



# Regulatory Alert

Financial Services Regulatory Insight Center



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## The role of supervisory guidance

### Key points

- Five federal financial regulators issued an interagency statement clarifying that supervisory guidance is not law and is not the basis for enforcement actions.
- The interagency statement does not clarify whether supervisory actions are included within the definition of “enforcement actions.”
- The SEC released a similar statement indicating staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties.
- Last year, on multiple occasions, GAO found supervisory guidance issued by the regulators to be statements of policy and, therefore, rules that required Congressional review before taking effect.

### Agencies clarify that guidance is not law

The Federal Reserve, CFPB, FDIC, NCUA, and OCC issued a joint statement [clarifying](#) that supervisory guidance does not have the full force and effect of law and does not guide enforcement actions. They state, rather, that supervisory guidance outlines the regulators’ supervisory expectations, priorities, and general views regarding “appropriate practices.”

Supervisory guidance includes interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions. The agencies note that it can include examples of practices that the agencies generally consider consistent with safety-and-soundness standards or laws and regulations, and can provide insight to industry and supervisory staff to help ensure consistency in the supervisory approach.

**Ongoing clarification efforts:** To further clarify the role of supervisory guidance, the agencies state they will:

- **Limit numerical thresholds in guidance:** Numerical thresholds or other “bright-lines” in

describing supervisory expectations will be exemplary only.

- **Not criticize institutions for “violations” of supervisory guidance:** Examiners will criticize supervised institutions only for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions.
- **Sometimes seek public comment on supervisory guidance:** Public comment helps the agencies improve their understanding of an issue, gather information on risk management practices, and determine how to achieve a supervisory objective most effectively.
- **Reduce the issuance of multiple supervisory guidance documents on the same topic:** The agencies will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and limit future issuance of multiple guidance.
- **Continue to clarify the role of supervisory guidance:** The agencies will continue to clarify the role of supervisory guidance in their



communications to examiners and to supervised financial institutions.

### Closing thoughts

The statement comes nearly a year after the Government Accountability Office (GAO), in October 2017, reviewed interagency guidance from the Federal Reserve, FDIC, and OCC on leveraged lending [finding](#) it to be a "general statement of policy" and "a rule" subject to the Congressional Review Act. The GAO made the same [finding](#) in December 2017 regarding the CFPB's 2013 guidance on indirect auto lending. In both cases, the GAO cited the Administrative Procedure Act, which states that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."

The agencies' clarification of guidance is a notable change from past practice where guidance has been referenced in supervisory actions and enforcement matters. It is unclear whether the agencies intended to include supervisory actions, such as matters requiring attention (MRAs) and matters requiring immediate attention (MRIAs), within the scope of "enforcement actions."

Additionally, the SEC has issued a similar [statement](#) reiterating its "longstanding position" that all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties. Staff statements include: written statements, compliance guides, letters, speeches, responses to frequently asked questions and responses to specific requests for assistance.

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