Guidance on Guidance Issue Summary

In recent years, regulators have increasingly relied on guidance, policy statements, and similar communications as the basis for supervisory mandates, introducing legal uncertainty about what is required and creating additional compliance burdens for banks of all sizes. Failure to comply with guidance can result in the issuance of Matters Requiring Attention (MRA) that have significant supervisory consequences, as the banking agencies have routinely taken the position that a bank may not expand by acquisition, investment or branching until any MRAs have been remediated. In a positive first step towards addressing this problem, the agencies issued an Interagency Statement confirming that supervisory guidance does not have the force of law, and that bank examiners should not issue enforcement actions based on supervisory guidance. Instead, enforcement actions will be based on banks' compliance with laws and regulations that have been subject to public notice and comment. In the Interagency Statement, regulators set forth principles on the use of guidance including not criticizing a financial institution for a "violation" of guidance and limiting the use of numerical thresholds or other "bright-lines."

BPI's Position

The Bank Policy Institute believes that the examination process for banks should be exclusively focused on practices that are material to their financial condition and based on statutory requirements and regulations. BPI encourages greater legal certainty around the examination process and supports the Interagency Guidance as a clear commitment to the rule of law. Unfortunately, the Interagency Statement still includes unclear language regarding how guidance could still be used to "criticize" an institution and vague references to "safety and soundness" or "reputational risk," which may be referenced in future MRAs. Examinations should focus on issues that matter – compliance with law and practices that pose a major risk to the bank, taxpayers and the overall financial system. The results would be a boost to bank customers – and bank safety and soundness.

Recommendation: To encourage adoption of a formal rule, BPI and the American Bankers Association took the rare step of petitioning the agencies to propose a formal rulemaking of the guidance to ensure that examiners follow the guidance and to provide necessary clarity to the examination process.

Guidance Versus Rulemaking

Unlike a statute or regulation, supervisory guidance does not have the force and effect of law. Laws and regulations must adhere to the Administrative Procedure Act (APA) notice and comment process and survive the scrutiny of the Congressional Review Act. This ensures that institutions and the public have prior notice and an opportunity to comment on government mandates that are treated as binding by agency examiners. Creating new requirements through guidance or examination bypasses this step, ignoring the role of Congress and the public's opportunity to comment. Formalizing the Interagency Statement would ensure that financial institutions and the public have prior notice and an opportunity to comment on government mandates that are treated as binding by examiners

The Need for Clarity

Clarity, transparency and consistency of regulations are necessary for any business. Formal guidance serves the interest of consumers by providing banks with clear legal expectations within which they may operate, without ambiguity or doubt as to regulatory consequence. This legal clarity will allow banks to better serve their customers more efficiently and effectively.