



## OCC Regulatory Impact Analysis 2021-2

### Final Rulemaking: Supervisory Guidance

January 19, 2021

**Purpose:** The Policy Analysis Division of the Economics Department prepares a regulatory impact analysis for proposed and final rules. This Regulatory Impact Analysis pertains to the Supervisory Guidance rulemaking.

**Related Link:**

OCC News [2021-12](#): “OCC Approves Final Rule on Supervisory Guidance.”

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#### I. Summary Assessment

This memorandum provides our assessment of the economic impact for the final rulemaking to codify the Interagency Statement Clarifying the Role of Supervisory Guidance,<sup>1</sup> issued on September 11, 2018 (the Statement). The Office of the Comptroller of the Currency (OCC) will issue an OCC-specific version of the rule originally proposed jointly by the OCC with the Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Bureau of Consumer Financial Protection (Bureau) (the agencies).<sup>2</sup>

As you requested, we have assessed the impact of the final rule to determine if: (1) pursuant to the Regulatory Flexibility Act (RFA), it will have a significant economic impact on a substantial number of OCC-supervised small entities; (2) consistent with the Unfunded Mandates Reform Act of 1995 (UMRA), whether mandates imposed by the rule may result in an expenditure of \$100 million or more annually by state, local, and tribal governments or by the private sector, adjusted for inflation (currently \$157 million);<sup>3</sup> and (3) assess whether this final rule is a “major rule” under the Congressional Review Act (CRA).

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<sup>1</sup> <https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf>

<sup>2</sup> Though the Bureau was not party to the Statement, it has elected to participate in this rulemaking.

<sup>3</sup> We estimate the UMRA inflation adjustment using the change in the annual U.S. GDP Impact Price Deflator between 1995 and 2019, which is the most recent available annual data (source: FRED data from <https://fred.stlouisfed.org>). The deflator was 71.865 in 1995, and 112.831 in 2019, resulting in an inflation adjustment factor of 1.57 ( $112.831/71.865 = 1.57$ ). and \$100 million x 1.57 = \$157 million).

Because the rule does not impose any new mandates, we estimate that the costs, if any, associated with the rule, will be modest – i.e., *de minimis*. The final rule does not modify the OCC’s current supervisory processes, including the use of Matters Requiring Attention (MRAs). Rather, the rule reiterates well-established principles of administrative law, including the principle that supervisory guidance does not have the force and effect of law. As a result, we believe the rule will not result in an expenditure of \$157 million or more annually by state, local, and tribal governments or by the private sector. Furthermore, we believe the rule will not have a significant economic impact on a substantial number of OCC-supervised small entities, and it is not a major rule under the CRA.

## **II. Background**

The agencies issued the Statement to clarify the role of supervisory guidance and describe the agencies’ approach to supervisory guidance. The agencies noted in the Statement that supervised institutions, at times, request supervisory guidance and that guidance is important to provide insights to institutions supervised by the agencies, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

## **III. The final rule**

The final rule addresses a rulemaking petition (Petition) requesting that the agencies codify the Statement. The Petition was received on November 5, 2018 by the OCC, Board, FDIC, and the Bureau. It argues that: (i) a rule on guidance is necessary to bind future agency leadership and staff to the Statement’s terms, (ii) there are ambiguities in the Statement concerning how supervisory guidance is used in connection with various enforcement actions - i.e. matters requiring immediate attention (MRAs) and other supervisory communications - and (iii) a rulemaking to implement changes in the agencies’ standards for issuing MRAs is necessary to limit the role of MRAs in addressing circumstances in which there is a violation of a statute, regulation, or order, or demonstrably unsafe and unsound practices. The petition was sent to all agencies participating in the rulemaking except the NCUA.<sup>4</sup>

While the final rule does clarify that the Statement is binding on the OCC, it does not change or restrict the OCC’s current supervisory processes, including the use of MRAs. Instead, the rule reiterates well-established principles of administrative law, including the principle that supervisory guidance does not have the force and effect of law.

## **IV. Impact on banks**

The OCC currently supervises 1,150 institutions (commercial banks, trust companies, federal savings associations, and branches or agencies of foreign banks).<sup>5</sup> Because the final rule does not impose new mandates on the banking industry, but instead codifies current procedures at the OCC, we believe the costs associated with it, if any, will be minimal.

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<sup>4</sup> The Petition was not submitted to the NCUA because it has no supervisory authority over the financial institutions that are represented by Petitioners. Nevertheless, the NCUA decided to join this rulemaking.

<sup>5</sup> Based on data accessed using FINDRS on January 5, 2021.

## V. RFA

As part of our analysis, we consider whether the rule will have a significant economic impact on a substantial number of OCC-supervised small entities, pursuant to the RFA. The OCC currently supervises approximately 745 small entities.<sup>6</sup> Because the rule applies to all OCC-supervised depository institutions, the final rule affects all small OCC-supervised entities, and thus a substantial number of them. However, because we estimate that the costs, if any, associated with the rule will be negligible, the final rule will not have a significant economic impact on any small OCC-supervised entities. Therefore, the rule will not have a significant economic impact on a substantial number of small entities.

## VI. UMRA

Consistent with the UMRA, our review considers whether the mandates imposed by the final rule may result in an expenditure of \$157 million or more by state, local, and tribal governments, or by the private sector, in any one year. The rule does not impose new mandates on banks or the OCC. Therefore, we conclude that the rule will not result in an expenditure of \$157 million or more annually by state, local, and tribal governments, or by the private sector.

## VII. CRA

The CRA defines a “major rule” as a rule that the Administrator of the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) finds has resulted in or is likely to result in:

1. An annual effect on the economy of \$100 million or more;
2. A major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or
3. Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*An annual effect on the economy of \$100 million or more*

As noted above, we estimate the overall annual effect of the final rule on the economy will be *de minimis*. Thus, we believe the final rule will not have an annual effect on the economy of \$100 million or more.

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<sup>6</sup> We base our estimate of the number of small entities on the SBA’s asset size thresholds for commercial banks (\$600 million), savings institutions (\$600 million), and trust companies (\$41.5 million). Consistent with the General Principles of Affiliation 13 CFR § 121.103(a), we count the assets of affiliated financial institutions when determining if we should classify an OCC-supervised institution as a small entity. We use December 31, 2019, to determine size because a “financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See footnote 8 of the U.S. Small Business Administration’s *Table of Size Standards*.

*A major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions*

Because of the highly competitive markets for banking and credit intermediation services, only an increase in costs that applies to all banks, such as an increase in interest rates or deposit insurance fees, or requiring a specific product-related incremental cost (e.g., an appraisal) would be likely to result in a measurable increase in costs or prices. The substantial number of banks, thrifts, and savings associations currently operating in the United States creates a competitive environment, limiting the extent to which a subset of depository institutions could increase prices without losing customers. Thus, any incremental costs associated with rules or guidance that apply only to specific types of banking organizations are unlikely to be passed along to customers. Rather, these costs are more likely to be absorbed into the overhead (non-interest expenses) of affected institutions. This is especially true in cases where the direct costs of a rule or guidance are *de minimis*. The direct compliance costs associated with this final rule will be *de minimis*, and thus, we fully expect compliance costs, if any, to be absorbed as ongoing bank administrative expenses. Therefore, we do not expect the final rule to result in an increase in costs or prices for consumers or any other entities or geographic regions.

*Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets*

A significant adverse effect on competition, employment, or investment is more likely to occur when a rule specifically prohibits an activity, restricts access to a particular market, or significantly increases the production costs of certain institutions that provide the good or service. None are a factor in this final rule.

Thus, for the reasons discussed above, we believe the final rule is not a major rule under the CRA.