

This subpart does not alter the legal status of guidelines authorized by statute, including but not limited to, 12 U.S.C. 1831p–1, to create binding legal obligations.

Appendix A to Part 302—Statement Clarifying the Role of Supervisory Guidance

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 issues 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.[1] 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.

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

[31] FDIC Consolidated Reports of Condition and Income Data, September 30, 2020.

[32] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999), 12 U.S.C. 4809.

[33] 12 U.S.C. 4802(a).

[34] 12 U.S.C. 4802.

[35] 5 U.S.C. 801 *et seq.*

[36] 5 U.S.C. 801(a)(3).

[37] 5 U.S.C. 804(2).

[1] 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.

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 encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on January 19, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–01537 Filed 3–1–21; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0905; Project Identifier 2019–SW–102–AD; Amendment 39–21384; AD 2021–02–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2015–26–01, which applied to certain Airbus Helicopters Model AS332C1, AS332L1, AS332L2, EC225LP, AS–365N2, AS 365 N3, EC 155B, and EC155B1 helicopters with an energy-absorbing seat. AD 2015–26–01 required inspecting for the presence of labels (placards) that prohibit stowing anything under the seat, and if a label (placard) is missing or not clearly visible to each occupant, installing a label (placard). This AD retains all of the requirements of AD 2015–26–01, and also adds helicopters to the applicability and requires a modification (installing new labels (placards)). This AD was prompted by the determination that additional helicopters are affected by the unsafe condition, and that new labels (placards) are required for all affected helicopters. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 6, 2021.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 6, 2021.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of January 26, 2016 (80 FR 79466, December 22, 2015).

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; phone: 972–641–0000 or 800–232–0323; fax: 972–641–3775; or at *https://www.airbus.com/helicopters/services/support.html.* You may view this referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0905.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0905; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aviation Safety Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3218; email: *kathleen.arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2015–26–01, Amendment 39–18349 (80 FR 79466, December 22, 2015) (AD 2015–26–01). AD 2015–26–01 applied to certain Airbus Helicopters Model AS332C1, AS332L1, AS332L2, EC225LP, AS–365N2, AS 365 N3, EC 155B, and EC155B1 helicopters with an energy-absorbing seat. The NPRM published in the **Federal Register** on October 7, 2020 (85 FR 63240). The NPRM was prompted by the discovery that required labels (placards) prohibiting stowage of any object under an energy-absorbing seat had not been systematically installed and the determination that additional helicopters are affected by the unsafe condition, and that new labels (placards) are required for all affected helicopters. The NPRM proposed to continue to require inspecting for the presence of labels (placards) that prohibit stowing anything under the seat, and if a label (placard) is missing or not clearly visible to each occupant, installing a label (placard), and also proposed to add helicopters to the applicability and require a modification (installing new labels (placards)). The FAA is issuing this AD to address any object stowed under an energy-absorbing seat, which could reduce the efficiency of the energy-absorbing function of the seat,