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# Bank Regulators' "Clarifying" Statement on Enforcing Supervisory Guidance

By Joann Needleman, Jane C. Luxton, Thomas A. Brooks / Sep 18, 2018

The prudential regulators, including the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency ("prudential regulators") along with the Bureau of Consumer Financial Protection ("Bureau") ("agencies") recently issued an Interagency Statement Clarifying the Role of Supervisory Guidance ("Statement") (See [here](#)) to explain the role of supervisory guidance and the agencies approach to it. In summary, the agencies are clarifying their position that they "do not take enforcement actions based on supervisory guidance." Will banks and thrifts be free to avoid compliance with supervisory guidance, assured they will suffer no consequences? Don't bet on it.

What is "supervisory guidance?" The agencies describe supervisory guidance as including "interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions." Their view is that supervisory guidance "outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area."

The purpose of the Statement is to distinguish a supervisory guidance document from a law or regulation. The Statement is clear that unlike a law or regulation, supervisory guidance "does not have the force and effect of law, and agencies do not take enforcement actions based on supervisory guidance." This Statement is consistent with similar clarifications of the limited status of guidance issued within the past year by the U.S. Justice Department (See <https://www.justice.gov/file/1028756/download>).

Note, however, in December, 2017, the Government Accountability Office (GAO) determined that the Bureau's March 2013 Bulletin was a "general statement of policy designed to assist indirect auto lenders to ensure . . . compliance with [the Equal Credit Opportunity Act]", and "[was] a rule subject to the requirement of [the Congressional Review Act ("CRA")]". The GAO's review was in response to a request from Senator Pat Toomey. For purposes of the CRA, supervisory guidance can be treated by the GAO as a regulation, but in the case of enforcement, the agencies seem to look at supervisory guidance differently. (See our previous discussion of the CRA issue [here](#).)

Ensuring that banks and thrifts are operating in a safe and sound manner is a critical function of the agencies' examination process. Section 39 of the Federal Deposit Insurance Act requires the FDIC, the OCC and the Federal Reserve to adopt standards for safety and soundness. The FDIC's regulation (12 C.F.R. § 364) ("Regulation") implements this requirement by mandating that regulators "establish certain safety and soundness standards by regulation or by guidelines for all insured depository institutions." It then states that these regulators must adopt guidelines to establish safety and soundness practices for operations and management, compensation and standards relating to asset quality, earnings, and stock valuation.

Supervisory guidance sets out the safety and soundness standards that the agencies use to identify and address problems at insured depository institutions before capital becomes impaired or mismanagement occurs. These standards are designed to identify potential safety and soundness concerns and ensure that action is taken to address those concerns before they pose a risk to the Deposit Insurance Fund. The Regulation clearly states, however, that neither section 39 nor supervisory guidance "in any way limits the authority of the agencies to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices." Action may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the agencies.

Historically, violations of supervisory guidance have not, per se, resulted in an imposition of enforcement actions; however, the Bureau has in some instances considered its supervisory guidance as a bench-mark for covered entities to incorporate into their processes and procedures. Failure to do so can result in potential UDAAP violations. The Statement attempts to provide clarification to the position of the agencies that they will not use enforcement actions for violations of supervisory guidance. However, if banks and thrifts do not adhere to the principles underlying supervisory guidance, the agencies have the authority and mandate to use their broad powers to ensure a healthy financial system.

If you would like more information on how the agencies implement their regulations or supervisory guidance, please contact Tommy Brooks at [tbrooks@clarkhill.com](mailto:tbrooks@clarkhill.com), 202 552 2356, Joann Needleman at [jneedleman@clarkhill.com](mailto:jneedleman@clarkhill.com), 215 640 8536, or Jane Luxton at [jluxton@clarkhill.com](mailto:jluxton@clarkhill.com), 202 572 8674.

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