Client Alert

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Federal Agencies Reaffirm that Supervisory Guidance Is Not Law – Who Knew?

By Oliver I. Ireland and Jeremy R. Mandell

Yesterday, five federal agencies – the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Bureau of Consumer Financial Protection – issued a two-page, joint statement on the role of supervisory guidance for regulated institutions. Although brief, the joint statement is significant.

Too often since the financial crisis, the distinction between regulatory requirements and supervisory guidance has been blurred. The joint statement emphasizes that supervisory guidance "does not have the force and effect of law," and that "the agencies do not take enforcement actions based on supervisory guidance." Instead, the role of supervisory guidance is to outline the agencies' supervisory expectations or priorities or to articulate the agencies' general views regarding appropriate practices in a given subject area, including in response to industry requests for such guidance. Supervisory guidance may also provide "examples of practices that the agencies generally consider consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers." The agencies contrast supervisory guidance with regulations "that generally have the force and effect of law [and that] generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document."

The reaffirmation of the historic role of supervisory guidance should be welcomed by supervised institutions that have committed significant resources to implementing the details of supervisory guidance as though they were regulatory requirements. In practice, areas that have not been subject to, and are not appropriate for, detailed regulatory requirements, such as guidance on third-party service providers, have been addressed by extensive, and often specific, guidance that has all too often been viewed as stating inflexible requirements.

The joint statement should clarify for both supervised institutions and examiners that guidance needs to be applied flexibly with the understanding that the ultimate goal is safety and soundness and compliance with actual statutory and regulatory requirements rather than the details of the guidance. For example, the joint statement provides that "[e]xaminers will not criticize a supervised financial institution for a 'violation' of supervisory guidance. Rather, any citations will be for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions." While the joint statement notes that "[i]n some situations, examiners may reference (including in writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations," in a clear signal to agency examiners, the joint statement provides that "[t]he agencies will continue efforts to make the role of supervisory guidance clear in their communications to examiners…."

The joint statement also provides that the agencies "intend to limit the use of numerical thresholds or other 'bright-lines' in describing expectations in supervisory guidance." The agencies state that "where numerical thresholds are used … the thresholds [will be] exemplary only and not suggestive of requirements."

Supervised institutions should welcome the agencies' reaffirmation of the role of supervisory guidance as a means of communication with supervised institutions, but should also recognize that field examiners are likely to continue to look to guidance in the examination process.

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