NATIONAL

12 CFR Part 791

[Docket No. NCUA-2020-0098]

RIN 3133-AF28

Role of Supervisory Guidance

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board is adopting a final rule that codifies the Interagency Statement Clarifying the Role of Supervisory Guidance, issued by the NCUA, Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve (the Board), the Office of Comptroller of the Currency (OCC), and the Consumer Financial Protection Bureau (Bureau) (collectively, the agencies) on September 11, 2018 (2018 Statement). By codifying the 2018 Statement, with amendments, the final rule confirms that the NCUA will continue to follow and respect the limits of administrative law in carrying out their 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 NCUA. The final rule adopts the rule as proposed without change.

DATES: The provisions of this final rule are effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. Background

The NCUA 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 NCUA along with the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve (the Board), the Office of Comptroller of the Currency (OCC), and the Consumer Financial Protection Bureau (Bureau) (collectively, 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

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[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.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf.*

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

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[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* 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

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

that the agencies codify the 2018 Statement.[7] 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 determined that it was appropriate to join this rulemaking on its own initiative. References in the preamble to "agencies" therefore include the NCUA.

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 for banks), as well as in connection with other supervisory actions that should be clarified through a rulemaking. As explained in the next section, the NCUA examiners use a notification similar to an MRA called a Document of Resolution (DOR). 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.

B. NCUA's Examination and Supervisory Oversight

As a member of the Federal Financial Institution Examination Council (FFIEC),[8] the NCUA participates with and generally has regulations and guidance consistent with the other financial regulators. Nevertheless, given its different statutory framework, the NCUA's supervision of Federal credit unions and federally insured, state-chartered credit unions is different than the other agencies. With respect to safety and soundness, the Federal Credit Union Act requires the NCUA to ensure all federally insured credit unions operate safely and soundly.[9] In

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[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. .

[8] https://www.ffiec.gov/

[9] There are 21 references to "safety and soundness" in the Federal Credit Union Act. *See* 12 U.S.C. 1757(5)(A)(vi)(I), 1759(d & f), 1781(c)(2), 1782(a)(6)(B), 1786(b), 1786(e), 1786(f), 1786(g), 1786(k)(2), 1786(r), 1786(s), and 1790d(h). Similarly, the NCUA requires federally insured credit unions to comply with relevant consumer protection statutes and regulations.

particular, 12 U.S.C. 1786(b) compels the agency to act to correct unsafe or unsound conditions or practices in insured credit unions.[10]

Often, and necessarily, regulatory requirements are not simple prescriptions that lend themselves to right-or-wrong determinations. Codifying in regulation all unsafe and unsound conditions and practices in explicit detail would be unfeasible, especially in light of the ever-evolving nature of financial services. Highly detailed or prescriptive regulations would also lead to unintended consequences. Regulated entities would face additional burden, less flexibility, and innovation would be stifled.

Notwithstanding these limitations, the NCUA has issued a regulation that implements the Federal Credit Union Act's requirement that federally insured credit unions operate safely and soundly. Section 741.3(b) of the NCUA's Rules and Regulation lists various factors the agency considers "in determining whether the credit union's financial condition and policies are both safe and sound." Regarding the continuing insurability of a credit union, Section 741.3(d) of the NCUA's Rules and Regulation goes on to specify that "[i]nsurance of member accounts would not otherwise involve undue risk to the National Credit Union Share Insurance Fund (NCUSIF)."[11]

The NCUA needs to be able to address safety and soundness issues through supervisory determinations that properly evaluate and weigh the relevant facts and considerations in their totality. For example, a federally insured credit union may be engaged in an inherently high-risk

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[10] "Whenever, in the opinion of the Board, any insured credit union is engaging or has engaged in unsafe or unsound practices in conducting the business of such credit union, or is in an unsafe or unsound condition to continue operations as an insured credit union, or is violating or has violated an applicable law, rule, regulation, order, or any condition imposed in writing by the Board in connection with any action on any application, notice, or other request by the credit union or institution-affiliated party, or is violating or has violated any written agreement entered into with the Board, the Board shall serve upon the credit union a statement with respect to such practices or conditions or violations for the purpose of securing the correction thereof."

[11] This provision states: "Any circumstances which may be unique to the particular credit union concerned shall also be considered in arriving at the determination of whether or not an undue risk to the NCUSIF is or may be present. For purposes of this section, the term 'undue risk to the NCUSIF' is defined as a condition which creates a probability of loss in excess of that normally found in a credit union and which indicates a reasonably foreseeable probability of the credit union becoming insolvent because of such condition, with a resultant claim against the NCUSIF."

activity, but the credit union may mitigate the risk by holding extra capital and liquidity and adopting leading practices in managing the underlying risk. Conversely, another institution may have not adopted sufficient mitigations to offset the risk, leading to undue risk to the National Credit Union Share Insurance Fund and taxpayers.

Like the other agencies, the NCUA has instructions that set requirements for how examiners supervise institutions.[12] For example, when addressing a concern in a report of examination, examiners are required to cite the highest authority related to the subject matter, and describe the root problem including the corresponding details and facts that support the examiner's conclusion. Examiners can cite agency guidance when addressing some violations or unsafe or unsound conditions or practices when they involve a significant degree of judgment or interpretation in their application. This is necessary and helpful for both regulated institutions and examiners by standardizing application of regulatory requirements that require judgment or interpretation in their application, instead of relying on the individual views of each examiner. The examiner guidance explains how the subject relates to a regulatory or statutory requirement and provides the institution with additional information on the topic.

Pursuant to agency policy, examiners may only include in the Document of Resolution (DOR)[13] issues that are significant enough that they would be escalated to the next level of enforcement for failure to correct the problem. These types of problems are defined as:

- Unsafe or unsound practices that reasonably threaten the stability of the credit union—that is, any action or lack of action that, if left uncorrected, may result in substantial loss or damage to the credit union or its members.
- Violations of law or regulation that are systemic, recurring, or that result from willful neglect.

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[12] https://www.ncua.gov/regulation-supervision/manuals-guides/examiners-guide.

[13] The *Document of Resolution* section of the NCUA's report of examination is the equivalent of *Matters Requiring Immediate Attention* used by the other banking agencies.

With that statutory and regulatory background in mind, the NCUA uses DORs to address practices that result in substantive noncompliance with laws or rules, enforcement actions, or conditions imposed in writing. The NCUA's policy is to identify deficient practices and violations in a timely manner and encourage corrective action well before deficiencies affect a credit union's financial condition or viability.

II. The Proposed Rule and Comments Received

On November 5, 2020, the agencies issued a proposed rule (Proposed Rule) that would codify the 2018 Statement, with clarifying changes, as an appendix to proposed rule text.[14] The Proposed Rule would supersede the 2018 Statement. The rule text would also provide that the 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 such as DORs, including those communicated through matters requiring board attention, documents of resolution, and supervisory recommendations (collectively, supervisory criticisms).[15] 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

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[14] 85 FR 70512 (November 5, 2020).

[15] 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.

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.[16]

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 (MOUs), 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."[17] As noted in the Proposed Rule, examiners all take steps to identify deficient practices

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[16] 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 12, 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.

[17] 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

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 and credit unions 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 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.[18]

Comments on the Proposed Rule

A. NCUA Specific Comments

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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. For credit unions, the corresponding provision is 12 U.S.C. 1786.

[18] 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.

The NCUA received 13 comments specifically focusing on credit union concerns about the Proposed Rule. These commenters, which included national trade associations, state credit union leagues, and credit unions, generally supported he proposed rule. Six comments were sent jointly to each regulator, two were from associations that provided similar comments to the CFPB, and five were comments provided solely to the NCUA. Topics discussed within the scope of the proposal are issues addressing the effect and applicability of the guidance. Issues beyond the scope of the rule addressed coordination with other Federal and State regulatory authorities, consistency in applying guidance, the examination cycle, the need for an appeals process, and the need for the Board to issue more guidance on various topics.

One commenter stated that each guidance statement from the NCUA should include a notice that it is nonbinding. In addition, the commenter believed that the NCUA should add a notice to each guidance statement to support that credit unions are fully permitted to develop their own approaches to compliance issues, and that the examiner's recommendations or suggestions do not eliminate the ability of the credit union to implement its specific solutions.

Aside from expressing general support for the rule, most credit union specific comments were beyond the scope of the rulemaking. Three commenters requested that the NCUA improve coordination with respect to other Federal regulators, especially CFPB and FINCEN. Two commenters also requested that NCUA improve coordination with state supervisory authorities. The commenters stated that such enhanced coordination would help avoid overlapping or consecutive examinations, which they stated imposes operational burdens and utilizes critical staff member time. With respect to state guidance, two commenters stated that the NCUA must ensure state regulators understand how the NCUA will incorporate state reliance on state guidance into joint examinations or in alternating examinations where the NCUA may be the lead agency.

Two commenters stated that there should be more consistent application of the rules and guidance across regions, with examples provided about BSA/AML and audit reports. One

commenter recommended that the NCUA should create a task force to evaluate inconsistent application of guidance comprised of credit union officials and staff.

One commenter stated that the NCUA Interpretive Rules and Policy Statements (IRPS) are part exempted interpretive rules and covered policy statements. NCUA might consider explicitly identifying existing and future issuances as either covered supervisory guidance or exempt interpretive rule to provide clarity for stakeholders.

B. Comments to all the Agencies Including the NCUA

In addition, the agencies received 30 comments concerning the Proposed Rule.[19] Commenters representing trade associations for banking institutions and other businesses, state bankers' associations, individual financial institutions, and one member of Congress expressed support for the proposed rule. These commenters supported codification of the 2018 Interagency 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 allowing institutions to know what the law is and to develop 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 order, including a "demonstrable unsafe or unsound practice" and that supervisory guidance remains a beneficial tool to communicate supervisory

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

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 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 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 improper practices by financial institutions 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 financial institutions have wider discretion to ignore supervisory guidance.

B. Scope of Rule

Several 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 issuing

agency 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 and 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 such as DORs, 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 compliant conduct, 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 that supervisory guidance or interpretive rule as deemed compliance. 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. 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. According to this commenter, 12 U.S.C. 1831p-1 and 12 U.S.C. 1818 recognize the discretionary power conferred on banking agencies separate from the power to issue regulations. The commenter noted that, pursuant to these statutes, regulators may issue cease and desist orders based on a 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 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. Commenters suggested that supervisory criticisms should be specific as to practices, operations, financial conditions, or other matters that could have a negative effect. 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, 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 suggested 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 they are 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 the underlying conduct giving rise to concerns should be the basis for an MRA 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. 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 undermine safety and soundness or 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; that it may be cited as, and serve as the basis for, criticisms. According to the commenter, even under the "well-established law" described in the proposal, it is quite permissible for guidance to be used as a set of standards that may indeed 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 (which is apparently forbidden) and issuing supervisory criticisms that make "reference" to supervisory guidance (which continues to be permitted). The commenter suggested that is a distinction that it may be difficult for people 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 to the point that it becomes almost useless in the process of issuing criticisms designed to correct deficient bank practices.

E. Legal Authority and Visitorial Powers

One commenter questioned the 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.

F. Issuance and Management of Supervisory Guidance

Several commenters made suggestions about how the agencies should issue and manage supervisory guidance. Some comments suggested that the agencies should clearly delineate 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 a 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 does not contain the kind of granularity that could be misconstrued as binding expectations. According to this commenter, the agencies can issue separate FAQs 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. One commenter expressed concern that the agencies will aim to reduce the issuances 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 and other supervisory actions such as DORs 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 such as DORs. Similarly, because the NCUA is not addressing approaches to supervisory criticism in the final rule, including any criticism related to reputation risk, the final rule does not include standards for supervisory criticisms relating to "reputation risk."

With respect to the comments on coverage of interpretive rules, the NCUA 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.[20] 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.[21] 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,[22] whereas general statements of policy, such as supervisory guidance, advise the public of how an agency intends to exercise its discretionary powers.[23] To this end, guidance generally reflects an agency's policy views, for example, on practices on safe and sound risk management. On the other hand, interpretive rules generally resolve ambiguities regarding what statutes and regulations require. Because supervisory guidance and interpretive rules have different characteristics and serve different purposes, the NCUA is adopting the proposed rule's coverage of 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

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

[21] Questions concerning the legal and supervisory nature of interpretive rules are case-specific and have engendered debate among courts and administrative law commentators. The NCUA 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* (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)).

[22] *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.

[23] *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).

address interpretive rules. As such, the NCUA 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," the NCUA agrees that examples offered in guidance may provide reassurance about practices that, in general, may lead to safe and sound operation and compliance with regulations and statutes. The examples in guidance, however, are typically generalized. The question of whether the employment of the examples meets supervisory goals requires consideration of how an institution applies those examples under the facts and circumstances. In addition, the underlying legal principle of guidance is that it does not created binding legal obligation for either the public or an agency. As such, the NCUA does not intend to deem examples in guidance as categorically setting safe harbors.[24]

In response to the comment that the proposal may undermine the important role that supervisory guidance can play by informing supervisory criticism and by serving to address conditions before those conditions lead to enforcement actions, the NCUA agrees that the appropriate use of guidance supports a more collaborative and constructive regulatory process that supports the safety and soundness of institutions and diminishes the need for enforcement actions. In addition, 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 NCUA intends, therefore, to continue using guidance to bolster the supervisory process. The NCUA does not view the final rule as weakening the role of guidance in the supervisory process. Further, the NCUA will continue to use guidance in a robust way to support the safety and soundness of credit unions. In response to the related question from these commenters, which suggested there is no basis for the rule, the NCUA notes the question of the role of guidance has been one of interest to regulated parties and other

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[24] The question of whether an example in guidance can provide a safe harbor would also likely not be a logical outgrowth of the proposed rule.

stakeholders over the past few years. The Petition is evidence of this interest. As such, the NCUA believes it will serve the public interest to reaffirm the appropriate role of supervisory guidance.

With respect to the comment that visitorial powers do not provide the authority to issue supervisory criticisms like DORs, the NCUA disagrees. The visitorial powers of financial regulators 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."[25] The Court ruled that the "power to enforce the law exists separate and apart from the power of visitation."[26] 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 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."[27] 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 NCUA 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 NCUA'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. 1786. In the case of the federal banking agencies, such statutory examination and reporting authorities pre-existed 12 U.S.C. 1786, which neither superseded nor replaced such authorities.

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[25] 557 U.S. 519, 536 (2009).

[26] *Id.* at 533.

[27] 550 U.S. 1, 127 (2007).

Each of the agencies has been vested with statutory examination and reporting authorities with respect to institutions under its supervision.[28]

In response to the commenter's request regarding guidance issued for public comment, the NCUA 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 NCUA issues 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 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 to comply with laws or regulations.

With respect to the commenter's request that the agencies affirm that they will apply statutory factors while processing applications, the NCUA 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 guidance and interpretive rules, the NCUA notes that interpretive rules are outside the scope of the rulemaking. In addition, as stated earlier, while both guidance and interpretive rules serve different purposes, both lack the force and effect of law. Interpretive rules must be rooted in the statutes and regulations those rules interpret. As for identification of these documents, the NCUA generally does, identify guidance and interpretive rules and will continue to do so going forward.

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

In response to the two commenters opposing the Proposal, this final rule does not undermine any of the NCUA's safety and soundness authorities. Indeed, the final rule is designed to solidify the NCUA's ability to enforce the very matters of most importance. In addition, the NCUA 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 is evidence of this interest. As such, the NCUA believes it will serve the public interest to reaffirm the appropriate role of supervisory guidance. Therefore, the NCUA is proceeding with the rule as proposed.

One credit union commenter stated that examiners should only use regulatory requirements as the basis to assess credit union operations, and afford credit unions the opportunity to demonstrate that their practices, which may deviate from the examples provided in supervisory guidance, nonetheless constitute safe and sound practices that meet regulatory requirements. The NCUA notes that the final rule clearly indicates that examiners will not criticize a supervised financial institution for, and the NCUA will not issue an enforcement action on the basis of, a "violation" of or "non-compliance" with supervisory guidance. Nevertheless, examiners may reference supervisory guidance to provide examples of safe and sound practices, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations.

Another commenter requested that all supervisory guidance be published for public comment before being issued. The commenter argued that this process would reinforce the nature of the guidance and provide credit unions a role in helping to achieve vetted guidance that is useful to their operations. The NCUA does not agree with this comment as publishing each supervisory guidance for public comment would prevent it from being issued timely to provide examples of safe and sound practices, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations where applicable. As stated in response to other comments, the NCUA's position is the underlying legal principal of guidance is that it does not create a binding legal obligation for either the public or an agency.

One comment stated that the NCUA should include a notice in each supervisory guidance indicating that it is nonbinding. The NCUA believes such a notice is not necessary, given that the final rule reflects the NCUA's position that the underlying legal principal of supervisory guidance is that it does not created binding legal obligation for either the public or an agency.

One comment recommended identifying existing and future issuances of NCUA Interpretive Rules and Policy Statements (IRPS) as either a covered supervisory guidance or an exempt interpretive rule to provide clarity for credit unions. The NCUA reiterates that interpretive rules are outside the scope of this rulemaking. However, as stated in the proposed rule, while both guidance and interpretive rules serve different purposes, both lack the force and effect of law. As for identification of NCUA IRPS issuances, the NCUA generally does identify guidance and interpretive rules and will continue to do so going forward.

Comments Beyond the Scope of the Rulemaking

Most comments by credit union affiliated commenters were beyond the scope of the rulemaking, including the need for coordination with other Federal and State regulatory authorities, consistency in applying guidance, the examination cycle, the need for an appeals process, and the need for the Board to issue more guidance on various topics. Given that these comments addressed issues not relevant to the guidance rulemaking, the NCUA has determined that it is more appropriate to assess them outside the context of this rulemaking. Nevertheless, the Board agrees with the commenters that is important to enhance coordination with other regulatory authorities and apply guidance consistently.

III. The Final Rule

For the reasons discussed above, the final rule adopts the Proposed Rule without change. However, the NCUA has decided to issue a final rule that is specifically addressed to the NCUA and NCUA-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 Analysis

The Paperwork Reduction Act of 1995[29] (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 NCUA 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 Analysis

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined by the NCUA for purposes of the RFA to include federally insured credit unions with assets less than $100 million)[30] and publishes its certification and a short, explanatory statement in the Federal Register together with the rule. This rule will not impose any obligations on federally insured

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[29] 44 U.S.C. 3501–3521.

[30] NCUA Interpretive Ruling and Policy Statement (IRPS) 87-2, as amended by IRPS 03-2 and 15-1, *available at* https://www.ncua.gov/files/publications/irps/IRPS1987-2.pdf.

credit unions, and regulated entities will not need to take any action in response to this rule. The NCUA certifies that the rule will not have a significant economic impact on a substantial number of small entities. The NCUA received no comments in response to its request for comments on this analysis.

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rule will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined this rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.[31]

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.[32] 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.[33]

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[31] Public Law 105–277, 112 Stat. 2681 (1998).

[32] 5 U.S.C. 801 et seq.

[33] 5 U.S.C. 801(a)(3).

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.[34] As required by the Congressional Review Act, the NCUA will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

National Credit Union Administration

List of Subjects in 12 CFR Part 791

Administrative practice and procedure, Credit unions, Sunshine Act

By the National Credit Union Administration Board on January 19, 2021

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Melane Conyers-Ausbrooks

Secretary of the Board

12 CFR Chapter VII

Authority and Issuance

For the reasons stated in the preamble, 12 CFR part 791 is amended as follows:

PART 791 - RULES OF NCUA BOARD PROCEDURE; PROMULGATION OF NCUA RULES AND REGULATIONS; OBSERVANCE OF NCUA BOARD MEETINGS

1. The authority citation for part 791 is revised to read as follows:

[34] 5 U.S.C. 804(2).

Authority: 12 U.S.C. 1766, 1781, 1786, 1787, 1789, and 5 U.S.C. 552b.

2. Subpart D is added to part 791 to read as follows:

Subpart D—Use of Supervisory Guidance

Sec.

791.19 Purpose.
791.20 Implementation of the Interagency Statement.
791.21 Rule of construction.
Appendix A to Subpart D—Statement Clarifying the Role of Supervisory Guidance

Subpart D—Use of Supervisory Guidance

§ 791.19 Purpose.

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

§ 791.20. Implementation of the Interagency Statement.

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

§ 791.21 Rule of construction.

Appendix A to this subpart does not alter the legal status of guidance that is authorized by statute, including but not limited to 12 U.S.C. 1781, 1786, and 1789, to create binding legal obligations.

Appendix A to Subpart D—Statement Clarifying the Role of Supervisory Guidance

Statement Clarifying the Role of Supervisory Guidance

The National Credit Union Administration is responsible for promoting safety and soundness and effective consumer protection at Federal credit unions. The NCUA is issuing this statement to explain the role of supervisory guidance and to describe its approach to supervisory guidance.

Difference between supervisory guidance and laws or regulations

(1) The NCUA issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to their respective 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 NCUA do not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the NCUA's supervisory expectations or priorities and articulates the agency's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the agency 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 agency efforts to clarify the role of supervisory guidance

(2) The NCUA is clarifying the following policies and practices related to supervisory guidance:

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[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.

(i) The NCUA intends to limit the use of numerical thresholds or other "bright-lines" in describing expectations in supervisory guidance. Where numerical thresholds are used, the NCUA intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The agency 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.

(ii) 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 NCUA 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.

(iii) 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.

(iv) The NCUA 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 agency 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.

(v) The NCUA will aim to reduce the issuance of multiple supervisory guidance

documents on the same topic and will generally limit such multiple issuances going forward.

(3) The NCUA will continue efforts to make the role of supervisory guidance clear in their 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.

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