CLIENT ALERT

Financial Regulators Have Gotten the Memo—The "Brand Memo"

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Following the lead of the Department of Justice, financial regulators recently released statements announcing the “important distinction” between statutes and regulations on the one hand, and agency guidance on the other. In those statements, financial regulators re-assured supervised entities that they will not take enforcement action for purported violations of guidance.

Background

Over the past year, top DOJ leadership has repeatedly criticized the unlawful use of federal-agency guidance to create binding legal obligations that do not otherwise exist in statute or regulation. On November 16, 2017, Attorney General Sessions issued a memorandum to all DOJ components instructing,

> It has come to my attention that the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process. The Department will no longer engage in this practice.

Consistent with that memorandum, on January 25, 2018, then-Associate Attorney General Rachel Brand instructed the heads of civil litigating components and U.S. Attorneys that “Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in affirmative civil enforcement cases.” Deputy Attorney General Rod Rosenstein, Deputy Associate Attorney General Stephen Cox, and most recently Acting Associate Attorney General Jesse Panuccio have echoed those positions in public addresses.

As Crowell & Moring previously explained here, “DOJ’s top leadership has now essentially communicated to *all* federal agencies that using sub-regulatory guidance to expand statutory and regulatory requirements is inconsistent with promoting the rule of law, fair notice, and due process.”

Financial Regulators Follow DOJ’s Lead

A number of financial regulators recently issued similar statements on the impermissible use of guidance.

On September 11, 2018, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau issued an “Interagency Statement Clarifying the Role of Supervisory Guidance.” In that statement, the regulators highlighted the “difference between supervisory guidance and laws or regulations.” Supervisory guidance includes interagency statements, bulletins, policy statements, questions and answers, and frequently asked questions. In contrast to statutes or regulations, supervisory guidance “does not have the force and effect of law.” Although “such guidance is important to provide insight to industry,” the statement emphasized that “agencies do not take enforcement actions based on supervisory guidance.”

The statement also listed "ongoing agency efforts" to reinforce that restriction on the use of guidance. Among other things and perhaps most importantly, examiners "will not criticize" a supervised financial institution for a "violation" of supervisory guidance. The statement stressed that "any citations will be for violations of law, regulation, or non-compliance with enforcement orders or other enforceable conditions."

Two days after the Interagency Statement Clarifying the Role of Supervisory Guidance, the Chairman of the Securities and Exchange Commission followed suit, releasing a similar "Statement Regarding SEC Staff Views." Chairman Clayton underscored the SEC's "longstanding position … that all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties." Such guidance includes SEC compliance guides and frequently asked questions and responses.

Chairman Clayton reminded the SEC that it must "keep this important distinction in mind" and to "further emphasize this distinction" to the directors and staff of the Enforcement Division and the Office of Compliance Inspections and Examinations.

Takeaways

In their statements, the financial regulators proclaimed that they "do not take enforcement actions based on supervisory guidance," and that position was "longstanding." Perhaps recognizing a gap between that position and actual practice, the regulators are taking "ongoing" steps to "further emphasi[ze]" the lawful use of agency guidance.

Those are encouraging and welcome signs.

Some in the industry have voiced concern that the statements may remove defensive reliance on agency guidance. But as with the Brand memo, nothing in the recent statements precludes private parties from using guidance to *defend* themselves in agency actions or litigation. For example, the SEC must plead a "strong inference of fraudulent intent" in its enforcement actions under Section 10(b) of the Exchange Act and Rule 10b-5. A defendant's reasonable reliance on SEC guidance—including No-Action Letters and FAQs—can negate culpable scienter.

So while the statements prevent the agencies from using guidance as a sword, they do not prevent regulated entities from using guidance as a shield.

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