Effective Agency Guidance

Examining Bank Regulators' Guidance Practices

American Bankers Association®

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Introduction

The American Bankers Association[1] (ABA) and its members are committed to compliance with all Federal laws and regulations. Banks of all sizes devote considerable resources each year to compliance—resources that could otherwise be directed to serving their customers and communities and to innovation. ABA encourages Federal bank regulators to issue guidance that helps banks and other regulated entities understand and more efficiently comply with legal requirements. Given the many and sometimes conflicting legal requirements that apply to banking activities, guidance can promote understanding of agency expectations and legal positions and can help level the playing field. As the Office of Management and Budget has explained:

> Guidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.[2]

However, not everything that an agency calls "guidance" is in fact guidance. Too often, agencies announce as "guidance" what is in practice a "legislative rule" that Federal law requires go through notice-and-comment rulemaking. This is because legislative rules bind the public, and Congress decided that before an agency can bind the public, it must publish the text of a proposed rule, seek public input, evaluate costs and benefits, and in the case of the Consumer Financial Protection Bureau (CFPB or Bureau), consider the impact on small entities.

[1] The American Bankers Association is the voice of the nation's $23.5 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans.
[2] Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), https://www.govinfo.gov/content/pkg/FR-2007-01-25/pdf/E7-1066.pdf.

Guidance, in contrast, does not bind the public. Rather, it advises regulated entities on what the agency believes the law requires, or how the agency will use discretion in exercising the authority Congress has given it. Agencies issue guidance in a variety of forms, including advisory opinions, statements, circulars, blogs, and frequently asked questions. Depending on their function, the Administrative Procedure Act (APA) refers to these types of agency documents as either "interpretive rules" or "general statements of policy."

Recently, more and more Federal agencies, including Federal bank regulators, have issued so-called "guidance" documents that are legislative rules. This misuse of guidance creates unnecessary confusion for regulated entities, often deprives the industry of fair notice, and undermines the legitimacy of the regulatory process.

In contrast, regulated entities appreciate and welcome guidance that provides information about an agency's interpretation of existing law and how it intends to use its discretion. However, even in these cases, while notice-and-comment is not legally required, soliciting comment from the public helps promote the effectiveness of the guidance. This is because the failure to confer with regulated entities to understand interpretive questions, operational challenges, and system constraints often limits the utility of guidance.

ABA is publishing this white paper to help agencies issue guidance that complies with agencies' legal requirements while providing useful advice and information to regulated entities. This paper begins by discussing the applicable legal requirements, especially those related to when agency action should be considered a legislative rule and go through the APA notice-and-comment process. It then discusses instances in which agencies issued guidance consistent with these legal requirements and contrasts these examples with a discussion of guidance documents that were ineffective for one or more reasons.

Finally, the paper recommends that Federal bank regulators adopt written procedures governing the development, issuance, and use of guidance, which will maximize the utility of future guidance documents. Further, we urge each agency to publish – after soliciting public comment – a mandatory process that will govern the issuance of "significant"[3] guidance

[3] E.g., a guidance document that the agency in good faith reasonably anticipates may: lead to an annual effect on the economy of $100 million or more; create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency; or raise novel legal or policy issues arising out of legal mandates.

documents, which shall include public notice of a draft of the proposed guidance and a reasonable opportunity to comment before issuance of a final document.

Legal Framework

Nearly everything the executive branch does is governed by the requirements of the Administrative Procedure Act (APA).[4] The APA mandates the steps an agency must follow as part of the rulemaking process, broadly defined.[5] One of the key provisions of the APA is that rules must go through a process of notice-and-comment unless they are subject to an exception.[6] The main exception to this notice-and-comment requirement is for "interpretative [or interpretive] rules, general statements of policy, or rules of agency organization, procedure, or practice."[7]

The APA, however, does not define any of these terms. Courts have used various approaches to define these terms over the years. But, as a general matter, they appear to distinguish between legislative rules on the one hand, and interpretive rules and guidance documents on the other, by looking at whether the rule or document at issue binds the public, or confers rights or imposes legal obligations beyond existing statutes and regulations.[8] As contemplated by the APA, interpretive rules advise and guide the public; they do not bind it.[9] Rather, interpretive rules and

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[4] 5 U.S.C. § 551, *et seq*. A key distinction in the APA is between rulemaking on the one hand, and adjudication on the other. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (noting that the distinction between rules, which "have legal consequences only for the future," and adjudication, which "has future as well as past legal consequences," is "the entire dichotomy upon which the most significant portions of the APA are based.").

[5] 5 U.S.C. § 551(4); *Apter v. Dep't of Health & Hum. Servs.*, 80 F.4th 579, 590 (5th Cir. 2023) ("[t]he APA defines the term 'rule' broadly enough to include virtually every statement an agency may make." (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983)).

[6] 5 U.S.C. § 553(b); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring) ("The Act guards against excesses in rulemaking by requiring notice and comment.").

[7] 5 U.S.C. § 553(b)(A).

[8] *Brown Exp., Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) ("Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means." (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C.Cir.1952)); *see also id*. at 702 ("[W]hen a proposed regulation of general applicability has a *substantial* impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided." (citation omitted)).

[9] *Perez*, 575 U.S. at 109 (Scalia, J., concurring) ("An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means." (emphasis in original)). Another test courts use to determine if a rule should have gone through notice-and-comment is whether courts should defer to the agency's legal interpretation of an ambiguous statute consistent with the *Chevron* doctrine. *See United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). This particular test may be less

policy statements from an agency "simply let[] the public know its current enforcement or adjudicatory approach."[10]

But determining whether a rule or guidance document binds the public can be complicated.[11] In some instances the document itself purports to bind the public, so, regardless of whether the issuing agency styled the document as guidance or a legislative rule, courts will treat it as a legislative rule that must go through notice and comment to comply with the requirements of the APA. By contrast, some documents are styled as guidance and do not purport to bind the public, but courts nevertheless determine that they should be considered legislative rules because of their practical effect.[12] For example, if a guidance document limits the discretion that agency employees can exercise, that lack of discretion can have an effect on the public such that the guidance document is actually a legislative rule.[13] If a "so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a

useful going forward because in the October 2023 term the Supreme Court is considering whether to limit or overrule *Chevron*. *See Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (granting review on question of "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."). Further, the major questions doctrine substantially limits an agency's ability to act without express Congressional authorization. *See W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607–08 (2022). This means that fewer instances of agency action would even be eligible for *Chevron* deference in the first place since ambiguity that would allow for *Chevron* deference could also suggest the agency should not be acting at all. But just because something is not eligible for *Chevron* deference does not mean that it is not a legislative rule that needed to go through the notice-and-comment process.

[10] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95-96 (D.C. Cir. 1997); *see also Hoctor v. U.S.D.A.*, 82 F.3d 165, 167 (7th Cir. 1996) ("Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement.").

[11] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (differentiating between legislative rules, interpretive rules, and general statements of policy is "quite difficult and confused."); *Noel v. Chapman*, 508 F.2d 1023, 1029–30 (2d Cir. 1975) ("the distinction between a rule . . . and a general statement of policy . . . is enshrouded in considerable smog." (internal quote marks omitted)). Furthering this confusion is that judicial inquiries into whether a rule is *final* for purposes of APA review can overlap substantially with questions of whether it is *binding* for purposes of determining whether it is a legislative or interpretive rule. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (defining test for determining final agency action to include determining whether the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'" (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The difficulty in categorizing agency documents and in discerning whether they bind the public creates an incentive for agencies to circumvent the procedural requirements associated with issuing legislative rulemakings in favor of issuing guidance.

[12] *Lewis-Mota v. Secretary of Labo*r, 469 F.2d 478, 481–82 (2d Cir. 1972) ("[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.").

[13] *Cf. Texas v. United States*, 86 F. Supp. 3d 591, 670–71 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015) (DHS memo relating to administration of program "virtually extinguished" any agency discretion, and therefore it had "binding effect" on the public, "[i]n stark contrast to a policy statement that does not impose any rights and obligations and that *genuinely* leaves the agency and its decisionmakers free to exercise discretion." (internal quote marks omitted) (emphasis in original)).

binding rule of substantive law."[14] Similarly, if the guidance purports to create a "safe harbor" that will help shield an entity from liability, the guidance "can be binding as a practical matter."[15]

Given this, the language that an agency uses in issuing guidance becomes especially important. Mandatory language is highly indicative that an agency intends to bind the public or itself.[16] For example, the D.C. Circuit has held that a guidance document is binding because it required applicants for certain plans to engage in specific types of risk analysis, even though the guidance recognized that it may allow some exceptions in certain circumstances.[17] The court found it especially important that applicants had to use one of the pre-approved methods to analyze risk, and could not develop their own.[18] "To the applicant reading the Guidance Document the message is clear: in reviewing applications the Agency will not be open to considering approaches other than those prescribed in the Document."[19]

If, by contrast, the guidance "does not tell regulated parties what they must do or may not do in order to avoid liability," it likely is not binding in practice.[20] Similarly, if guidance does not dictate how an agency must act, and preserves its discretion when deciding issues in the future, it is not considered binding.[21] For example, when a guidance document preserves agency discretion to make determinations "on a case-by-case basis," the guidance is therefore "contingent on the 'individual facts in the various cases that arise' and thus not 'a binding norm.'"[22]

The question of whether guidance communicates a binding requirement is especially important in the context of financial services. Banking and other financial services are highly

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[14] *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).
[15] *See, e.g.*, *Sec. Indus. & Fin. Markets Ass'n v. United States Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 419 (D.D.C. 2014).
[16] *Id*. at 946 ("[W]e have, for example, found decisive the choice between the words 'will' and 'may.'"); *Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009); *Am. Trucking Ass'ns v. I.C.C.*, 659 F.2d 452, 463 (5th Cir. 1981). But, as noted above, this is not dispositive.
[17] *See Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 384 (D.C. Cir. 2002).
[18] *Id*. ("Furthermore, even though the Guidance Document gives applicants the option of calculating risk in either of two ways (assuming both are practical) it still requires them to conform to one or the other, that is, not to submit an application based upon a third way.").
[19] *Id*.
[20] *McCarthy*, 758 F.3d at 252.
[21] *See*, *e.g.*, *Catawba Cnty., N.C. v. E.P.A.*, 571 F.3d 20, 34 (D.C. Cir. 2009) (citing *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin*., 822 F.2d 1105, 1110 (D.C.Cir.1987) ("An agency pronouncement is not deemed a binding regulation merely because it may have some substantive impact, as long as it leaves the administrator free to exercise his informed discretion." (cleaned up))).
[22] *Nat'l Min. Ass'n v. Sec'y of Lab*., 589 F.3d 1368, 1372 (11th Cir. 2009) (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir.1983)).

regulated industries, and bankers want to comply with the letter and spirit of the law—and devote substantial resources to comply with applicable regulations. As a general matter, bank regulators also issue licenses allowing businesses to operate.[23] Participants in highly regulated industries "often face overwhelming practical pressure to follow what a guidance document 'suggests.'"[24] This is especially true with a regulated entity "who is subject to a pre-approval requirement," such as a bank seeking to open a new branch.[25] It is also true for entities such as banks that are subject to supervisory exams on a regular basis such that "banks consider it important to stay on the agencies' good side, and sensitivity to guidance is an important part of that."[26] This is not merely a theoretical concern; "Operation Choke Point" leveraged regulatory guidance from the FDIC[27] to pressure banks to stop providing services to business in legal industries that were disfavored by regulators.[28] Many banks, not wanting to upset their regulators, complied.[29]

The fact that financial institutions are under pressure to comply with agency guidance is especially relevant when evaluating so-called interpretive rules, which, in theory, provide the agency's view of statutory and regulatory requirements. If an agency's interpretive rule outlines a new legal interpretation of an existing statute that has never been enunciated before (or, worse yet, suggests that longstanding and/or widespread industry practice violates existing law), regulated entities will be under tremendous pressure to comply—even if the agency's interpretation is erroneous and ultimately overruled by a reviewing court.[30] Further, since

[23] *See*, *e.g.*, 12 U.S.C. § 26 (authorizing Comptroller of the Currency to "determine whether [an applicant to be a national bank] is lawfully entitled to commence the business of banking.").
[24] Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165, 174 (2019); *see also id.* ("the sources of pressure on regulated parties to follow guidance are mostly hard-wired into the structure of the regulatory scheme that Congress has imposed on them.").
[25] *Id.* at 192.
[26] *Id.* at 193.
[27] *See, e.g.*, Fed. Deposit Ins. Corp., *Managing Risks in Third-Party Payment Processor Relationships*, 8 (2011), https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum11/sisummer11-article1.pdf (identifying certain merchant categories as "high risk").
[28] *See generally* STAFF OF SUBCOMM. ON ECONOMIC GROWTH, JOB CREATION, AND REGULATORY AFFAIRS, H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, FEDERAL DEPOSIT INSURANCE CORPORATION'S INVOLVEMENT IN "OPERATION CHOKE POINT" 113TH CONG. (Comm. Print 2014), https://oversight.house.gov/wp-content/uploads/2014/12/Staff-Report-FDIC-and-Operation-Choke-Point-12-8-2014.pdf; Julie Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 574 (2020) ("Members of Congress became concerned that bank regulators were working with the DOJ to cut off banking access to legal industries.").
[29] Hill, *supra* note 25 at 573 ("Reports soon surfaced that banks, in response to regulatory pressure about reputation risk, had closed accounts of lawful businesses.").
[30] *Cf. Perez*, 575 U.S. at 106 ("the APA requires an agency to provide more substantial justification . . . when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (Kennedy, J., concurring in part and concurring in judgment))).

regulatory agencies exercise substantial authority over financial institutions, including through regular supervisory examinations, financial institutions are reluctant to challenge erroneous legal interpretations in court for fear of provoking backlash from the regulator.

Even if a guidance document is not considered binding, and therefore not a legislative rule, it is still important to determine whether the document is an "interpretive rule" or a "general statement of policy."[31] Interpretive rules may be subject to judicial review in some instances, but general statements of policy are not.[32] The Supreme Court has observed that "the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'"[33] General statements of policy, by contrast, are those that set forth an agency's policy on a statutory, regulatory, or technical issue, by, for example, outlining the agency's enforcement priorities.[34]

Effective Agency Guidance

As noted above, guidance can be an effective and welcome means for an agency to articulate to regulated entities how it will exercise its discretion in enforcing legal requirements, or how it will interpret vague or broad legal provisions. In many instances Federal bank regulators can put these principles into practice in a way that is both consistent with the law and provides helpful information to regulated entities. A few examples are discussed below, and additional examples are provided in the Appendix to this paper:[35]

Interagency Statement on Qualified Mortgage Fair Lending Risks: In October 2013, the Board of Governors of the Federal Reserve System (FRB), Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and CFPB issued an "Interagency Statement on Fair Lending Compliance and the

[31] It should be noted that even though guidance documents are not required by law to be issued through a notice and comment process, agencies may still undertake this process voluntarily and may benefit from the opportunity to consider feedback that raises unforeseen issues or concerns.
[32] *See McCarthy*, 758 F.3d at 251 (collecting cases).
[33] *Perez*, 575 U.S. at 97 (quoting *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995)).
[34] *See*, *e.g.*, *McCarthy*, 758 F.3d at 251–52 ("An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.").
[35] Identification of these guidance documents as "effective" examples does not mean that they are substantively unassailable, but rather that the issuing agencies generally followed appropriate procedures and the guidance documents provide helpful information to regulated entities without establishing binding requirements.

Ability-to-Repay and Qualified Mortgage Standards Rule."[36] The statement sought to respond to inquiries from lenders about whether they would be liable under the disparate impact doctrine of the Equal Credit Opportunity Act and its implementing regulation, Regulation B, by originating only "Qualified Mortgages" as defined in the CFPB's January 2013 Ability-to-Repay and Qualified Mortgage Standards Rule (Ability-to-Repay rule). The agencies stated that they do not anticipate that a creditors' decision to offer only Qualified Mortgages (QMs) would, absent, other factors, elevate a supervised institution's fair lending risk. The agencies also described some general principles that would guide their supervisory and enforcement activities with respect to entities within their jurisdiction that became subject to the Ability-to-Repay rule when it took effect in January 2014.

The statement was effective because it did not attempt to bind mortgage originators or prohibit certain conduct. Nor did it bind the agencies' discretion. Instead, it helped resolve legitimate concern that taking advantage of the QM safe harbor in the Ability-to-Pay rule would create fair lending risk and set forth factors the agencies would consider in the discretionary exercise of future supervisory and enforcement authorities.

Limited English Proficient Guidance: In January 2021, the CFPB issued a guidance document related to the "Provision of Financial Products and Services to Consumers with Limited English Proficiency" (LEP Guidance).[37] This document sought to "provide[] guidance on how financial institutions can provide access to credit in languages other than English in a manner that is beneficial to consumers while taking steps to ensure financial institutions' actions are compliant with the [Equal Credit Opportunity Act ("ECOA")], the prohibitions against unfair, deceptive, or abusive acts or practices (UDAAPs), and other applicable laws."[38] The Bureau issued a Request for Information (RFI) prior to issuing the guidance document, seeking input from the public on whether and how it should address legal issues related to provision of products and services to limited English proficiency (LEP) consumers.[39] In response to the RFI many regulated entities indicated a willingness to serve LEP consumers, but expressed concern about legal risks and

[36] *See* Interagency Statement (Oct. 2013), https://files.consumerfinance.gov/f/201310_cfpb_guidance_qualified-mortgage-fair-lending-risks.pdf.
[37] *See* 86 Fed. Reg. 6306 (Jan. 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-21/pdf/2021-01116.pdf.
[38] *Id.*
[39] *See* Request for Information on the Equal Credit Opportunity Act and Regulation B, 85 Fed. Reg. 46600 (Aug. 3, 2020), https://www.govinfo.gov/content/pkg/FR-2020-08-03/pdf/2020-16722.pdf.

uncertainties, especially in selecting which languages other than English in which to offer translation services, when in a product's life cycle to offer translation services, and whether the decision to offer translation services in one language could lead to liability for not offering similar services for other languages.[40] In response to these concerns, the LEP Guidance provides both general principles to consider in serving LEP consumers and guidelines that regulated entities can use to implement the principles, "including key considerations to inform those decisions and specific information about common components of a compliance management system."[41]
The LEP Guidance is an interpretive rule because it outlines how regulated entities can comply with the Bureau's interpretation of relevant legal requirements. Importantly, the Bureau did not assert that the principles and guidelines articulated in the document were the exclusive means by which companies could legally provide services to LEP consumers. Also, it did not mandate provision of translation services in certain languages (or the provision of translation services at all), nor did it mandate when or how such translation services must be provided. Instead, it provided a roadmap for institutions that want to provide translation services to follow in setting up such a program, including questions the institution should consider when starting out.[42] The LEP Guidance explicitly notes that "differences in financial institutions and the ways they choose to serve LEP consumers will likely require different compliance solutions."[43]

Model Risk Management Guidance: In April 2021, the FRB, FDIC, and OCC, in consultation with the Financial Crimes Enforcement Network (FinCEN), issued an "Interagency Statement on Model Risk Management for Bank Systems Supporting Bank Secrecy Act/Anti-Money Laundering Compliance" (MRM Guidance).[44] This guidance expanded on a previous document that provided advice to regulated entities on how to engage in prudent risk management when using models to comply with legal and regulatory requirements of the Bank Secrecy Act and the Money Laundering Control Act. It provided principles that could inform how regulated entities engage in model risk management and provided examples of questions regulated entities should ask when designing a model risk management framework.

[40] *See id.* at 6308-09.
[41] *Id.* at 6309.
[42] *Id.* at 6309-12.
[43] *Id.* at 6309.
[44] *See* Interagency Statement (Apr. 2021), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20210409a2.pdf.

Consistent with the requirement that only documents that go through notice-and-comment rulemaking can bind private parties, the MRM Guidance affirmatively disclaimed that it had the force of law.[45] It noted that the document was only promulgated to help "clarify how the [previous guidance document] may be a useful resource to guide a bank" risk management framework and to "assist with BSA/AML compliance."[46] It stated that banks would always retain "flexibility . . . in developing, implementing and updating models," including those used to comply with legal requirements.[47] Consistent with sound guidance practices the MRM Guidance also did not identify any conduct that would or would not comply with legal and regulatory requirements or purport to identify safe harbors or otherwise identify steps that regulated entities could take to ensure compliance.

Ineffective Agency Guidance

Unfortunately, experience shows that agencies can provide ineffective guidance just as often as they provide effective guidance. The Federal Register is littered with examples of agencies purporting to issue an interpretive rule or other form of guidance document that was in fact a legislative rule. What follows are a few examples of ineffective agency guidance, and additional examples are included in the Appendix to this paper.

FDIC Financial Institution Letter (FIL) on Multiple NSF Fees: In August 2022, the FDIC issued guidance (FIL 40-2022) to "ensure that supervised institutions are aware of the consumer compliance risks associated with assessing multiple non-sufficient fund (NSF) fees arising from the re-presentment of the same unpaid transaction."[48] The FDIC asserted that such practices raised UDAAP risks as well as third-party risk management and litigation risks, and "encouraged" institutions to review their practices and to consider mitigation activities, which included eliminating NSF fees altogether. The FDIC also stated that it expects supervised financial institutions to make full corrective action for self-identified issues, which includes conducting

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[45] *Id.* at 1 ("This statement does not alter existing BSA/AML legal or regulatory requirements, nor does it establish new supervisory expectations. In addition, this statement does not suggest that a bank change existing risk management practices if the bank uses them to effectively manage its risk.").
[46] *Id.* Again, since the guidance document explained the agency's view of existing legal requirements, without purporting to bind, it should be considered an interpretive rule.
[47] *Id.* at 2.
[48] *See* FIL-40-2022 (Aug. 2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf.

restitution look-back reviews using Automated Clearing House (ACH) data for re-presentment transactions, with no limit on the look back period.

This document contains the hallmarks of ineffective agency guidance because in the guise of describing the FDIC's supervisory approach, it creates new obligations for supervised financial institutions, under threat of supervisory or enforcement action, including civil monetary penalties. Less than a year later, following receipt of concerns expressed by banks regarding the near impossibility of accurately identifying re-presented transactions through core processing systems, the FDIC had to revise and reissue its guidance to eliminate the lookback review requirement absent a likelihood of substantial consumer harm.[49]

Deposit Advance Product Guidance: In November 2013, the OCC and FDIC issued "Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products."[50] This guidance set forth the agencies' expectations regarding the use of deposit advance products (DAPs), which were a form of small-dollar, short-term loans or lines of credit offered to a bank customer whose deposit account reflects recurring direct deposits. Among these expectations were new requirements for depository institutions—requirements that were not expressly required by law or regulation. One new requirement was conducting financial capacity assessments that evaluated a customer's ability to repay by analyzing the customer's deposit inflows and outflows over at least six continuous months and considering the customer's net surplus or deficit at the end of each of the preceding six months. Another new requirement was a mandatory "cooling-off" period of at least one monthly statement cycle after the repayment of a DAP before another advance could be extended.

Banks warned the agencies in comment letters that the DAP guidance was overly burdensome, would have a "chilling effect" on the overall small-dollar, short-term credit market, and would potentially drive consumers to illegal and/or unregulated lenders. Notwithstanding these concerns, the agencies finalized the guidance substantially as proposed. Following the issuance of the guidance, banks supervised by the FDIC and OCC ceased offering DAP

[49] *See* FDIC, FIL-32-2023, *Supervisory Guidance on Multiple Re-Presentment NSF Fees* (revised Jun. 2023), https://www.fdic.gov/news/financial-institution-letters/2023/fil23032a.pdf.

[50] *See* 78 Fed. Reg. 70552 (Nov. 26, 2013), https://www.federalregister.gov/documents/2013/11/26/2013-28306/guidance-on-supervisory-concerns-and-expectations-regarding-deposit-advance-products (FDIC); *see also* 78 Fed. Reg. 70624 (Nov. 26, 2013), https://www.federalregister.gov/documents/2013/11/26/2013-28361/guidance-on-supervisory-concerns-and-expectations-regarding-deposit-advance-products (OCC).

altogether.[51] In October 2017, less than four years after issuance, the OCC rescinded its guidance.[52] In addition to the rescission statement, the Acting Comptroller of the Currency stated:

> [I]n the years since the agency issued the guidance, it has become clear to me that it has become difficult for banks to serve consumers' need for short-term, small-dollar credit. As a result, consumers who would rely on highly regulated banks and thrifts for these legitimate and well-regulated products to meet their financial needs turn to other, lesser regulated entities, which may result in consumer harm and expense. In ways, the guidance may even hurt the very consumers it is intended to help, the most marginalized, unbanked and underbanked portions of our society.[53]

OCC Guidance on Debt Sales: In August 2014, the OCC issued a guidance bulletin on Consumer Debt Sales.[54] The bulletin expanded upon "best practices" on debt sales provided by the Comptroller in July 2013 in the form of a supplement to written testimony before a House Subcommittee.[55] The bulletin set forth the OCC's supervisory expectations regarding the adoption of internal policies and procedures governing debt-sale arrangements, the performance of due diligence when selecting a debt buyer, the structure of debt-sale contracts, and the accuracy and completeness of account data transferred to debt buyers.[56]

The bulletin further specified that certain types of debts are "not appropriate" for sale by banks, which included categories of debt the OCC deemed "clearly not appropriate for sale" and other categories that banks should also "refrain" from selling because the debt "may pose greater potential compliance and reputational risk."[57] Among these other categories of debt the OCC included "accounts close to the statute of limitations," although it did not provide further guidance

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[51] This fact was recognized by the CFPB in its final 2017 Payday Rule. *See* 82 Fed. Reg. 54472, 54496 (Nov. 17, 2017), https://www.federalregister.gov/documents/2017/11/17/2017-21808/payday-vehicle-title-and-certain-high-cost-installment-loans.
[52] *See* Rescission of Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 82 Fed. Reg. 47602 (Oct. 12, 2017), https://www.federalregister.gov/documents/2017/10/12/2017-22012/rescission-of-guidance-on-supervisory-concerns-and-expectations-regarding-deposit-advance-products.
[53] *See* OCC, News Release, *Acting Comptroller of the Currency Rescinds Deposit Advance Product Guidance* (Oct. 5, 2017), https://www.occ.treas.gov/news-issuances/news-releases/2017/nr-occ-2017-118.html.
[54] *See* OCC, Bulletin 2014-37, Consumer Debt Sales: Risk Management Guidance (2014), https://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.
[55] *See* OCC, News Release, *OCC Statement Regarding Oversight of Debt Collection and Debt Sales* (July 17, 2013), https://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-116.html.
[56] *See* OCC, Bulletin 2014-37.
[57] *Id.*

regarding how "close" an account must be to the statute of limitations for the OCC to expect a bank to refrain from its sale.

This bulletin is ineffective because it established new regulatory expectations for specific actions to be taken by banks, but lacked the precision required for compliance that can be provided by notice-and-comment rulemaking. Lacking the requisite level of precision, the bulletin created uncertainty among banks and discouraged them from undertaking lawful debt sales.

Recommendations for Ensuring Effective Agency Guidance

The discussion above demonstrates that guidance can vary significantly in effectiveness and documents agencies call guidance, in fact, are not always guidance. To make guidance more effective and compliant with legal requirements, there are a number of good government practices that agencies should follow.

The best way to make guidance effective would be to follow notice-and-comment procedures for all but ministerial documents. Allowing the public to comment on proposed guidance, including legal interpretations, would help sharpen the guidance by identifying potential legal issues or contradictions with previous guidance, highlight how the guidance may be sweeping more broadly than it should (either intentionally or unintentionally), and highlight potential operational challenges with putting the guidance into practice. While agencies may be tempted to avoid the delay involved in notice-and-comment, it helps neither the agency nor regulated parties to have guidance documents tied up in lengthy legal challenges based on procedural violations, such as not going through the notice-and-comment process.

But since time or resource constraints can limit when it is feasible to put guidance documents through the notice-and-comment process, other practices can help agencies issue more effective guidance and ensure they are complying with their legal obligations. Agencies would be well served to implement the following practices.

Guidance should help regulated entities understand agency priorities and how agencies will exercise their discretion. To that end, agencies should limit guidance documents as much as possible to identifying principles that will inform the exercise of agency discretion. However, regulators should ensure they do not issue guidance that purports to bind regulated entities or could

have the practical effect of binding regulated entities. Financial regulators, especially those that have licensing and/or supervisory examination authority, should pay particular attention to whether regulated entities will view the guidance as binding as a practical matter. Agencies also should be careful not to issue guidance that contradicts existing legal and regulatory requirements.

Agencies should avoid issuing guidance that purports to interpret a statute in such a way that makes illegal longstanding and/or widespread industry practice and should avoid contradicting previously issued guidance without expressly noting that they are withdrawing the prior guidance and discussing the reasons for doing so. Substantial changes such as those should be carefully reviewed to ensure that they are within the agency's legal authority, undergo advance consultation with major stakeholders, and go through a public notice-and-comment process. To avoid applying such changes retroactively, agencies should expressly state that any such changes will only apply prospectively and that regulated entities will be afforded adequate time to adjust their activities and programs.

To ensure agencies follow good guidance practices, they should establish policies and procedures for the guidance development process. To better categorize documents within the APA definitions, agencies should develop an internal taxonomy and framework that includes procedures to identify when a guidance document could be considered binding, and therefore legislative, such that it must go through the notice-and-comment process. This could include adopting the Good Guidance Practices promulgated by OMB in 2007. It could also include empowering an agency's risk officer to ensure that guidance is developed consistent with the agency's enterprise risk plan and the agency is following proper procedures to help minimize the risk of issuing improper guidance (or proper guidance through improper processes).Finally, agencies should develop and implement procedures for affected parties to identify issues that would benefit from clarifying guidance and to ask for reconsideration of existing guidance and policy statements, consistent with recommendations from the Administrative Conference of the United States.[58] These procedures should establish a reasonable time frame in which the agency will publish a written response.

[58] Administrative Conference of the United States, Agency Policy Statements: Recommendation II.B (Jun. 18, 1992), https://www.acus.gov/recommendation/agency-policy-statements.

To ensure that these practices are regularly followed, ABA recommends that the agencies adopt written procedures governing the development, issuance, and use of guidance documents. Such procedures should, at a minimum:

1. Clearly define the term "guidance document"[59] and identify the specific categories of guidance documents[60] used by the agency.
2. Ensure that all guidance documents comply with all relevant statutes and regulations.
3. Require that all guidance documents identify or include: the term "guidance;" the date of issuance; a short title; a unique numerical identifier; the activity or entities to which the guidance applies; citations to applicable statutes or regulations; a statement indicating whether the guidance is intended to revise or replace previously issued guidance; a short summary of the subject matter covered in the guidance; and a clear and prominent statement declaring that the contents of the document do not have the force and effect of law, are not meant to bind the public in any way.
4. Establish and maintain on the agency's website a single, searchable, indexed, publicly accessible database containing all guidance documents issued by the agency and identifying whether they are still in effect.
5. Publish all guidance in the Federal Register, as required by law.[61]
6. Establish a process for electronic submission of petitions for issuance, reconsideration, modification, or rescission of guidance documents, and for electronic submission of complaints that the agency is not following its guidance regulations or procedures or is improperly treating a guidance document as a binding requirement.

[59] E.g., any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556.

[60] E.g., interpretive rules, statements of policy, letters, memoranda, circulars, bulletins, advisories issued in any format. The agencies should also distinguish guidance documents from other defined categories of "non-guidance," such as rules of agency organization, procedure, or practice; decisions of agency adjudications; internal legal advice and legal briefs and court filings, agency statements of specific applicability (except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public; communications that do not set for the a policy on a statutory, regulatory or technical issue or an interpretation of a statute or regulation (which may include speeches, press releases, congressional testimony, or blog posts); and contract solicitations and awards.

[61] 5 U.S.C. 552(a)(1)(D).

7. Establish a special process for the issuance of "significant"[62] guidance documents, which shall include public notice of a draft of the proposed guidance and a reasonable opportunity to comment before issuance of a final document.
8. Submit all guidance documents to both Houses of Congress and the Government Accountability Office (GAO) for review under the Congressional Review Act (CRA), as generally required by law.[63]
9. Require a review of existing guidance documents for conformity to the procedures above and revise or rescind the guidance documents, as necessary.

Conclusion

Agency guidance can be a useful tool for agencies to provide regulated entities with information on how the agency views the law and how it intends to use its discretion when exercising its legitimate government functions. But too often agencies announce what are in practice legislative rules—which must go through notice-and-comment rulemaking—in the guise of agency guidance. This misuse of guidance creates unnecessary confusion for regulated entities and undermines the authority of the regulators. Agencies that issue guidance consistent with the practices outlined in this paper, and that avoid the pitfalls of the ineffective agency guidance previously discussed, will be doing themselves and the entities they regulate a substantial service.

[62] E.g., a guidance document that the agency in good faith reasonably anticipates may: lead to an annual effect on the economy of $100 million or more; create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency; or raise novel legal or policy issues arising out of legal mandates.

[63] The CRA requires Federal agencies to submit for Congressional review all issuances that qualify as "rules" under the APA, including statements of policy and interpretive rules, unless certain narrow exceptions are met. 5 U.S.C. 801; 5 U.S.C. 804(3).

Appendix

Additional Examples of Effective Agency Guidance

Interagency Appraisal and Evaluation Guidelines: In December 2010, the OCC, FRB, FDIC, NCUA, and Office of Thrift Supervision (OTS) issued "Interagency Appraisal and Evaluation Guidelines" (Guidelines).[64] The Guidelines were intended to provide federally regulated institutions and examiners clarification on the Agencies' expectations for prudent appraisal and evaluation policies, procedures, and practices. The Guidelines did not impose new requirements on financial institutions. Rather, the Guidelines summarized the collective standards for conducting appraisals in connection with "federally related transactions," which Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) had required the agencies to promulgate through separate regulations. The Guidelines included citations to the underlying regulatory requirements when summarizing the appraisal standards, and the presentation of unified standards as required by multiple underlying regulatory requirements simplified the task of compliance for many institutions involved in mortgage transactions covered by the rules.

Abusiveness Policy Statement: In January 2020, the Consumer Financial Protection Bureau published a "Statement of Policy Regarding Prohibition on Abusive Acts or Practices" ("Abusiveness Statement").[65] In the abusiveness statement, the Bureau identified "a framework for [its] exercise of its supervisory and enforcement authority to address abusive acts or practices."[66] The Abusiveness Statement noted that the statutory language prohibiting abusive acts and practices is relatively vague, and that Congress provided little to guide the agency in

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[64] *See* Interagency Guidelines (Dec. 2010), https://www.fdic.gov/news/financial-institution-letters/2010/fil10082a.pdf.
[65] *See* Abusiveness Policy (Jan. 2020), https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-enforcement-policy_statement.pdf.
[66] *Id.* at 1

determining what qualifies as abusive.[67] It further noted that the Bureau's enforcement history did not provide much guidance to regulated parties, since the vast majority of cases that alleged conduct was abusive also alleged that the same or very similar conduct was unfair and/or deceptive.[68] To help address this uncertainty, the Abusiveness Statement "provide[d] greater clarity on how the Bureau plans to implement and apply the abusiveness standard in its supervisory and enforcement work."[69] The Bureau then articulated a series of principles that would inform how it would exercise its discretion in enforcement and supervision with regards to abuse, including determining whether the alleged harm outweighed any benefits to consumers,[70] not alleging an abusiveness violation "that relies on all or nearly all the same facts as an unfairness or deception violation,"[71] and refraining from seeking substantial monetary relief where the company acted based on a good-faith, reasonable interpretation of legal requirements.[72]

This is a paradigmatic example of a general statement of policy contemplated by the APA.[73] It did not purport to bind private parties or announce any legally binding standard.[74] It did not identify specific conduct that would or would not be considered abusive, outline substantive "safe harbors" or otherwise address what the law specifically requires of regulated entities. Rather, it preserved the Bureau's discretion and explained to regulated entities how the Bureau intended to exercise that discretion when evaluating whether to bring an enforcement action or cite a violation in the supervisory context.[75]

[67] *Id.* at 3 ("Although Congress, through the language in section 1031(d), provided some indication of the abusiveness standard, the Dodd-Frank Act does not further elaborate on the meaning of the terms used in section 1031(d), and there is relatively limited legislative history discussing the meaning of the language in section 1031(d) (including in distinguishing the abusiveness standard from the deception and unfairness standards).").
[68] *Id.* at 4.
[69] *Id.* at 9 ("The Bureau therefore issues this Policy Statement to describe certain aspects of how it intends to approach its use of the abusiveness standard in its supervision and enforcement matters going forward.").
[70] *Id.* at 10-11.
[71] *Id.* at 11-13.
[72] *Id.* at 13-14.
[73] *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir.), opinion modified on reh'g, 36 F.3d 89 (5th Cir. 1994) ("A general statement of policy is a statement by an administrative agency announcing motivating factors the agency will consider, or tentative goals toward which it will aim, in determining the resolution of a substantive question of regulation." (citing *Brown Express*, 607 F.2d at 701)).
[74] *See Gill v. United States Dep't of Just.*, 913 F.3d 1179, 1186 (9th Cir. 2019) (finding that guidance document was not legislative rule "because it allows analysts to exercise discretion" in how to handle documents to which guidance applied).
[75] In March 2021, the CFPB rescinded this guidance document, claiming that the guidance was "inconsistent with the Bureau's duty to enforce Congress's standard" for abusiveness, and that the Bureau would "consider good faith, company size, and all other factors it typically considers as it uses its prosecutorial discretion." *See* Consumer Fin. Prot. Bureau, Newsroom, *Consumer Financial Protection Bureau Rescinds Abusiveness Policy Statement to Better*

<u>Special Purpose Credit Program (SPCP) Advisory Opinion</u>: In January 2021, the Bureau issued an advisory opinion on how regulated entities can establish SPCPs consistent with the Equal Credit Opportunity Act (ECOA).[76] ECOA permits "profit-making organizations" to establish SPCPs "to meet special social needs," and exempts from ECOA's definition of discrimination credit decisions made under SPCPs if the SPCP meets standards established by the Bureau.[77] The Bureau issued the SPCP guidance after the Bureau published an RFI asking for feedback on ECOA and its implementing regulations.[78] Numerous comments asked for additional guidance around SPCPs.[79] In response, the Bureau issued guidance that further explained the standards and legal requirements for SPCPs, including what information should be included in the regulatorily required written plan for the SPCP,[80] and how best to determine whether a SPCP is needed in the first place, including types and sources of information a creditor can use to make such a determination.[81]

The Bureau labeled this document an "interpretive rule."[82] While the label an agency gives a rule is not dispositive,[83] the advisory opinion bore all the hallmarks of a valid interpretive rule. Most significantly, it did not purport to have the force and effect of law;[84] only clarified previously promulgated, legally binding regulations;[85] and, as a result, explained pre-existing obligations and

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Protect Consumers (Mar. 11, 2021), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rescinds-abusiveness-policy-statement-to-better-protect-consumers/.

[76] *See* Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs, 86 Fed. Reg. 3762 (Jan. 15, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-15/pdf/2020-28596.pdf. Advisory opinions are paradigmatic examples of interpretive rules because they purport to provide the agency's interpretation of existing legal requirements.

[77] 15 U.S.C. § 1691(c). Oversight of SPCPs was originally vested in the Board of Governors of the Federal Reserve System but was transferred to the Bureau by the Dodd-Frank Act. *See* Public Law 111–203, 124 Stat. 1376, 2084.

[78] Request for Information on the Equal Credit Opportunity Act and Regulation B, 85 Fed. Reg. 46600 (Aug. 3, 2020), https://www.govinfo.gov/content/pkg/FR-2020-08-03/pdf/2020-16722.pdf.

[79] *See* 86 Fed. Reg. at 3763.

[80] *See id.* at 3764-65.

[81] *See id.* at 3765-66.

[82] *Id.* at 3766.

[83] *See, e.g.*, *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) ("[T]he agency's own label, while relevant, is not dispositive.")

[84] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) ("Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" (quoting Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995))).

[85] *See Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114 (D.C. Cir. 2021) ("an interpretive rule 'derives a proposition from an existing document, such as a statute, regulation, or judicial decision, whose meaning compels or logically justifies the proposition.'" (quoting *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020))).

rights rather than announcing new ones.[86] It did not purport to deem illegal widespread industry practice or otherwise express a controversial legal opinion. It merely provided advice to regulated entities on how to comply with existing legal requirements.

Additional Examples of Ineffective Agency Guidance

UDAAP Exam Manual Change: In March 2022, the CFPB updated the portion of examination manual dedicated to unfair, deceptive, and abusive acts or practices (UDAAP).[87] The exam manual provides guidance—and in many cases step-by-step instruction—to CFPB employees when examining regulated financial institutions for, among other things, violations of federal consumer financial law.[88] The Bureau routinely updates the exam manual to include new procedures or instructions to examiners, but the March 2022 update noted that examiners should look to see if an institution engaged in "discriminatory acts or practices" as part of a general review of whether the institution engaged in "unfair" acts and practices in violation of the Consumer Financial Protection Act. The CFPB announced the exam manual update with a blog post that also suggested the review for discrimination would focus on disparate impact in addition to intentional and invidious discrimination.[89]

The updated exam manual announced an interpretation inconsistent with decades of understanding and usage of the term "unfairness" in the Federal Trade Commission (FTC) Act and with the enactment of ECOA. Indeed, the exam manual's conflation of unfairness and discrimination ignores the text, structure, and legislative history of the Dodd-Frank Act. The exam manual update also confused more than it clarified. It did not include information about which classes (i.e. race, gender, sexual orientation, etc.) an examiner or banker should consider, what tests an examiner should run to determine whether an act or practice was discriminatory, and what, if any, defenses would be recognized, including whether, consistent with civil rights caselaw,

[86] *Id*.
[87] *See* Consumer Fin. Prot. Bureau, Newsroom, *CFPB Targets Unfair Discrimination in Consumer Finance* (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/.
[88] In theory the examination manual is exempt from the notice-and-comment requirement because it is rules of agency practice since it merely instructs CFPB examiners in how to conduct exams. But, as discussed in this section, the nature of the update converted what should be a statement of agency practice into a substantive rule.
[89] *See id.* ("CFPB examiners will require supervised companies to show their processes for assessing risks and *discriminatory outcomes*, including documentation of customer demographics and the impact of products and fees on different demographic groups." (emphasis added)).

examiners should determine whether the identified discriminatory outcome is the result of a legitimate business objective. This guidance was ineffective in nearly every way. It sought to bind,[90] announced new legal requirements without reference to previously issued regulations or guidance, and changed the status of regulated parties,[91] all without going through notice-and-comment rulemaking.[92]

OCC Overdraft Bulletin: In April 2023, the OCC issued OCC Bulletin 2023-12 entitled "Overdraft Protection Programs: Risk Management Practices."[93] The bulletin purported to identify risk management issues related to bank account overdraft programs and specifically noted that the agency had previously found several practices to be unfair and/or deceptive in violation of Section 5 of the FTC Act.[94] The bulletin then recommended several specific actions that banks should take to address these risks, including specific ways to tailor these overdraft programs to better conform with the OCC's preferences on how they should be operated.

This document is an example of ineffective agency guidance because it bears all the hallmarks of a legislative rule that was not subjected to the formal rulemaking process.[95] It did not identify any broad principles or guidelines that would inform agency action in the future. It did not rely on previous regulations or guidance that specifically addressed the practices at issue.[96] Rather,

[90] *Id.* (discrimination defined in updated manual can "trigger liability" for regulated entities).
[91] *See Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022). Arguably the guidance was *ultra vires* since the Bureau could only issue the exam manual update if discrimination is in fact *per se* unfair conduct.
[92] The manual update was challenged in court by a coalition of trade associations and was vacated by the district court because the Bureau's conflation of unfairness and discrimination violated the major questions doctrine. *See Chamber of Com. of United States of Am. v. Consumer Fin. Prot. Bureau*, No. 6:22-CV-00381, 2023 WL 5835951, at *7 (E.D. Tex. Sept. 8, 2023). On November 6, the Bureau filed a notice with the district court indicating that is appealing the case to the Fifth Circuit Court of Appeals.
[93] *See* Bulletin 2023-12 (Apr. 2023), https://www.occ.gov/news-issuances/bulletins/2023/bulletin-2023-12.html.
[94] *Id.*
[95] The OCC did not attempt to label the bulletin as either an interpretive rule or a general statement of policy.
[96] Indeed, if any prior guidance addressed the overdraft practices that were the subject of the bulletin, it implicitly allowed the practice that the OCC was now criticizing. Because of timing issues, some debit card transactions can be authorized when an account balance is positive but settle when the balance is negative (an "authorize positive/settle negative" or "APSN Transaction"), and therefore incur an overdraft fee. The 2023 bulletin expressly notes that the OCC has found APSN to be unfair in violation of the FTC Act. But, in 2005 the OCC, along with other Federal banking regulators, published in the Federal Register, after notice-and-comment, "Joint Guidance on Overdraft Protection Programs." 70 Fed. Reg. 9127 (Feb. 24, 2005), https://www.govinfo.gov/content/pkg/FR-2005-02-24/pdf/05-3499.pdf. That guidance document did not find such transactions to be unfair, but simply advised regulated institutions to clearly "explain [the] impact of transaction clearing policies" to consumers, being sure to note that "transactions may not be processed in the order in which they occurred, and that the order in which transactions are received by the institution and processed can affect the total amount of overdraft fees incurred by the consumer." In other words, the prior guidance document suggested a best practice was to inform customers that APSN Transactions might occur, not that they should never happen because they might violate the FTC Act.

the bulletin identified specific practices that were common throughout the industry (and had been so for many years and that the agency had implicitly permitted), asserted that they were likely illegal (which was at best a contestable interpretation of the relevant law), and identified specific steps that regulated entities could take to avoid legal liability.[97] Though not labeled as such, this is a behavior-shaping legislative rule that should have gone through notice-and-comment rulemaking.[98]

Joint Statement on Consideration of Immigration Status: In October 2023, the CFPB and Department of Justice (DOJ) issued joint guidance related to consideration of immigration status in making credit decisions.[99] The joint guidance document stated that "unnecessary or overbroad reliance on immigration status in the credit decisioning process, including when that reliance is based on bias, may run afoul of ECOA's antidiscrimination provisions and could also violate other laws."[100] The guidance admitted that "ECOA and Regulation B do not expressly prohibit consideration of immigration status,"[101] but nevertheless concluded that "they do prohibit creditors from using immigration status to discriminate on the basis of national origin, race, or any other protected characteristic."[102]

This guidance is ineffective for many of the same reasons already discussed. Perhaps most salient here is that the guidance selectively omits key provisions from the Official Commentary,

[97] *See Cmty. Nutrition Inst.*, 818 F.2d at 948 (finding that agency policy statements constituted a substantive rule because "[t]he agency's own words strongly suggest that action levels are not musings about what the FDA might do in the future but rather that" it has already determined it will take action if certain facts are present).

[98] *See Apter v. Dep't of Health & Hum. Servs.*, 80 F.4th 579, 591 (5th Cir. 2023) ("we do not see any daylight between an agency that uses imperative language in recommending a general course of action and an agency that uses imperative language in prescribing a policy."). As discussed above, regulated institutions cannot participate in the banking industry without OCC's continued approval so "guidance" and suggestions in most instances are functionally binding on regulated entities, regardless of whether the guidance claims to be binding.

[99] *See Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers under the Equal Credit Opportunity Act* (Oct. 12, 2023) ("DOJ/CFPB Statement"), https://files.consumerfinance.gov/f/documents/cfpb-joint-statement-on-fair-lending-and-credit-opportunities-for-noncitizen-b_jA2oRDf.pdf. This statement was nominally an interpretive rule since it purported to explain the agencies' view of what existing law and regulations require of regulated entities.

[100] *Id.* at 1. The guidance also asserted, without citation to any relevant legal authority, that "[d]iscouraging applications for credit on a prohibited basis is also prohibited." *Id.* at 1. It makes this statement despite at least one Federal district court having held that ECOA does not reach this conduct (though that ruling is currently being appealed). *See* Bureau *of Consumer Fin. Prot. v. Townstone Fin., Inc.*, No. 20-CV-4176, 2023 WL 1766484, at *5 (N.D. Ill. Feb. 3, 2023) ("[I]t is clear that ECOA does not apply to prospective applicants.").

[101] In fact, 12 C.F.R. 1002.6(b)(7) expressly permits creditors to consider the applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment.

[102] DOJ/CFPB Statement at 2.

including a statement that denying a request for credit because the applicant is not a US citizen is not per se discrimination, so the guidance "contradicts existing law and regulation.[103] The guidance document admits that "Regulation B notably provides that a 'creditor may consider [an] applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment,'"[104] but nevertheless seeks to discourage creditors from considering this information out of a concern that it could serve "as a proxy" for discrimination based on protected characteristics.[105]

The guidance instructs creditors to determine whether their consideration of immigration status is "necessary or unnecessary" in determining their rights and remedies, without explaining how a creditor would go about doing that. The one concrete example it offers—suggesting that "a blanket policy of refusing to consider applications from certain groups of noncitizens" could run afoul of legal requirements—muddies rather than clarifies the situation. The guidance suggests that this hypothetical blanket policy could be problematic because it does not allow for individualized consideration of the credit characteristics of any given applicant. But this appears to conflate questions of creditworthiness on the one hand with rights and remedies on the other. For example, regardless of creditworthiness, all individuals who are not present in the country legally are subject to greater risk of deportation (which could make enforcing rights in court more difficult) and less able to secure legal employment (which could limit potential remedies such as wage garnishment). Further, existing regulatory commentary noted that "[t]he applicant's immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on a creditor's ability to obtain repayment."[106]

<u>Circular on Adverse Action Notices</u>: In September 2023, the CFPB issued a circular purporting to provide additional guidance related to the requirement that creditors provide adverse action

[103] *See* 12 C.F.R. Part 1002, supp. I, § 1002 6(b)(7)-2. *Cf. D & W Food Centers, Inc. v. Block*, 786 F.2d 751, 758 (6th Cir. 1986) ("since the Secretary's rule departs from the literal language of the statute and of the AG's opinion, it would do violence to plain English to characterize the rule as only a 'clarification' of existing law.").
[104] DOJ/CFPB Statement at 2 (quoting 12 C.F.R. § 1002.6(b)(7) (alteration in original)).
[105] *Id.*
[106] 12 C.F.R. § Pt. 202, Supp. I.

notices to applicants.[107] According to the circular, creditors have been providing adverse action notices that include checklists of reasons that were provided in sample forms from the CFPB.[108] But, per the circular, those checklists may not adequately reflect the true reasons for denial of credit or other adverse action.[109] If that is the case, creditors "may not rely solely on the unmodified checklist of reasons in the sample forms" because "it is the duty of the creditor—if it chooses to use the sample forms—to either modify the form or check 'other' and include the appropriate explanation, so that the applicant against whom adverse action is taken receives a statement of reasons that is specific and indicates the principal reason(s) for the action taken."[110]

This guidance is ineffective for two reasons. First, it appears to contradict the Official Commentary, which was issued decades earlier through notice-and-comment. The Circular states that if a creditor takes adverse action on an account "based on behavioral data, such as the type of establishment at which a consumer shops or the type of goods purchased, it would likely be insufficient for the creditor to simply state 'purchasing history' or 'disfavored business patronage' as the principal reason for adverse action. Instead, the creditor would likely need to disclose more specific details about the consumer's purchasing history or patronage that led to the reduction or closure, such as the type of establishment, the location of the business, the type of goods purchased, or other relevant considerations, as appropriate."[111]

In contrast, the Official Commentary states that "a creditor need not describe how or why a factor adversely affected an applicant. For example, the notice may say "length of residence" rather than "too short a period of residence."[112] Additionally, Comment 9(b)(2)-4 states that when using a credit scoring system, the creditor must provide the actual reason for adverse action, e.g., "age of collateral," even if the reason's relationship to creditworthiness may not be clear to the applicant.[113]

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[107] *See* Consumer Fin. Prot. Bureau, Circular 2023-03 (Sept. 19, 2023) https://files.consumerfinance.gov/f/documents/cfpb_adverse_action_notice_circular_2023-09.pdf. The circular itself claims that it is simply a "general statement [] of policy" because it "provide[s] background information about applicable law . . . and, in the interest of maintaining consistency, advise[s] other parties with authority to enforce federal consumer financial law." *Id.* at 7. But these are the hallmarks of an interpretive rule, not a statement of policy. See Sec. II, *supra*.

[108] *Id.* at 1. The sample forms are currently codified as part of Regulation B. 12 C.F.R. § Pt. 202, App. C.

[109] *Id.*

[110] *Id.* at 4 (parentheses in original).

[111] *Id.* at 5.

[112] 12 C.F.R. § 1002.9(b)(2) cmt. 3.

[113] *Id.* § 1002.9(b)(2) cmt. 4.

Even worse, the Circular conflicts with guidance issued three years before, related to the use of artificial intelligence (AI) in credit decision-making. In 2020, the Bureau encouraged regulated entities to "think creatively" about how to use AI in their processes.[114] The 2020 guidance noted that since nothing in ECOA mandates the use of any particular reasons, companies can be flexible in how they comply with the regulatory requirement.[115] But the new guidance suggests that only certain, highly specific reasons are acceptable.

Second, while the Circular professes to help guide regulated entities that are using "artificial intelligence [AI] or complex credit models" in making credit decisions,[116] and their use of model form checklists that may not accurately reflect reasons for credit decisions, it appears to apply to all decision-making processes, not just those involving AI or complex models Understanding the Circular's scope is essential for industry to incorporate it into their processes.

Both failings suggest that it would have been more appropriate for this guidance document to go through the notice-and-comment process.

Indirect Auto Fair Lending Bulletin: In March 2013, the CFPB published a bulletin to provide "guidance about compliance with the fair lending requirements of [ECOA] and its implementing regulation . . . for indirect auto lenders that permit dealers to increase consumer interest rates and that compensate dealers with a share of the increased interest revenues."[117] As explained in the bulletin, indirect auto financing occurs when a consumer obtains financing from a dealership. The dealer collects information from the consumer, and then "forward[s] that information to several prospective indirect auto lenders."[118] If an indirect lender wishes to pursue the transaction, it can then determine a "buy rate," or minimum interest rate at which it will purchase the loan.[119] In some

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[114] Consumer Fin. Prot. Bureau, *Innovation Spotlight: Providing adverse action notices when using AI/ML models* (July 7, 2020), https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/.

[115] The CFPB has since appended a note to this Innovation Spotlight saying that it "conveys an incomplete description of the adverse action notice requirements of ECOA and Regulation B." *See id.*

[116] *Id.* at 1.

[117] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-02* (Mar. 21, 2013) https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf. Since this purported to explain the Bureau's view of the requirements of ECOA and Regulation B in the indirect auto lending context, the Bureau should have considered this to be an interpretive rule.

[118] *Id.* at 1.

[119] As a technical matter, these transactions are consummated using a retail installment sales contracts, which have features that can make them legally distinct from garden variety loans. The term "loan" is used to avoid confusion.

instances, the dealer has discretion to negotiate an interest rate above the buy rate. In instances where the loan final rate is above the buy rate, the lender may compensate the dealer for this excess interest ("dealer participation").[120] The bulletin notes that CFPB identified instances where the dealer reserve was higher for borrowers with protected characteristics than those without, which would violate ECOA.[121] The guidance document then identifies specific policies and practices regulated entities should adopt to help manage risk related to this violation.

There was a myriad of issues with this guidance document. Perhaps most egregious was that the true purpose of the bulletin was an attempt to regulate the conduct of the auto dealers themselves, something that the CFPB was expressly prohibited from doing by statute.[122] The CFPB specifically took issue with "practices that permit *dealers* to increase consumer interest rates and that compensate dealers with a share of the increased interest revenues" due to concern about potential discrimination based on prohibited characteristics such as race.[123] Put another way, the CFPB was concerned about the business practices of dealers, but, unable to regulate them directly, sought to regulate their business partners instead, in the hope that those business partners would act to change dealers conduct.

But that was not the only issue. The guidance asserted the controversial (and never judicially tested) proposition that a creditor can violate ECOA because certain policies have a disparate impact based on protected characteristics.[124] More mundanely, it bore the hallmarks of a legislative rule (it would effectively bind regulated entities that were subject to CFPB authority; it identified specific conduct that would violate the law; it included specific steps that regulated entities should take to comply with the law, etc.), but did not go through the notice-and-comment process. It would have declared illegal practices that had been used in the indirect auto industry for many years. It did not identify principles that would inform how the CFPB would exercise its discretion or identify compliance principles for clearly identified legal risks. Instead, it effectively controlled the outcome of CFPB investigations into indirect auto lending activities by declaring that statistical disparities were violations of ECOA.[125]

[120] *Id.*
[121] *Id.* at 2–3.
[122] *See* 12 U.S.C. § 5519.
[123] Bulletin 2013-02 at 1–2.
[124] *Id.* at 3.
[125] *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (agency action was "rule" for purposes of APA because it effectively controlled the outcome of future adjudications).

The GAO found the 2013 bulletin to be a rule subject to the requirements of the CRA, and Congress overruled it using its authority under the CRA.[126] This is the only time that Congress has used its CRA authority to overrule an agency guidance document.

1034(c) Advisory Opinion: In October 2023, the CFPB issued an advisory opinion purporting to clarify the requirements of the Consumer Financial Protection Act (CFPA) related to timely complying with consumer requests for account information.[127] Section 1034(c) of the CFPA requires certain financial institutions to, with certain exceptions, "in a timely manner, comply with a consumer request for information . . . concerning the consumer financial product or service that the consumer obtained" for the institution, "including supporting written documentation[] concerning the account of the consumer."[128] The advisory opinion explains how the CFPB may interpret various provisions of the legal requirement, including what type of information that must be timely provided in response to a consumer request. While this may be an appropriate use of guidance, the opinion also includes provisions that appear to create new legal requirements divorced from the actual text of the statute. Specifically, the advisory opinion identifies conduct that may "unreasonably impede consumer information requests."[129] This bears the hallmark of ineffective guidance because it is, at best, an extension of the text of the statute that would be a legislative rule that must go through the notice-and-comment process. At worst it is an exercise in agency lawmaking divorced from the statutory text the agency is charged with enforcing, which is illegitimate regardless of the process the agency follows.

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[126] *See* Pub. L. No. 115-172, 132 Stat. 1290. The Government Accountability Office has since determined that at least two other guidance documents are "rules" for CRA purposes. *See* U.S. GAO, B-334540, *Securities and Exchange Commission—Applicability of the Congressional Review Act to Staff Accounting Bulletin No. 121* (Oct. 31, 2023), https://www.gao.gov/assets/870/862501.pdf; U.S. GAO, B-331324, *Board of Governors of the Federal Reserve System—Applicability of the Congressional Review Act to Supervision and Regulation Letter 11-7* (Oct. 22, 2019), https://www.gao.gov/products/b-331324.
[127] *See* Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279 (Oct 16, 2023) https://www.federalregister.gov/documents/2023/10/16/2023-22774/consumer-information-requests-to-large-banks-and-credit-unions ("1034(c) Opinion"). The opinion itself asserted that it was a "general statement of policy," since "it provides background information about applicable law and articulates considerations relevant to the CFPB's exercise of its authorities." Id. at 71283. But that label is contrary to the substance of the opinion, and, in any event, as noted above, n. 49, *supra*, advisory opinions are usually interpretive rules since they explain the agency's reading of relevant legal authority.
[128] 12 U.S.C. § 5534(c).
[129] 88 Fed. Reg. at 71281-82.

Instead of going through notice-and-comment (or not issuing the rule), the advisory opinion attempts to evade this requirement by arguing the statute already prohibits this conduct. But that reading, like many other examples discussed in this paper, is contrary to the statutory language. For example, the advisory opinion argues that if a financial institution were to charge a fee for providing the requested information, it would not comply with the request—regardless of whether the fee reasonably reflects the costs of collecting and providing the information. This reads too much into the word "comply;" a restaurant complies with a request from a diner to prepare a cheeseburger, but it still charges the diner a fee for doing so. And Congress knew how to place limitations on the way financial institutions would respond to these requests, by, for example, mandating that the compliance be timely. But it did not mandate that the documents be provided "for free," or "at no charge to the consumer."

The advisory opinion notes that the Bureau would exercise its prosecutorial discretion by not seeking "monetary relief" for alleged violations of this provision that occur before February 1, 2024.[130] This statement related to exercise of agency discretion does not cure the other defects of the opinion, because it is not the type of reservation of agency discretion that is the hallmark of legitimate guidance. But worse, it could be read as a tacit admission that the Bureau recognizes it is announcing a new legal rule and giving regulated entities time to comply. It also suggests that the Bureau believes that regulated entities are bound by the legal interpretation in the advisory opinion and will act accordingly, at some point in the future.

[130] *Id.* at 71283.