

POLUNSKY BEITEL GREEN
ATTORNEYS AT LAW

To: Clients and Friends of the Firm

From: Polunsky Beitel Green, LLP

Date: September 13, 2018

Subject: Federal Agencies Limit Impact of Supervisory Guidance

The Federal Reserve Board, the Bureau of Consumer Financial Protection, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency issued a joint statement on September 11, 2018 stating that supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. This pronouncement is a significant departure from the guidance of the agencies under the Obama administration, where both commentary and enforcement actions were deemed by certain of the agencies to be elevated to the force of law.

The joint statement provides that only the statute and the authorized regulations (which are adopted only after following a rule making procedures, including public comment) constitute the controlling law, not commentary. Commentary is simply guidance issued by the agencies.

In the September 11, 2018 statement, the agencies have clarified that:

1. The agencies intend to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance. Where numerical thresholds are used, the agencies intend to clarify that the thresholds are exemplary only and not suggestive of requirements. The agencies 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.
2. Examiners 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. During examinations and other supervisory activities, examiners may identify unsafe or unsound practices or other deficiencies in risk management, including compliance risk management, or other areas that do not constitute violations of law or regulation. In 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.
3. The agencies also have at times sought, and may continue 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 agencies to improve their 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.

POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

4. The agencies will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.
5. The agencies will continue efforts to make the role of supervisory guidance clear in their communications to examiners and to supervised financial institutions, and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

In June, Chairman of the Subcommittee on Financial Institutions and Consumer Credit, Congressman Blaine Luetkemeyer (MO-03), called on financial regulators to address so-called “regulation by enforcement.” Chairman Luetkemeyer released the following statement applauding today’s announcement:

“I’m very pleased that the federal financial agencies have finally taken the first step in drawing the important distinction between rule and guidance, something I’ve pressed them to do for some time. For too long, regulators have inappropriately used guidance as if it had the full force of a formal rulemaking. We must continue to restore sanity and clarity in the regulatory regime, and move away from regulation by enforcement,” said Chairman Luetkemeyer. “In that spirit, I plan to introduce legislation to mandate that all guidance issued by federal regulatory agencies feature a disclosure stating the guidance has not gone through the formal rulemaking process and does not have the effect of law.”

[See: <https://luetkemeyer.house.gov/news/documentsingle.aspx?DocumentID=399114>.]

Allan Polunsky at Allan.Polunsky@mortgagelaw.com

Jay Beitel at Jay.Beitel@mortgagelaw.com

Marty Green at Marty.Green@mortgagelaw.com

Lauren Polunsky Dreszer at Lauren.Polunsky@mortgagelaw.com

Jonathan Jaskot at Jonathan.Jaskot@mortgagelaw.com

Andrew Duane at Andrew.Duane@mortgagelaw.com