CFPB Launches Pilot Program for Issuing Advisory Opinions

**Overview:** The Consumer Financial Protection Bureau (the “Bureau”) recently announced the launch of an advisory opinion pilot program (“Pilot AO Program”) as part of its ongoing efforts to reduce regulatory uncertainty.

**Bringing Regulatory Clarity**

The Bureau had previously announced in March the implementation of an advisory opinion program to provide clear guidance to companies seeking to better understand their regulatory obligations. Although announced as part of a larger effort to advance one of the Bureau’s main policy objectives, preventing consumer harm, the idea of actively issuing regulatory guidance clearly also aligns with another concerted effort of the Bureau: providing regulatory clarity and reducing uncertainty.

So far in 2020 the Bureau has been active on this front. For example, the Bureau has clarified its responsible conduct policy and its abusive conduct policy, and published two templates to give businesses a charted path to obtaining no-action letters under the recently improved no-action letter program. The Pilot AO Program further builds on these initiatives. As stated in the announcement, one of the Bureau’s primary functions, as provided by the Dodd-Frank Act, is to issue guidance implementing federal consumer financial laws. According to the Bureau, “providing clear and useful guidance to regulated entities is an important aspect of facilitating markets that serve consumers.”

**The Pilot Program**

The Pilot AO Program is designed to give interpretive guidance to entities seeking to comply with regulatory requirements. Although the Bureau has several mechanisms for providing regulatory guidance, such as official interpretations issued through the formal public comment process, compliance aids, and an individualized regulatory inquiry webpage, these mechanisms are not intended to interpret regulatory ambiguities. Accordingly, in response to input from external stakeholders, the Bureau is now implementing the Pilot AO Program “to provide guidance with interpretive content that is: focused on regulatory uncertainty identified by requestors; reliable for the requestor and all similarly situated parties as the Bureau’s authoritative interpretation of the law; and
publicly released for the awareness of all affected persons.”

Advisory opinions issued under the Pilot AO Program will be applicable to all other entities in situations with similar facts and circumstances. Such other entities will be able to find advisory opinions published on the Bureau’s website and in the Federal Register.

Requests for advisory opinions under the program may be submitted by email to advisoryopinion@cfpb.gov, or by any other means the Bureau designates. All requests must meet certain form and content requirements as set forth in more detail in the announcement. The Bureau also specified some of the criteria it will use to evaluate requests for advisory opinions. In particular, to determine whether a request is appropriate for the issuance of an advisory opinion, the Bureau will weigh several factors, including whether the issue in question:

- has been previously noted by the Bureau as one that might benefit from additional clarity;
- is of substantive importance or impact, or is one whose clarification would provide significant benefit; or
- concerns an ambiguity that the Bureau has not previously addressed through an interpretive rule or other authoritative source.

The Bureau did note it would strongly presume that any issues that are part of an ongoing investigation or enforcement action, or are the subject of an ongoing or planned rulemaking, will not be appropriate for advisory opinions.

The Bureau has not specified how long the Pilot AO Program will run, but the public is encouraged to submit comments to help the Bureau determine how best to implement the final program.

Responses

Industry groups have largely issued neutral or even positive responses to the Bureau’s announcement. However, some consumer groups and Democratic lawmakers have expressed concern. The National Consumer Law Center noted that the advisory opinions may reduce consumer protections in areas of substantive importance, but will be issued without notice and public comment. This response follows a similar message from December of 2019 by Senators Elizabeth Warren and Sherrod Brown, who sent a letter to the Bureau’s Director, Kathleen Kraninger, voicing worries that advisory opinions tailored to companies’ specific circumstances could harm consumers and allow companies to circumvent consumer protection laws.

Outlook: Published regulatory guidance, such as advisory opinions, are generally useful tools for companies struggling to understand their compliance obligations. Given the complexities of the financial services regulated by the Bureau, the advisory opinions issued under both the pilot program and the eventual permanent program can only help businesses avoid regulatory pitfalls. FDIC Seeks to Update Signage and Advertising Rules
Banking Regulators Issue New Guidance for Exams During the Pandemic

Overview: Federal bank and credit union regulators, together with their state counterparts (collectively, the “Agencies”), issued an interagency examiner guidance to outline various principles that the regulators deem important for assessing financial institutions’ safety and soundness in light of the ongoing effects of the coronavirus pandemic.

Background and Context

The Agencies acknowledge that the ongoing coronavirus pandemic has had and will continue to have a significant impact on regulated financial institutions. In particular, the examiner guidance notes that various containment measures – such as shelter-in-place orders – have created operational hurdles for financial institutions. Meanwhile, government efforts to support and assist those experiencing financial hardship – such as the passage of the CARES Act relief legislation – have serious consequences both financial and operational for financial institutions. The Agencies have observed that financial institutions may experience challenges with asset quality, management processes, operations, compliance, and cybersecurity. As such, the Agencies feel it is vitally important that examiners understand the financial condition of each regulated institution in light of the tectonic societal and economic changes resulting from the pandemic.

Highlights of the Interagency Examiner Guidance

Under the guidance, regulators will expect their examiners to:

- consider the unique, evolving, and potential long-term nature of the issues confronting banks and will exercise appropriate flexibility in their supervisory response;
- continue to assign supervisory ratings in accordance with the interagency CAMELS and ROCA rating systems; and
- consider whether institution management has managed risk appropriately, including taking appropriate actions in response to stresses caused by COVID-19 impacts.

Evaluation of institutions’ risk assessments is a central tenet of the guidance. Examiners are instructed to look at both the initial and subsequent assessments by management of the risks presented by the pandemic. Notably, the guidance states that examiners “will assess an institution’s risk identification and reporting processes given the level of information available and stage of local economic recovery.” In other words, examiners will have to take into account localized circumstances when reviewing the appropriateness of regulated institutions’ risk assessments. Examiners will also be assessing how well an institution manages the risks it identifies in connection with the pandemic.

Some other key points include:

- Examiners should take into account government programs and regulatory relief.
- The guidance recognizes that capital ratios may suffer temporarily due to increased lending, unusually large deposit inflows, or inflows from various government programs.
- In terms of asset quality, the Agencies also acknowledge that the scope of examinations may need to be adjusted to account for the effects of the pandemic on loan and investment portfolios.
• The Agencies indicated a willingness to not criticize the safety and soundness of institutions participating in the Paycheck Protection Program under the CARES Act, so long as the institutions follow the Small Business Administration’s guidelines.

• The Agencies continue to encourage regulated institutions to work with borrowers who are unable to meet their payment obligations due to the pandemic. The guidance directs examiners to assess the appropriateness of an institution’s credit renewals, extensions, or modifications, but also notes that the Agencies will not criticize institutions for working with borrowers in a safe and sound manner even if restructured loans ultimately result in adverse credit classification.

• An institution’s management will be evaluated on its ability to properly identify and prudently manage risks associated with the pandemic, but examiners will take into account the extraordinary circumstances while also evaluating how management accounts for these circumstances in its long-term strategies.

**Outlook:** The interagency examiner guidance is intended to promote consistency and flexibility in the supervision and examination of financial institutions during the coronavirus pandemic. It encourages examiners to consider the ongoing and ever-changing circumstances in which financial institutions find themselves and to exercise an appropriate amount of judgment and flexibility when examining these institutions.

Craig Saperstein, a member of NACHA’s Government Relations Advisory Group, is a partner in the Public Policy practice of Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C. In this capacity, he provides legal analysis for clients on legislative and regulatory developments and lobbies congressional and Executive Branch officials on behalf of companies in the payments industry. Deborah Thoren-Peden is a partner and member of the Financial Institutions Team at Pillsbury Winthrop Shaw Pittman LLP. She provides advice to financial institutions, bank and non-bank, and financial services companies. Daniel Wood is a Senior Associate and member of the Financial Services Regulatory Team. He provides analysis for financial institutions, technology companies, and clients that offer consumer financial products. The information contained in this update does not constitute legal advice and no attorney-client relationship is formed based upon the provision thereof.