

Publications

The Role of “Supervisory Guidance”

Related Industries

Financial Institutions

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The federal banking agencies (including the FDIC, the OCC, the Federal Reserve, and the CFPB) adopted an important final rule in early 2021 (Rule) relating to how the agencies view and treat the impact and role of “supervisory guidance” (SG) in the regulation and oversight of their constituent institutions. The Rule arises from adoption of an interagency statement issued on September 11, 2018.

The underlying intent of the Rule is to provide enhanced clarity with regard to the differences and distinctions between SG and applicable law and formal regulations impacting the industry, and how the agencies expect institutions and their management and boards to react to SG.

General highlights of the Rule include:

1. Clarifying that SG does not have the same formal impact on institutions and supervised persons as do applicable laws and regulations in terms of enforcement actions, but rather reflect the approach of the agency to supervision under applicable law and regulation, and safe and sound practices.
2. Clarifying that SG reflects supervisory expectations or priorities and articulates the general views of the agencies regarding practices.
3. Clarifying that SG recognizes a distinction between valid supervisory criticisms and “best practice” recommendations.
4. Expressing agency intention to limit the use of “bright line” and/or “numerical thresholds” in SG, to reduce the issuance of multiple SG by agencies on the same topic in order to provide enhanced clarity, to endeavor to make the limited role of SG clear in agency and examiner communications, and to encourage institutions to discuss any SG concerns and seek clarification with their agency contacts.
5. Recognizing that SG alone does not provide a basis for examiner criticism OR enforcement actions for “violations”.

The Rule should be helpful to institutions and their boards in understanding the technical legal and regulatory limitations on the impact of SG. However, agencies have significant discretion in their oversight of institutions and SG is reflective of how agencies view industry issues. It is important to keep in mind that, insofar as SG reflects important agency attitudes and concerns, SG should never be ignored.

Issues and recommendations contained in SG are indicators of how the agencies view particular industry issues and priorities, and while not technically enforceable as matters of law or regulation they certainly form a path for understanding how the agencies view relevant matters and will in fact impact their perspective on institutions and their management and boards. Certain SG may in fact reflect positions that will ultimately result in agencies seeking relevant legislative action and/or implementing actual regulations that will have force and effect under applicable law.

Therefore, institutions and their management and boards should always take care to be able to demonstrate attention to SG, and understand that SG reflects those issues, priorities and positions on issues that the agencies deem important especially in regard to matters of safety and soundness. The issues and concerns reflected in SG will be on the minds of examiners and their supervisors as they view the operations of the institution and its practices, will form the basis for their perception of how the institution reacts to those items and issues deemed important to the agencies regardless of technical legal enforceability, and may make a significant difference in how the agencies react when exercising agency discretion on an issue.

If you have any questions regarding this topic, please reach out to your Vorys attorney.