



WASHINGTON, D.C.

99 M Street SE
Suite 300
Washington, D.C. 20003-3799

Phone: 202-638-5777

Fax: 202-638-7734

January 4, 2021

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Role of Supervisory Guidance; Docket No. CFPB-2020-0033; RIN 3133–AF28

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America’s credit unions and their 120 million members. On behalf of our members, we are writing regarding the Consumer Financial Protection Bureau’s (CFPB or Bureau) interagency proposed rule on the Role of Supervisory Guidance.¹

Background

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Bureau (collectively, the agencies) are considering a proposed rule that would codify the Interagency Statement Clarifying the Role of Supervisory Guidance issued by the agencies on September 11, 2018 (2018 Statement).² By codifying the 2018 Statement, the proposed rule is intended to confirm that the agencies will continue to follow and respect the limits of administrative law in carrying out their supervisory responsibilities. The 2018 Statement reiterated well-established law by stating that, unlike a law or regulation, supervisory guidance does not have the force and effect of law. As such, supervisory guidance does not create binding legal obligations for the public. The proposal would also clarify that the 2018 Statement, as amended, is binding on the agencies.

General Comments

CUNA is supportive of the agencies’ proposed rule. In particular, we believe it is critical for federal regulators, including the Bureau, to appreciate the significant differences in the appropriate role of regulations and of guidance. Regulations create binding legal obligations whereas supervisory guidance is issued to “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power” and does not create binding legal obligations.³

Supervisory guidance outlines the agencies’ supervisory expectations or priorities and articulates the agencies’ general views regarding appropriate practices for a given subject area. Supervisory guidance often

¹ Role of Supervisory Guidance, 85 Fed. Reg. 70512 (Nov. 5, 2020).

² See <https://www.federalreserve.gov/supervisionreg/srletters/sr1805a1.pdf>; <https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf>; <https://www.ncua.gov/files/press-releases-news/interagency-statement-role-supervisory-guidance.pdf>.

³ 85 Fed. Reg. at 70,512, 70,514.

provides examples of practices that mitigate risks, or that the agencies generally consider to be consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers.

The 2018 Statement restates existing law and reaffirms the agencies' understanding that supervisory guidance does not create binding, enforceable legal obligations. The 2018 Statement reaffirms that the agencies do not issue supervisory criticisms for "violations" of supervisory guidance and describes the appropriate use of supervisory guidance by the agencies.

Section 1025 of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (the Dodd-Frank Act) conveys supervision and enforcement authority with respect to consumer financial protection laws for credit unions with assets greater \$10 billion to the Bureau.⁴ With the exercise of that authority in mind, we believe it is important that the CFPB to refrain from using supervisory guidance as a basis for an adverse finding during the examination process. Examiners must clearly identify where a requirement or prohibition is expressed in an established law or regulation. With that said, we urge the CFPB to continue examiner engagement in productive discussions with the staff of credit unions subject to its jurisdiction regarding relevant supervisory guidance. Such discussions are particularly helpful when there is confusion regarding a specific regulation and its application to the issue at hand. Further, codifying the 2018 Statement could also help credit unions avoid unnecessary legal exposure.

We appreciate the role of supervisory guidance and support the proposal to codify the 2018 Statement. Doing so not only ensures credit unions understand where an examiner is basing its decisions, but also ensures the basis for such decisions is well-founded, given statutes must go through the legislative process and regulations through the rulemaking process under the Administrative Procedure Act.⁵

Conclusion

On behalf of America's credit unions and their 120 million members, thank you for your consideration. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio
Senior Director of Advocacy & Counsel

⁴ 12 U.S.C. § 5515.

⁵ 5 U.S.C. § 551.