BANK POLICY INSTITUTE

December 5, 2020

Via Electronic Mail

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218, Washington, DC 20219
Docket ID OCC–2020–0005

Ann Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW, Washington, DC 20551
Docket No. R–1725; RIN No. 7100–AF96

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429
RIN 3064–AF32

Melane Conyers-Ausbrooks, Secretary of the Board
National Credit Union Administration
1775 Duke Street, Alexandria, VA 22314
Docket ID NCUA–[2020–0098]

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW, Washington, DC 20552
Docket No. CFPB–2020–0033; RIN 3170-AB02

Re: Role of Supervisory Guidance[1]

Ladies & Gentlemen:

The Bank Policy Institute[2] appreciates the opportunity to respond to the notice of proposed rulemaking (the "Proposal") issued by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Bureau of Consumer Financial Protection (each an "Agency," and collectively, the "Agencies") to codify in regulation the Agencies' policies concerning the use of supervisory guidance. As the Proposal notes, the Bank Policy Institute submitted a petition for rulemaking with certain of the

---

1 Role of Supervisory Guidance, 85 Fed. Reg. 70512 (proposed Nov. 5, 2020) (to be codified at 12 C.F.R. pt. 4, 262, 302, 791, and 1074) [hereinafter Proposal].

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

Agencies on November 5, 2018 on this topic, and we appreciate that the Proposal reflects timely consideration of, and action upon, that petition and the specific issues it raised.[3]

The Proposal represents a significant step forward in the Agencies' continuing work to examine and better communicate how they use supervisory guidance in practice, and to appropriately ground and align those practices with the fact that, as a matter of black letter administrative law, guidance cannot create binding, enforceable legal obligations. The Proposal would significantly build upon the Agencies' 2018 *Interagency Statement Clarifying the Role of Supervisory Guidance* ("2018 Interagency Statement") both by improving upon the substance of that document and by codifying it in regulation that is binding on each Agency. In particular, the Proposal would expressly preclude the issuance of "matters requiring attention" and other forms of supervisory criticism by the Agencies on the basis of a "violation of" or "non-compliance with" supervisory guidance, resolving a substantial ambiguity in the 2018 Interagency Statement that could have undermined its effectiveness as a tool to ensure that examiners do not give guidance greater weight than it is entitled to receive as a matter of law. For that reason, as we describe further in Parts I and II of this letter, we strongly support the core elements of the Proposal and urge the Agencies to adopt them.

At the same time, however, we are concerned with several aspects of the Proposal that could undermine its effectiveness and utility in practice. First, the Proposal would (via footnote in the preamble) exclude so-called "interpretive rules" from the scope of guidance documents subject to the Proposal and its approach to guidance. This is unwarranted as a matter of policy because, like supervisory guidance, interpretive rules do not have the force and effect of law, and should not be applied as such. It also would create potential confusion regarding which agency issuances are interpretive rules excluded from the Proposal and thus, at minimum, would require the Agencies to provide significantly greater transparency regarding which issuances are (and are not) subject to the Proposal in practice. Second, the Proposal appears to incorrectly suggest (again by footnote in the preamble) that certain of the Agencies retain broad "visitorial powers" to compel conduct through the issuance of supervisory criticism that is not based on conduct that violates the law. Parts III and IV of this letter identify each of these problems in greater detail. Third, the Proposal also leaves unresolved certain key questions about the legal standards and consequences that attach to the Agencies' issuance of MRAs and other supervisory criticisms. Part V of this letter describes the importance of these unresolved questions and urges the Agencies to appropriately address the current ambiguity regarding the standards that apply to MRAs and other supervisory criticism and to confirm that MRAs and other supervisory criticism will not give rise to adverse legal consequences, such as an Agency's refusal to consider or approve an application.

Taken together, we believe that the Proposal and our suggested changes would strengthen the important and helpful role that supervisory guidance can play in the U.S. system of bank regulation and supervision. Guidance documents, whether in the form of policy statements, FAQs, interpretive materials, or other issuances, can be useful to supervised institutions and Agency staff alike by providing greater public transparency into the Agencies' current views on supervisory and legal matters. By

3 BPI Petition for Rulemaking on the Role of Supervisory Guidance (November 5, 2018), https://bpi.com/wp-content/uploads/2018/11/BPI_PFR_on_Role_of_Supervisory_Guidance_Federal_Reserve.pdf.

underscoring the purposes and utility that such guidance is intended to serve, while also clarifying that such guidance is *not* intended to establish specific, mandatory requirements or standards to which institutions would be bound in practice, the Proposal and the suggestions we make in this letter will help ensure that supervisory guidance plays a constructive and appropriate role in our bank regulatory framework.

I. We strongly support the proposed codification of the Agencies' policies concerning the use of supervisory guidance in a regulation that binds each of the Agencies, including the explicit recognition of the basic legal principle that supervisory guidance does not create binding, enforceable legal obligations.

We strongly support the Proposal's codification of the 2018 Interagency Statement for the same reasons we described in our 2018 petition for rulemaking. First, the Proposal reflects a clear commitment to the rule of law, and in particular the clear black letter principle of American administrative law articulated in the 2018 Interagency Statement: guidance does not have the force of law, and so cannot give rise to binding, enforceable legal obligations. Express affirmation of this principle in a regulation binding each of the Agencies would appropriately signal that institutions and the public will have prior notice of, and an opportunity to comment on, government mandates that are treated as binding by agency examiners, and would also help dissuade individual examiners from inappropriately applying guidance as binding in practice. Second, 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. Third, the Proposal would maintain the focus of the examination process on matters material to the financial condition of financial institutions.

II. We strongly support the Proposal's clarification 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.

As we noted in our 2018 petition for rulemaking, the 2018 Interagency Statement's general reference to a "criticism" or "citation" created substantial ambiguity regarding whether MRAs or other adverse supervisory criticisms are covered by the 2018 Interagency Statement, and could have been misconstrued by examiners as leaving them with authority to issue MRAs and other such mandates on the basis of supervisory guidance. The Proposal helpfully resolves this ambiguity by more clearly describing the range of supervisory criticisms that may not be based upon a "violation" of, or non-compliance with, supervisory guidance, including "matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations."[4] We strongly support these changes.

We note that, in the context of affirming this important principle, the Proposal nonetheless states that "[i]n some situations, examiners may reference (including in writing) supervisory guidance to

[4] Proposal at 70519.

provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations."[5] Although such references may indeed be appropriate where they are truly illustrative, we are concerned that in practice, these kinds of references to supervisory guidance could be conveyed in a way that strongly implies that they are not merely "examples," but rather de facto standards or expectations to which the supervised financial institution will be held. To mitigate that risk, we believe that the Agencies should, in finalizing the Proposal, clarify that such references shall in no case be stated or construed to require or imply that a supervised institution must conform to any supervisory guidance so referenced.

We also note that the Proposal indicates that the Agencies may seek public comment on supervisory guidance, but that the act of seeking public guidance "does not mean that the guidance is intended to be a regulation or have the force and effect of law."[6] While we support this aspect of the Proposal, we are concerned that requests for public comment on guidance could create confusion about whether the issuance is intended to be guidance, or rather a regulation. For that reason, we request that when the Agencies do seek public comment on supervisory guidance, they clearly identify it as such (i.e., as guidance that is not intended to have the force and effect of law, and not a binding regulation).

III. The Proposal's exclusion of "interpretive rules" from the scope of the proposed rule is inappropriate as a matter of policy and would, unless clarified, create significant ambiguity and uncertainty as to which agency issuances the proposed rule would actually apply.

In a footnote, the Proposal notes that the Agencies may sometimes issue "interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions" that are not supervisory guidance, but instead are "interpretive rules addressing regulatory requirements" that are "outside the scope of this rulemaking."[7] This exclusion is inappropriate as a policy matter and unworkable as a practical matter.

As a matter of policy, there is no clear rationale for excluding interpretive rules. Although it is true, as the Proposal explains, that the Administrative Procedure Act refers to "interpretive rules" and "statements of policy" separately in addressing notice and comment requirements, and that these terms have been defined in jurisprudence and secondary literature in slightly different ways, they share one overwhelming salient feature: unlike legislative rules that are established pursuant to notice-and-comment procedures, *neither has the force and effect of law*.[8] The mere fact that the purpose of an

---

[5] Proposal at 70523.

[6] Proposal at 70519.

[7] Proposal at 70514 n.4.

[8] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) ("[T]he critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: [i]nterpretive rules do not have the force and effect of law and are not accorded that weight in the

interpretive rule is slightly different than that of a policy statement does not change the basic fact that neither is law.[9]

Yet by excluding interpretive rules from the scope of the proposed rule, the Agencies appear to reserve to themselves the ability to use interpretive rules in ways they propose *not* to use supervisory guidance -- for example, by issuing MRAs and other supervisory criticisms on the basis of interpretive rules, using numerical thresholds or other "bright-lines" in describing expectations in interpretive rules, and issuing multiple interpretive rules on the same topic. To use interpretive rules in those ways is inappropriate for the same reason that using other types of guidance documents in those ways is inappropriate – neither has the force and effect of law. For that reason, interpretive rules (as well as any other agency issuances that are not legislative rules subject to the notice-and-comment requirements of the APA) should be expressly *included* within the scope of the proposed rule.

In addition to these substantive problems, the proposed exclusion of interpretive rules poses an equally large practical problem: absent greater Agency transparency, how are supervised financial institutions to ascertain which agency issuances are "supervisory guidance" subject to the proposed rule and which are "interpretive rules" excluded from it? The Agencies have not, to date, ever labelled or categorized their statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions documents in this way, and do not propose to do so, either retroactively or prospectively. This ambiguity and confusion is further exacerbated by the fact that the distinction between interpretive rules and policy statements is neither clear nor well-settled. Indeed, as the Proposal itself notes, "[q]uestions concerning the status of interpretive rules are case-specific and have engendered debate among courts and administrative law commentators."[10]

Thus, without greater transparency from the Agencies on this point, supervised financial institutions would be left to make such a determination on their own, with no assurance that an agency might take a different view at any time. For this reason, we suggest that interpretive rules be included within the scope of the Proposal or, at a minimum, that the Agencies commit to (i) appropriately labelling any documents they deem interpretive rules as such, along the lines recommended by the

adjudicatory process") (internal quotation marks and citation omitted); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (emphasizing that an interpretative rule has "no power to control"); *see also* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 552 (2000) (discussing how agency interpretive rules have no binding legal effect).

9 *See* Proposal at 70514 (asserting that the purpose of an administrative rule is to advise the public of "the agency's construction of the statutes and rules which it administers" while the purpose of a policy statement is to advise the public of "how an agency may exercise its discretionary powers.").

10 *Id.*

Administration Conference of the United States ("ACUS") in 2019[11] and (ii) otherwise generally following ACUS's recommendations on agency best practices for issuing interpretive rules.[12]

IV. The Proposal inaccurately characterizes the Agencies' ability to issue MRAs or take other action on the basis of "visitorial powers," as distinct from the enumerated enforcement, examination, reporting, and other powers actually granted to the Agencies by statute.

In a footnote to the Proposal, the Proposal states:

> The Petition asserts that the federal banking agencies rely on 12 U.S.C. 1818(b)(10) 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 Ass'n L.L.C.,* 557 U.S. 519 (2009); *United States v. Gaubert*, 499 U.S. 315 (1991); and *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963). The visitorial powers facilitate 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]

This language appears to assert that the federal banking agencies have the authority to issue MRAs or other supervisory criticisms on the basis of "visitorial powers," in and of themselves, and that such authority is somehow distinct from the express powers granted to those agencies by statute (e.g., the power to make examinations, require reports, or enforce the law). The Agencies should, in finalizing the Proposal, clarify and correct this statement, as there is no basis for this assertion.

First, as a statutory matter, the term "visitorial powers" appears in federal banking law in only three instances, none of which affirmatively grants or expands federal visitorial authority.[14] The first

---

[11] Administrative Conference of the United States, 2019-1, Administrative Conference Recommendation: Agency Guidance Through Interpretive Rules (2019), (recommending that "[a]n agency should prominently state, in the text of an interpretive rule or elsewhere, that the rule expresses the agency's current interpretation of the law but that a member of the public will, upon proper request, be accorded a fair opportunity to seek modification, rescission, or waiver of the rule."), *https://www.acus.gov/sites/default/files/documents/Agency%20Guidance%20Through%20Interpretive%20Rules%20CLEAN%20FINAL%20POSTED.pdf*

[12] *See id.*

[13] Proposal at 70515 n.12.

[14] Notably, *none* of these statutory provisions address the "visitorial powers" of the Federal Reserve or FDIC with respect to bank holding companies, foreign banking organizations, state member or nonmember banks, or any other institution over which either has supervisory oversight.

and oldest of these statutory provisions is 12 U.S.C. § 484 – titled "*Limitations* on visitorial powers". Section 484 states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."[15] This provision does not affirmatively grant any visitorial (or other) power, but rather limits the exercise of such powers, particularly by state governments acting under state law. The other two instances, 12 U.S.C. §§ 25b and 1465, were enacted in 2010 and apply to national banks and federal savings associations, respectively. These provisions codify the core holding of *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. 519 (2019) by stating that no provision of the National Bank Act "shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law."[16] Again, these statutory provisions grant no visitorial (or other) powers to the federal banking agencies whatsoever.

Second, this assertion is flatly inconsistent with the Supreme Court precedent the Proposal cites as purported support for the position:

- Nothing in *Cuomo* indicates "support for a broad reading of the [federal] agencies' visitorial powers." Rather, that case addresses the scope of powers that a *state* government may exercise over national banks, and in the process, adopts a *narrow* construction of "visitorial powers" that states are barred from exercising by clearly distinguishing visitorial powers from enforcement powers: "In sum, the unmistakable and utterly consistent teaching of our jurisprudence, both before and after enactment of the National Bank Act, is that a sovereign's visitorial powers and its power to enforce the law are two different things."[17]

- Although *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) does refer to the federal banking agencies' visitorial powers as "broad," it describes them by clear reference to the various powers granted to the agencies by statute, and not as anything separate and apart from them. Additionally, in doing so, the case clearly differentiates the agencies' "surveillance" powers (i.e., the power to examine and require reports) from their enforcement powers:

  > But perhaps the most effective weapon of federal regulation of banking is the broad visitorial power of federal bank examiners. Whenever the agencies deem it necessary, they may order a thorough examination of all the affairs of the bank, whether it be a member of the FRS or a nonmember insured bank. Such examinations are frequent and intensive. In addition, the banks are required to furnish detailed periodic

[15] 12 U.S.C. § 484.

[16] 12 U.S.C. § 25b(i)(1).

[17] *Cuomo*, 557 U.S. at 529 (internal quotation marks omitted).

> reports of their operations to the supervisory agencies. In this way the agencies maintain virtually a day-to-day surveillance of the American banking system. And should they discover unsound banking practices, they are equipped with a formidable array of sanctions. If in the judgment of the FRB a member bank is making undue use of bank credit, the Board may suspend the bank from the use of the credit facilities of the FRS. The FDIC has an even more formidable power. If it finds unsafe or unsound practices in the conduct of the business of any insured bank, it may terminate the bank's insured status. Such involuntary termination severs the bank's membership in the FRS, if it is a state bank, and throws it into receivership if it is a national bank. Lesser, but nevertheless drastic, sanctions include publication of the results of bank examinations. As a result of the existence of this panoply of sanctions, recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings.[18]

- *United States v. Gaubert*, 499 U.S. 315 (1991), does not address the scope of visitorial powers at all. Rather, it examines whether certain supervisory actions of the Federal Home Loan Bank Board are within the "discretionary function" exception to the liability of the United States under the Federal Tort Claims Act, concluding that they are.[19]

Importantly, this jurisprudence not only elucidates the absence of any basis for concluding that the federal banking agencies possess implied "visitorial powers" as distinct from authority expressly granted to them by statute (e.g., to make examinations, require reports, or enforce laws). It also emphasizes the extent to which the federal banking agencies' examination and surveillance powers are not independent bases for bringing enforcement actions. Rather, those powers are the means by which the agencies gather information about the condition of a supervised financial institution. Enforcement activity must be taken pursuant to the statutes enacted by Congress explicitly for that purpose; in the words of the Court in *Philadelphia Nat'l Bank*, "should they discover unsound banking practices, they are equipped with a formidable array of sanctions."[20] This distinction is important because, as we discuss below in Part V, the Proposal reinforces the significant degree of current uncertainty as to whether the Agencies' issuance of MRAs and other supervisory criticisms are an exercise of their examination and surveillance powers, their enforcement powers, or a conflation of the two that has no basis in law.

---

18 *Philadelphia Nat'l Bank*, 374 U.S. at 329–330 (internal quotation marks and citations omitted).

19 *Gaubert*, 499 U.S. at 334.

20 *Philadelphia Nat'l Bank*, 374 U.S. at 329.

V. The Agencies should further address the current ambiguity regarding what standards and consequences apply to MRAs and other supervisory criticisms.

Although the Proposal is an important step forward in limiting the inappropriate use of guidance in the supervisory process – namely, the application of guidance as binding when it does not have the force and effect of law – it also raises a significant question that remains unresolved: what *is* a supervisory criticism? More specifically, is an MRA or other type of supervisory criticism a communication of the agency's informal views, which an institution may consider but may ultimately choose to address in a number of ways (or, possibly, not at all) without risking sanction or other punitive consequence, making the criticism an exercise of the Agencies' authority to make examinations and require reports? Or is it instead effectively a requirement that, if not met, will give rise to sanction or other consequences, such as a decrease in CAMELS or other rating, or the imposition of a bar on regulatory approval of expansionary proposals,[21] in which case it must be grounded in the Agencies' enforcement powers or the statutes governing approval of expansionary activities, and must therefore meet the relevant legal standards for such?

Those standards are high, and many supervisory criticisms of the type issued in recent years would not appear to meet them. For example:

- Applications under section 3 of the Bank Holding Company Act ("BHC Act") are subject to three sets of factors -- "competitive factors," "banking and managerial factors," and "supervisory factors."[22] That statute's two relevant "supervisory factors" state that an application shall be disapproved if the applicant (i) "fails to provide the Board with adequate assurances that the company will make available to the Board such information on the operations or activities of the company, and any affiliate of the company, as the Board determines to be appropriate to determine and enforce compliance with this chapter," or (ii) "in the case of an application involving a foreign bank, the foreign bank is not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank's home country."[23] Neither of these two supervisory factors have anything to do with past or pending supervisory criticisms. Yet the Federal Reserve's SR 14-02 indicates that supervisory criticisms are an important criteria when it considers applications of any type, stating "[t]he organization . . . must be responding appropriately to and must have made notable progress in addressing supervisory concerns" and that "applicants and notificants are generally expected to resolve their outstanding substantive supervisory issues prior to filing an application or notice with the Federal Reserve."[24]

---

21 *See, e.g.*, Federal Reserve Supervisory Letter SR 14-02.

22 *See* 12 U.S.C. § 1842(c).

23 *Id.*

24 *Id.*

- Similarly, the general standards for review of a notice under section 4 of the BHC Act state that the Federal Reserve shall consider whether the relevant activity "can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, and gains in efficiency that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, unsound banking practices, or risk to the stability of the United States banking or financial system."[25] It is difficult to imagine most supervisory criticisms rising to a level that would preclude approval under those standards, yet the Federal Reserve's SR 14-02 again effectively requires firms "to resolve their outstanding substantive supervisory issues" before even filing a notice under section 4.

- Applications to any of the federal banking agencies under the Bank Merger Act or Change in Bank Control Act are subject to a standard substantially similar to those applicable to section 3 of the BHC Act,[26] and these rigorous standards for non-approval are unlikely to be met in the context of most supervisory criticisms.

One type of examiner criticism appears particularly inappropriate as grounds for a finding of unsafe or unsound practice or a finding that a firm lacks managerial resources or otherwise fails to meet the statutory standards above: so-called "reputational risk." In practice, the concept of reputational risk has allowed the examination process to proscribe bank activities that are both legal and raise no material safety and soundness risk.[27] As academic research has shown, reputational risk did not play a major role in bank examination in the 1990s, but has subsequently proliferated as an area of supervisory interest and scrutiny, and the banking agencies' examination manuals are now replete with references to the term.[28] That same research has also concluded that "[w]hen viewed in combination with the glut of reputation risk guidance, there is reason to believe that informal enforcement is used to police reputation risk in the absence of significant financial harm or violation of law."[29]

---

25 12 U.S.C. § 1843(j)(2)(A).

26 See 12 U.S.C. §§ 1828(c), 1817(j).

27 Recently, the OCC has proposed a rule that imposes new requirements on certain large banks to "provide fair access to financial services," which would prohibit those banks from considering qualitative factors other than financial risk in making their lending decisions, in particular reputational risk arising from political or investor pressure. The OCC particularly criticizes banks for making lending decisions based on factors other than "an objective, quantifiable risk-based analysis." We disagree with that proposal on a variety of grounds, but under its logic it must be far worse for the government to impose, through its own concept of "reputational risk," its own political or other preferences on all banks, rather than having each bank take its own view of its reputation. Fair Access to Financial Services, 85 Fed. Reg. 75261 (proposed Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55).

28 *See* Hill, Julie Andersen, *Regulating Bank Reputation Risk* (August 16, 2019). Georgia Law Review, Forthcoming; U of Alabama Legal Studies Research Paper No. 3353847, https://ssrn.com/abstract=3353847.

29 *Id.* at 570–571.

Thus, we recommend that in finalizing the Proposal, the Agencies explicitly affirm that reputational risk cannot serve as a basis for an MRA or other supervisory criticism, in much the same way that the Proposal would state that "violations" or noncompliance with supervisory guidance may not serve as a basis for supervisory criticisms. If a violation of law or an unsafe and unsound practice or activity poses a risk to the institution's reputation, that underlying conduct can be cited as the basis for an MRA.

Second, we recommend that the agencies reaffirm that they will apply the statutory factors in processing applications; thus, for example, the Federal Reserve will no longer apply the *ultra vires* "penalty box" approach set forth in SR 14-02.[30] While the OCC and the FDIC do not have parallel guidance to SR 14-02, we understand that their practices may have been largely the same, and communicated orally. Thus, the need for them to clarify here is all the more important, given past practice and its lack of transparency.

Third, each Agency should acknowledge and affirm that, however it chooses to utilize supervisory criticism, it will not issue an MRA or other supervisory criticism in a manner that compels conduct – that is, requires the supervised institution to take (or refrain from taking) an action under actual or implied threat of some adverse consequence (ratings downgrade, negative impact on an application etc.) – unless that criticism is based on and meets the standard underlying its relevant enforcement powers.[31] Finally, given the current absence of any clear standard for the issuance of supervisory criticism, the Agencies should review and either revise or rescind, as appropriate, guidance and other Agency issuances that suggest that past or pending MRAs or other supervisory criticisms may lead to adverse action or consequence –for example, by making clear that the response to supervisory criticism is not a relevant factor to an Agency's decision to consider and/or approve an application for expansionary activity.[32]

* * * * *

[30] We also note that, in any event, SR 14-02 has never been submitted to Congress under the Congressional Review Act, and thus is presently without legal effect.

[31] Conversely, that approach *would* permit an Agency to issue an MRA or other supervisory criticism pursuant to some lower standard, so long as it was clear that an institution may consider but may ultimately choose not to address that criticism without risk of sanction or other consequence.

[32] This would include, notably, the Federal Reserve's SR 14-02. This approach also has the benefit of aligning the Agencies' applications process with the law, which is generally quite clear regarding what supervisory factors should be considered, and as discussed above, in no instance references past or pending supervisory criticism or a supervised institution's responsiveness to that criticism as a supervisory factor.

If you have any questions, please contact me by phone at 202-589-1933 or by email at greg.baer@bpi.com.

Respectfully submitted,

Greg Baer
President and CEO
Bank Policy Institute

cc: Mark E. Van Der Weide
Board of Governors of the Federal Reserve System

Jonathan Gould
Office of the Comptroller of the Currency

Nicholas Podsiadly
Federal Deposit Insurance Corporation

Frank Kressman
National Credit Union Administration

Thomas Pahl
Bureau of Consumer Financial Protection