Federal Financial Agencies Issue Statement Clarifying the Role of Supervisory Guidance

Overview: Several weeks ago, five federal financial regulatory agencies—the Bureau of Consumer Financial Protection (the “Bureau”), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency—issued a joint Interagency Statement Clarifying the Role of Supervisory Guidance (“Statement”) that explains the agencies’ views on the role of supervisory guidance and describes their approach on how they intend to use it. Although financial services industry stakeholders immediately welcomed this clarification, they have already asked the agencies to do more to ensure that supervisory guidance is not treated by agency examiners as equivalent to law or regulation.

The Statement is likely a response to congressional and financial services industry criticism that federal agencies are blurring the line between supervisory guidance documents that are technically non-binding and laws and regulations that companies are obligated to follow. For example, the Government Accountability Office issued a determination in December 2017 that a Bureau Bulletin addressing indirect auto lending constituted a “rule” subject to the Congressional Review Act (“CRA”). This determination paved the way for Congress, earlier this year, to repeal the Bulletin via the fast-track procedures permitted by the CRA. And in April of this year, just weeks before its beneficial ownership rule took effect, FinCEN issued 24 pages of FAQs clarifying the rule. The Federal Reserve Board’s press release announced that the Statement was intended to respond to evidence suggesting that “the differences between supervisory guidance and laws and regulations may be unclear.”

The Statement begins by distinguishing between laws and regulations—which have “the force and effect of law”—and supervisory guidance (e.g., advisories, bulletins, policy statements, FAQs, etc.)—which does not. The agencies explain that, based on this distinction, they “do not take enforcement actions based on supervisory guidance.” Instead, such guidance should be viewed more as an amalgamation of expectations, insight, and examples that help to promote consistency and round out the agencies’ general views and approaches.

The agencies use the rest of the Statement to provide the following clarifications about how their policies and practices regarding supervisory guidance will align with the above explanation:

- Supervisory guidance will use minimal numerical thresholds and other “bright-line” language to describe expectations. Where such language is used, it will be “exemplary only,” used to clarify if the guidance only applies to certain supervised institutions, or used as required by statute.
The agencies will not deem a supervised institution to be in “violation” of supervisory guidance—instead, violations are limited to noncompliance with law, regulation, or enforcement orders. If examiners do reference supervisory guidance in an examination, for instance, it will be used to provide examples of how to address compliance with the law.

An agency’s decision to seek public comment on supervisory guidance will not mean that the guidance has the force and effect of law. Instead, such comment processes should be viewed as a way for agencies to attain greater understanding and more information about relevant issues and supervised institutions.

Going forward, the agencies will minimize the number of supervisory guidance documents issued on the same topic.

The Statement concludes with a promise from the agencies to continue clarifying the role of supervisory guidance in future communications and encourages supervised institutions to discuss any questions with their appropriate agency contact.

**Outlook:** This issuance of the Statement is the culmination of years of complaints by financial institutions, amplified by Congress, that regulators – and particularly their supervisory staff – are treating alleged noncompliance with guidance as the equivalent of legal violations. Moreover, the Statement aligns with the Trump administration’s active push to reduce perceived unnecessary regulation and to clarify supervisory expectations for financial institutions. Going forward, it appears likely that the agencies will pull back from directly tying noncompliance with supervisory guidance to an examination violation, and instead guidance will become more of a compliance safe harbor for supervised institutions.

Still, industry has voiced concern that regulators did not go far enough by issuing the Statement, which is a form of supervisory guidance itself. In a recent letter to financial regulators, two banking industry groups called for an official rulemaking process to formally adopt the Statement as a rule, and thereby prevent examiners from “continu[ing] to base examination criticisms on matters not based in law.” In the meantime, however, the Statement does not have the “force of law” enjoyed by formal rules, and therefore institutions would be well-advised to maintain caution before deviating from practices consistent with previous agency guidance.

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