

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552



November 13, 2020

Caleb Kruckenberg
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RE: Petition for Rulemaking Regarding Agency Guidance Documents

Dear Mr. Kruckenberg and Mr. Chenoweth,

Thank you for filing the petition for rulemaking regarding agency guidance documents. In the petition, you request that the Bureau “initiate a rulemaking proceeding to promulgate regulations prohibiting any Bureau entity from issuing, relying on, enforcing or defending improper agency guidance.”¹ Additionally, the petition requests that the regulations “provide affected parties with a means of redress for improper agency action.”²

The Bureau is denying your petition, for the reasons set forth below. Nonetheless, as described more fully below, the Bureau emphasizes that it has a number of existing and ongoing efforts regarding guidance that address many of the subjects raised by the petition. Further, the Bureau hopes to continue to have conversations with stakeholders, including NCLA, about how the Bureau provides and uses guidance.

¹ New Civil Liberties Alliance, Petition for Rulemaking to Promulgate Regulations Prohibiting the Issuance, Reliance on, or Defense of Improper Agency Guidance, at 2 (Jan. 25, 2019).

² Petition at 2.

Summary of the Petition's Requests³

The petition describes a “legislative rule” as “any ‘agency action that purports to impose legally binding obligations or prohibitions on regulated parties.’”⁴ The petition argues that government “agencies continue to promulgate legislative rules under the guise of being mere guidance, without following the notice-and-comment requirements of the [Administrative Procedure Act].”⁵ Further, the petition argues that “when agencies want to impose restrictions they cannot openly adopt as administrative rules, and that they cannot plausibly call ‘interpretation,’ they typically place the restrictions in guidance, advice, or other informal directives.”⁶ The petition argues that such guidance has “genuinely coercive effects.”⁷ Additionally, the petition argues that “[t]his extortion is enabled, primarily, by the [judicial] unreviewability of improper guidance.”⁸

Accordingly, the petition requests that the Bureau issue a specific regulation with two sections. The first section would be entitled “Requirements for Issuance of Legislative Rules.”⁹ The regulation would indicate that “[n]either the [Bureau] nor any office or entity operating within the Bureau may issue any ‘legislative rule’ without complying with all the requirements set out in [the Administrative Procedure Act,] 5 U.S.C. § 553.”¹⁰ The regulation would put certain requirements on “[a]ny pronouncement from the Bureau or any office or entity operating within the Bureau that is not a ‘legislative rule.’”¹¹ The regulation would indicate that “[a] regulated entity’s noncompliance with any [such] agency pronouncement ... may not be considered by any entity within the Bureau.”¹² Additionally, the regulation would indicate that the Bureau may not

³ This is a summary of the principal issues raised by the petition, based on the Bureau’s review of the entire petition.

⁴ Petition at 5 (quoting *National Mining Association v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014)).

⁵ Petition at 7.

⁶ Petition at 8 (quotation marks and alteration omitted).

⁷ Petition at 9.

⁸ Petition at 9.

⁹ Petition at 25.

¹⁰ Petition at 25.

¹¹ Petition at 25.

¹² Petition at 25.

apply or defend any legislative rules “which has not complied with all requirements set out in [the Administrative Procedure Act,] 5 U.S.C. § 553.”¹³

The second section of the regulation would be entitled “Judicial Review.”¹⁴ The regulation would indicate that “[a]ny ‘interested party’ may petition ... the Bureau [in writing] to determine whether a prior agency pronouncement, no matter how styled, is a ‘legislative rule.’”¹⁵ The regulation would require the Bureau to respond to such a petition within 60 days by either denying the petition or rescinding the “prior agency pronouncement.”¹⁶ The regulation would indicate that any such response (or a non-response) by the Bureau “shall constitute final agency action under [the Administrative Procedure Act,] 5 U.S.C. § 704, and shall be subject to [judicial] review.”¹⁷

Discussion

As indicated above, the Bureau has been and continues to be engaged in a variety of efforts to examine the ways that the Bureau provides guidance to regulated entities and the public. These efforts address many of the subjects raised by the petition. Additionally, the Bureau already has an otherwise active and busy agenda, including significant rulemaking activity, and in particular activity with urgent timing considerations or that is required by law. Given these other efforts and activity, the Bureau declines to issue the specific regulation requested by the petition.

As the petition notes, on September 11, 2018, the Bureau and the prudential regulators – the Federal Deposit Corporation (FDIC), Federal Reserve Board, National Credit Union Administration (NCUA), and Office of the Comptroller of the Currency (OCC)¹⁸ – issued an Interagency Statement Clarifying the Role of Supervisory Guidance (“2018 Statement”) to explain the role of guidance to supervised institutions and describe the agencies’ approach to such guidance.¹⁹ The 2018 Statement indicated that the Bureau issues various types of

¹³ Petition at 26.

¹⁴ Petition at 26.

¹⁵ Petition at 26.

¹⁶ Petition at 26.

¹⁷ Petition at 27.

¹⁸ See 12 U.S.C. 5481(24) (defining “prudential regulator”).

¹⁹ https://files.consumerfinance.gov/f/documents/interagency-statement_role-of-supervisory-guidance.pdf.

supervisory guidance to its supervised institutions, including, but not limited to, interagency statements, bulletins, policy statements, and frequently asked questions. Such guidance outlines the Bureau’s supervisory expectations or priorities and articulates the Bureau’s general views regarding appropriate practices for a given subject area. The 2018 Statement explained that supervised institutions at times request guidance and that guidance is important to provide insights to institutions supervised by the agencies, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

Similar to the request made by the Petition, the 2018 Statement reaffirmed the Bureau’s understanding that unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the Bureau does not take enforcement actions based on supervisory guidance. The 2018 Statement reaffirmed that Bureau examiners will not criticize a supervised financial institution’s “violations” of guidance and describes the appropriate use of guidance. In the 2018 Statement, the Bureau also expressed its intention to, among other things, continue efforts to make the role of supervisory guidance clear in communications to examiners and financial institutions and to encourage supervised institutions to discuss their concerns about supervisory guidance with their appropriate Bureau contact.

The Bureau and the prudential regulators have more recently issued a Notice of Proposed Rulemaking to codify the 2018 Statement, with clarifying changes, in the form of a regulation.²⁰ As that Notice states, the 2018 Statement’s description of the appropriate parameters concerning the use of supervisory guidance continues to reflect accurately the agencies’ policies concerning the use of supervisory guidance. The proposed rule, therefore, would codify the 2018 Statement, with clarifying changes, as an appendix to the proposed rule text, and would supersede the 2018 Statement.²¹ The rule text would provide that the proposed Statement is binding on each respective agency. By codifying the 2018 Statement, the proposed rule is

²⁰ Role of Supervisory Guidance, 85 FR 70512 (proposed Nov. 5, 2020), <https://www.federalregister.gov/d/2020-24484>.

²¹ The agencies clarified in the proposed Statement that the term “criticize” includes the issuance of Matters Requiring Attention (MRAs) and other supervisory criticisms, including those communicated through matters requiring board attention, documents of resolution, and supervisory recommendations (collectively, supervisory criticisms). As such, the agencies reiterated that examiners will not base supervisory criticisms on a “violation” of or “non-compliance with” supervisory guidance.

intended to confirm that the agencies will continue to follow and respect the limits of administrative law in carrying out their supervisory responsibilities.

Further, on January 1, 2020, the Bureau issued a Policy Statement on Compliance Aids.²² Compliance Aids issued by the Bureau can include various types of small entity compliance guides, instructional guides for disclosure forms, executive summaries, summaries of regulation changes, factsheets, flow charts, compliance checklists, frequently asked questions, summary tables, and other compliance resources.²³ The policy statement clarifies, among other things, that such Compliance Aids “are not ‘rules’ under the Administrative Procedure Act,” and that “regulated entities are not required to comply with the Compliance Aids themselves... Regulated entities are only required to comply with the underlying rules and statutes.”²⁴ The Bureau now includes a reference to the policy statement in Compliance Aids, so that users of Compliance Aids can refer to the policy statement for clarity regarding their status and role.

Also, on June 18, 2020, the Bureau launched a pilot advisory opinion program, which will allow a range of entities that are regulated by the Bureau to submit requests for an advisory opinion (AO) to the Bureau via its website.²⁵ The procedural rule regarding that pilot program emphasizes that the Bureau “will not issue AOs on issues that require notice-and-comment rulemaking under the APA, or that are better addressed through that process.”²⁶

Additionally, we note that the Bureau already has an otherwise active and busy agenda, including significant rulemaking activity, and in particular activity with urgent timing considerations or that is required by law. The Bureau’s Spring 2020 Regulatory Agenda²⁷ –

²² Bureau of Consumer Financial Protection, Policy Statement on Compliance Aids, 85 Fed. Reg. 4579 (Jan. 27, 2020).

²³ 85 Fed. Reg. at 4579.

²⁴ 85 Fed. Reg. at 4579.

²⁵ Consumer Financial Protection Bureau Launches Pilot Advisory Opinion Program to Provide Regulated Entities Clear Guidance and Improve Compliance (June 18, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-pilot-advisory-opinion-program-provides-regulated-entities-clear-guidance/>.

²⁶ Bureau of Consumer Financial Protection, Advisory Opinions Pilot, 85 Fed. Reg. 37331, 37332 (June 22, 2020).

²⁷ See Bureau of Consumer Financial Protection, Preamble to semiannual regulatory agenda (Mar. 5, 2020) (“Preamble to Spring 2020 Unified Agenda”), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202004/Preamble_3170_CFPB.pdf.

which is part of the Unified Agenda of Federal Regulatory and Deregulatory Actions,²⁸ as coordinated by the Office of Management and Budget – describes the regulatory matters that the Bureau reasonably anticipates having under consideration during the period from May 1, 2020 to April 30, 2021. As this agenda states, the Bureau already plans to engage in significant rulemaking activity at this time. This includes activity with urgent timing considerations²⁹ or that is otherwise required by law.³⁰ The Bureau is also actively engaged in responding to the COVID-19 crisis, including providing guidance to regulated entities and providing resources to the public.

Given the effort and activity outlined above, we decline to issue the specific regulation requested by the petition. We believe that the regulation that the Bureau has proposed with the prudential regulators on this topic would provide you with a significant piece of what the petition requests, namely, assurance that failure to comply with Bureau supervisory guidance would not be the basis for asserting a violation of law or regulation. If the proposed regulation becomes finalized,

²⁸ <https://www.reginfo.gov/public/do/eAgendaMain>.

²⁹ See, e.g., Preamble to Spring 2020 Unified Agenda, at 6-7 (“With certain exceptions, Regulation Z requires creditors to make a reasonable, good faith determination of a consumer’s ability to repay any residential mortgage loan, and loans that meet Regulation Z’s requirements for “qualified mortgages” obtain certain protections from liability. One category of qualified mortgages (QMs) covers certain loans that are eligible for purchase or guarantee by either the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac). Under Regulation Z, this category of QMs (Temporary GSE QM or ‘Patch’ loans) is scheduled to expire no later than January 10, 2021. The Bureau is planning to propose in May 2020 amendments to the definition of General QM.... The Bureau also expects that in May 2020 it will propose to extend the Patch for a short period until the effective date of the proposed alternative or until one or more of the GSEs exits conservatorship, whichever comes first.... Finally, the Bureau is considering adding a new ‘seasoning’ definition of QM which would be issued through a separate NPRM....”).

³⁰ See, e.g., Preamble to Spring 2020 Unified Agenda, at 3 (“The Bureau is conducting the two remaining rulemakings mandated in the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, Public Law 115-174, 132 Stat. 1297 (EGRRCPA). As part of these rulemakings, the Bureau is working to maximize consumer welfare and achieve other statutory objectives through protecting consumers from harm and minimizing regulatory burden, including facilitating industry compliance with rules.”); *id.* at 4 (“Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act to require, subject to rules prescribed by the Bureau, financial institutions to collect, report, and make public certain information concerning credit applications made by women-owned, minority-owned, and small businesses. The Bureau hosted a symposium on small business data collection in November 2019 to facilitate its decisionmaking. In addition, the Bureau is working to conduct a survey of lenders to obtain estimates of one-time costs lenders of varying sizes would incur to collect and report data pursuant to section 1071. The Bureau’s next step will be the release of materials in advance of convening a panel under the Small Business Regulatory Enforcement Fairness Act, in conjunction with the Office of Management and Budget and the Small Business Administration’s Chief Counsel for Advocacy, to hear from representatives of small businesses on which Bureau rules to implement section 1071 may impose costs.”).

it would then be contrary to Bureau regulations for the Bureau to take enforcement actions based on supervisory guidance.

We acknowledge, however, that this is only part of what the petition requests. The petitions also specifically requests that the Bureau issue a regulation with certain additional requirements relating to guidance, legislative rules, and judicial review. With respect to these portions of the request, the Bureau denies the petition, as the Bureau has decided to prioritize the other items on its agenda, including its other efforts on agency guidance, rather than pursuing the specific regulation requested by the petition.

We note that the Department of Energy, in its response to a similar petition for rulemaking filed by the New Civil Liberties Alliance, “decline[d] to ... establish procedures for compliance with the [Congressional Review Act] and for the issuance and use of legislative rules” and “decline[d] to include procedures for determining legislative versus non-legislative rules, the finality of such determinations, or judicial review of such determinations in the proposed rule.”³¹ The Department explained that “the provisions of the [Congressional Review Act] and [Administrative Procedure Act], as well as current [Department] internal procedures, adequately govern [Congressional Review Act] compliance and the issuance and use of legislative rules” and that “[t]he courts have the authority, and are best positioned, to determine what agency actions are reviewable by a court under the [Administrative Procedure Act] or other relevant laws and regulations.”³² We agree.

We would also note that, to the degree that what the petition requests is distinct from other Bureau efforts regarding agency guidance, we have not heard from a broad set of other stakeholders that this is desired. In part due to this, we believe that the Bureau’s limited resources would be better used at this time on the other items on its agenda.

³¹ Department of Energy, *Notice of proposed rulemaking (NOPR) and request for comment*, 85 Fed. Reg. 39495, 39497 (July 1, 2020).

³² 85 Fed. Reg. at 39497.

Conclusion

Thank you again for submitting the petition for rulemaking. Although the Bureau denies the petition, we appreciate the arguments raised and hope to have further dialogue about these important issues in the future.

Sincerely,

A handwritten signature in black ink that reads "Kathleen L. Kraninger". The signature is written in a cursive style with a large initial "K".

Kathleen L. Kraninger

Director