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National Association of Federally-Insured Credit Unions

December 30, 2020

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

RE: Role of Supervisory Guidance (Docket ID CFPB-2020-0033)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Bureau of Consumer Financial Protection's (Bureau or CFPB) notice of proposed rulemaking regarding the role of supervisory guidance. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve nearly 123 million consumers with personal and small business financial service products. NAFCU appreciates the CFPB's commitment to working with the other federal banking regulators to emphasize the distinction between rules and supervisory guidance. Additionally, NAFCU appreciates the CFPB clarifying ambiguities in the 2018 Statement Clarifying the Role of Supervisory Guidance (2018 Statement). Supervisory guidance plays a critical role in assisting credit unions to shape their practices, policies, and procedures. Transparent guidance serves as a valuable resource to provide a more consistent supervisory approach. NAFCU supports the proposal and urges the CFPB to ensure that examiners apply this position consistently so that supervisory guidance is not relied upon as de facto regulation.

General Comments

The 2018 Statement reiterated well-established law, that unlike a law or regulation, supervisory guidance does not have the full force and effect of law. Additionally, the 2018 Statement affirmed that the CFPB does not issue criticisms for violations of supervisory guidance. NAFCU appreciates the codification of the 2018 Statement into the CFPB's regulations. The 2018 Statement provides clarification regarding the supervisory process and will enable the CFPB to carry out is supervisory responsibilities under Federal consumer financial laws more effectively.

NAFCU urges the CFPB to reconsider the agency's approach to supervision to better coordinate resources and expertise with other regulators, including the National Credit Union Administration (NCUA) and state supervisory authorities. Credit unions over $10 billion in total assets and subject to supervision and examination by both the CFPB and either the NCUA or a state regulator have reported experiencing overlapping or consecutive examinations, which imposes operational burdens and utilizes critical staff member time. A reasonable amount of time between examinations should be afforded so that credit unions can continue to serve their members. Better coordination between the CFPB and other regulators would greatly reduce burdens and assist credit unions.

NAFCU Supports the Proposal Clarifying Supervisory Guidance

The proposal provides that examiners will not base supervisory criticism on violations of supervisory guidance, nor will examiners issue an enforcement action based on a violation of supervisory guidance. Despite this added transparency, NAFCU urges the CFPB to ensure examiners apply this position consistently. The proposal outlines the types of agency communications that constitute supervisory guidance and the CFPB does not need to provide any additional clarification regarding types of communication. NAFCU members do not expect to make any changes as to how they approach certain practices due to the proposal and this does not create any additional burdens. To further reduce burdens, the CFPB should continue to encourage examiners to take all necessary steps to identify and advise on deficient practices before they rise to the level of a violation of law or regulation. This includes providing supervisory guidance as a reference or example for credit unions.

Examiners should be able to reference supervisory guidance as an example of appropriate practices. Providing supervisory guidance as a reference is helpful for both the examiner and the credit union and offers greater examination consistency and transparency. However, the risk of "regulation by examination" presents itself if the line between supervisory guidance and regulatory requirement is blurred. Deviating from supervisory guidance should not automatically be construed as a deviation from a federal consumer financial law and should not in and of itself form the basis of an enforcement action. Rather, examiners should use regulatory requirements as the basis to assess credit union operations and afford credit unions with the opportunity to demonstrate that their practices, which may deviate from the examples provided in supervisory guidance, nonetheless meet regulatory requirements.

For instance, many credit unions rely on guidance such as the policy statement regarding unfair, deceptive, or abusive acts and practices (UDAAP) for the "abusive" standard, as the agency has not defined this term in the regulations. Compliance with UDAAP continues to be a concern for credit unions as significant resources are necessary to monitor and track the CFPB's supervisory enforcement actions to determine how best to design or modify internal practices and procedures. The CFPB has stated that the agency will provide clarity on the specific factual bases for violations; however, deviation from the policy statement should not constitute a UDAAP violation in and of itself, where a credit union demonstrate that the practice meets the spirit of the policy statement although not verbatim. NAFCU urges the CFPB to consider a rulemaking to enhance transparency and predictability over UDAAP compliance and enforcement.

Additionally, the CFPB should refrain from issuing supervisory guidance that adds requirements not explicitly stated in the regulations or law. A previous example of this is the CFPB's 2013 bulletin regarding indirect auto lending, that Congress ultimately repealed, which created additional requirements for indirect auto lending. Moreover, the CFPB enforced this supervisory guidance in the same manner the agency would have enforce a federal consumer financial law.

The CFPB should commit to only issuing guidance as a reference tool and refrain from enforcing guidance as if it has the force of law in the future.

Conclusion

NAFCU appreciates the opportunity to share its members' views on this matter. NAFCU supports the proposal as it provides transparency and clarity surrounding the examination and supervisory process. NAFCU encourages the continued use of supervisory guidance as a reference or example. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2249 or kschafer@nafcu.org.

Sincerely,

Kaley Schafer
Senior Regulatory Affairs Counsel