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To: Clients and Friends

From: David F. Dulock

Subject: CFPB Adopts Statement Clarifying the Role of Supervisory Guidance

In the February 12, 2021 issue of the *Federal Register* ([86 FR 9261](#)), the Consumer Financial Protection Bureau adopted a final rule that codifies the Interagency Statement Clarifying the Role of Supervisory Guidance, issued by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and the Bureau (collectively, the agencies) on September 11, 2018 (2018 Statement). The 2018 Statement states that, unlike a law or regulation, supervisory guidance does not have the force and effect of law and, as such, does not create binding legal obligations.

However, the Bureau has omitted from its final rule those specific phrases in the 2018 Statement that are inapplicable to the Bureau, because they pertain to the safety-and-soundness responsibilities of the Federal banking agencies and the NCUA. Thus, the Bureau's final rule is specifically addressed to the Bureau and Bureau supervised institutions, rather than the joint version that the five agencies included in their joint 2018 Statement.

The Bureau's final rule is effective on March 15, 2021, and is codified in 12 CFR Part 1074, consisting of §1074.1 designated as Subpart A, §§1074.2 and 1074.3 in Subpart B, and Statement Clarifying the Role of Supervisory Guidance (Statement) as Appendix A.

Subpart B states that the Statement is binding on the Bureau. Appendix A reads as follows:

Statement Clarifying the Role of Supervisory Guidance

The Bureau is issuing this statement to explain the role of supervisory guidance and to describe the Bureau's approach to supervisory guidance.

Difference Between Supervisory Guidance and Laws or Regulations

Supervisory agencies like the Bureau issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, or frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law. Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the Bureau does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the Bureau's supervisory expectations or priorities and articulates the Bureau's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the Bureau generally considers consistent with applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

(2 pages)

Ongoing Efforts To Clarify the Role of Supervisory Guidance

The Bureau is clarifying the following policies and practices related to supervisory guidance:

- The Bureau intends to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance. Where numerical thresholds are used, the Bureau intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The Bureau will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.

- Examiners will not criticize (through the issuance of matters requiring attention, matters requiring board attention, documents of resolution, and supervisory recommendations) a supervised financial institution for, and the Bureau will not issue an enforcement action on the basis of, a “violation” of or “non-compliance” with supervisory guidance. In some situations, examiners may reference (including in writing) supervisory guidance to provide examples of appropriate consumer protection and risk management practices and other actions for addressing compliance with laws or regulations.

- Supervisory criticisms should continue to be specific as to practices, operations or other matters that could cause consumer harm or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.

- The Bureau may decide to seek public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law. The comment process helps the Bureau to improve its understanding of an issue, to gather information on institutions’ risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.

- The Bureau will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.

- The Bureau will continue efforts to make the role of supervisory guidance clear in communications to examiners and to supervised financial institutions and encourages supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

In the preamble to the final rule, the Bureau states that the Bureau’s interpretive rules, small entity compliance guides and frequently asked questions are not supervisory guidance. The Bureau’s advisory opinions are classified as interpretive rules under the Bureau’s Advisory Opinion Policy (85 FR 77987 (Dec. 3, 2020)) and the Bureau’s small entity compliance guides and frequently asked questions are generally designated as compliance aids under the Bureau’s Policy Statement on Compliance Aids (85 FR 4579 (Jan. 27, 2020)), even though “frequently asked questions” is included in the Statement Clarifying the Role of Supervisory Guidance as a type of supervisory guidance.

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