U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

B-329272

October 19, 2017

The Honorable Pat Toomey
United States Senate

Subject: *Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation--Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending*

Dear Senator Toomey:

You asked whether the final Interagency Guidance on Leveraged Lending (Interagency Guidance or Guidance),[1] issued jointly on March 22, 2013, by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (the Board), and the Federal Deposit Insurance Corporation (FDIC), is a rule for purposes of the Congressional Review Act (CRA). CRA establishes a process for congressional review of agency rules and establishes special expedited procedures under which Congress may pass a joint resolution of disapproval that, if enacted into law, overturns the rule. Congressional review is assisted by CRA's requirement that all federal agencies, including independent regulatory agencies, submit each rule to both Houses of Congress and to the Government Accountability Office (GAO) before it can take effect.[2] For the reasons discussed below, we conclude that the Interagency Guidance is a general statement of policy and is a rule under the CRA.[3]

BACKGROUND

Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory agencies, to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. The report must contain a copy of the rule, "a concise general statement relating to the rule," and the

[1] 78 Fed. Reg. 17,766 (Mar. 22, 2013).

[2] CRA was included as part of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, subtitle E, 110 Stat. 857, 868 (Mar. 28, 1996*) codified at* 5 U.S.C. §§ 801-808.

[3] Our practice when rendering opinions is to contact the relevant agencies and obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at http://www.gao.gov/products/GAO-06-1064SP. We contacted the Chief Counsel of OCC and the General Counsels of the Board and FDIC, who provided us with the Agencies' views. Letter from OCC to Assistant General Counsel, GAO, July 20, 2017; Letter from the Board to Assistant General Counsel, GAO, July 21, 2017; Letter from FDIC to Assistant General Counsel, GAO, July 21, 2017.

rule's proposed effective date. In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process.[4]

CRA adopts the definition of rule under the Administrative Procedure Act (APA), which states in relevant part that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[5] CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.[6] The Agencies did not send a report on the Interagency Guidance to Congress or the Comptroller General because, as they stated in their letters to our Office, in their opinion the Guidance is not a rule under the CRA.

Interagency Guidance on Leveraged Lending

On March 22, 2013, OCC, the Board, and FDIC (referred to collectively as the Agencies)[7] issued the Interagency Guidance, which forms the basis of the Agencies' review of the leveraged lending activities of supervised financial institutions.[8] Leveraged lending generally encompasses large loans to corporate borrowers for the purposes of "mergers and acquisitions, business recapitalization and financing, equity buyouts, and business . . . expansions."[9] Leveraged loans raise risk concerns because of the size of the loans relative to the borrower's cash flow, and are generally used to finance one-time business transactions rather than a company's ordinary course of business activities.[10] The Guidance outlines the Agencies' minimum expectations on a wide range of topics related to leveraged lending, including underwriting standards, valuation standards, the risk rating of leveraged loans, and problem credit management.

[4] 5 U.S.C. § 801(a)(1)(A)-(B).

[5] 5 U.S.C. § 804(3), *citing* 5 U.S.C. § 551(4).

[6] 5 U.S.C. § 804(3). Although not applicable here, there is also an exception for "rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee." 5 U.S.C. § 807.

[7] OCC is an independent bureau within the U.S. Department of the Treasury that functions as the primary supervisor of federally chartered (national) banks and savings and loan associations. 12 U.S.C. §§ 481, 3102, 1463. The Board is an independent regulatory agency authorized to regulate and examine bank holding companies and state-chartered banks that are members of the Federal Reserve System. 12 U.S.C. §§ 325, 1467a(b), 1844(b), 1844(c)(2). FDIC is an independent regulatory agency that acts as the primary federal regulator for certain state-chartered banks. In that capacity, FDIC prescribes standards to promote banks' safety and soundness. 12 U.S.C. §§ 1463(a)(1)(B); 1820. *See Cmty. Fin. Servs. Ass'n v. FDIC*, 32 F. Supp. 3d 98, 106 (D.D.C. 2015).

[8] Letter from the Board to Assistant General Counsel, GAO, July 21, 2017, *at* 6.

[9] Office of the Comptroller of the Currency, Leveraged Lending: Comptroller's Handbook, 1 (Feb. 2008).

[10] *Id*. at 1–3.

The Interagency Guidance is "designed to assist financial institutions in providing leveraged lending to creditworthy borrowers in a safe-and-sound manner." [11] It does so by describing expectations for the sound risk management of leveraged lending activities and lists a number of considerations for financial institutions: (1) the ratio of a borrower's debt to the company's earnings before interest, taxes, amortization and depreciation; (2) the ability of the borrower to amortize its secured debt; and (3) the level of due diligence performed in evaluating the loan.[12] The Guidance explains the types of actions that concern the Agencies and that might motivate them to initiate a supervisory action that would require an independent finding that an unsafe or unsound action has occurred.[13]

ANALYSIS

As an initial matter, one argument raised by the Agencies is that since the Guidance explicitly states that it is not a rule or a rulemaking action, it should not be considered a rule under CRA.[14] However, although an agency's characterization should be considered in deciding whether its action is a rule under APA (and whether, for example, it is subject to notice and comment rulemaking requirements), "an agency's own label … is not dispositive." [15] Similarly, an agency's characterization is not determinative of whether it is a rule under CRA.[16]

The focus of the arguments made by the Agencies is that the Interagency Guidance is a general statement of policy and is not subject to the CRA. They assert that the Guidance is a statement that explains how they will exercise their broad enforcement discretion.[17] They maintain that it does not establish legally binding standards, is not certain or final, and does not substantially

[11] 78 Fed. Reg. at 17,771.

[12] More specifically, the Guidance notes that risk rating leveraged loans involves the use of realistic assumptions to determine the ability of the borrower to repay within a reasonable period of time. For example, the Agencies assume that the ability to repay at least 50% of total debt over a five-to-seven year period provides evidence of adequate repayment capacity. The Guidance also notes that an institution's underwriting standards should consider credit agreement covenant protections, including financial performance, such as debt-to-cash flow. The Guidance explains that a level of debt that must be serviced from operating cash flow in excess of 6x the ratio of total debt to EBITDA (earnings before interest, taxes, depreciation and amortization) raises concerns for most industries. *See also* Peter Webb, *Leveraged Lending Guidance and Enforcement: Moving the Fulcrum,* 20 N.C. Banking Inst. 91, 95-96 (2016).

[13] Letter from the Board to Assistant General Counsel, GAO, July 21, 2017, at 4.

[14] *Id.* at 2.

[15] *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980).

[16] *See* B-281575, Jan. 20, 1999.

[17] Letter from FDIC to Assistant General Counsel, GAO, July 21, 2017, at 4-5; Letter from the Board to Assistant General Counsel, GAO, July 21, 2017, at 2; Letter from OCC to Assistant General Counsel, GAO, July 20, 2017, at 4.

affect the rights or obligations of third parties.[18] As a result, they claim, the Interagency Guidance is not a rule under CRA.

The Supreme Court has described "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." [19] In other words, a statement of policy announces the agency's tentative intentions for the future:

> "A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy."[20]

The Interagency Guidance provides information on the manner in which the Agencies will exercise their enforcement authority regarding leveraged lending activities, does not establish a "binding norm," and does not determine the outcome of any Agency examination of a financial institution. Rather, the Guidance expresses the regulators' expectations regarding the sound risk management of leveraged lending activities.[21] We agree with the Agencies that the Guidance is a general statement of policy. However, the issue presented here is whether this general statement of policy is a rule under CRA.

GAO has previously held that general statements of policy are rules under CRA. For example, in B-287557, May 14, 2001, we decided whether a "record of decision" (ROD) issued by the Fish and Wildlife Service in connection with a federal irrigation project was a rule under CRA.[22] We found that the ROD was a general statement of policy regarding water flow and ecosystems issues in both the Trinity and Sacramento Rivers. The ROD modified prior policy in an attempt, in part, to restore fish habitat.

We cited to the APA definition of "rule," which includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret,

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[18] Letter from FDIC to Assistant General Counsel, GAO, July 21, 2017, at 7-8; Letter from the Board to Assistant General Counsel, GAO, July 21, 2017, at 2; Letter from OCC to Assistant General Counsel, GAO, July 20, 2017, at 4.

[19] *Lincoln v. Vigil,* 508 U.S. 182, 197 *(1993), citing Chrysler Corp. v. Brown,* 441 U.S. 281, 302 (1979) (quoting U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act at 30 n.3 (1947)).

[20] *Pacific Gas and Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). In another decision, the D.C. Circuit stated that a policy statement "genuinely leaves the agency and its decisionmakers free to exercise discretion." *Am. Bus. Ass'n v. United States,* 627 F.2d 525, 529 (D. C. Cir. 1980). In this regard, the general statement of policy serves a number of useful functions, including the facilitation of long range planning within the regulated industry and the promotion of uniformity in areas of national concern.

[21] *See* 78 Fed. Reg. at 17,771.

[22] The ROD was the culmination of a process covering nearly 20 years of detailed, scientific efforts documenting the selection by the Fish and Wildlife Service of actions determined to be necessary and appropriate to restore and maintain the anadromous fishery resources of the Trinity River. B-287557 at 3.

or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." [23] This definition includes three key components: (1) an agency statement, (2) of future effect, and (3) designed to implement, interpret, or prescribe law or policy. We stated that this definition is broad, and includes both rules requiring notice and comment rulemaking and those that do not, such as general statements of policy.

We noted that, since CRA adopts the definition of "rule" from APA, it too covers both those requiring notice and comment and general statements of policy, which do not. We decided that the ROD fell squarely within CRA as an agency action that constituted a "statement of general …applicability and future effect designed to implement, interpret or prescribe law or policy." [24] We also noted that Congress intended CRA to cover, not only formal rulemaking, but also rules requiring notice and comment under 5 U.S.C. § 553(c), rules that are not subject to notice and comment requirements, including rules that must be published in the Federal Register before taking effect (5 U.S.C. § 552(a)(1) and (2)), and other guidance documents.[25] Since a general statement of policy is specifically included among the types of agency actions subject to the requirements of Sections 552(a)(1) (D) and (a)(2)(B), it is clear that CRA covers general statements of policy.

Additionally, in B-316048, April 17, 2008, we considered whether a letter issued by the Centers for Medicare and Medicaid Services (CMS) to state health officials concerning the State Children's Health Insurance Program (SCHIP) was a rule under CRA. We concluded that the letter was subject to CRA because it was, in fact, a rule subject to notice and comment rulemaking requirements. However, in that decision we also discussed general statements of policy under CRA. CMS had argued that the letter was a general statement of policy "announcing the course which the agency intends to follow" in future adjudications*, i.e.,* what the agency seeks to establish as policy. We explained that the definition of "rule" under both APA and CRA includes "a statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." As a device that provides information on the manner in which an agency will exercise its authority or what the agency will seek to propose as policy, we noted that a general statement of policy would appear to fit squarely within this definition of a rule subject to CRA.[26]

In deciding that a general statement of policy is a rule for CRA purposes, our prior decisions cite to the legislative history of CRA, which confirms that rules subject to CRA requirements include general statements of policy. A principal sponsor of the legislation that became CRA made clear that general statements of policy are covered by CRA, stating that "[t]he committees intend [CRA] to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review." The sponsor added that documents covered by CRA include "statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public." [27]

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[23] 5 U.S.C. § 551(4).

[24] *See supra* note 5.

[25] B-287557, May 14, 2001, at 4.

[26] *See also* B-274505, Sept. 16, 1996 (memorandum issued by the Secretary of Agriculture in connection with the Emergency Salvage Timber Sale Program was a policy statement and a rule under CRA).

[27] 142 Con. Rec. E578 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde).

Additionally, in a floor statement during final consideration of the bill that became CRA, another principal sponsor of the legislation pointed out that rules subject to CRA include agency general statements of policy:

> "Although agency interpretive rules, general statements of policy, guideline documents, and agency policy and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the congressional review provisions of the new chapter 8 of title 5.
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> "Under section 801(a) [CRA], covered rules, with very few exceptions, may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress. Interpretive rules, general statements of policy, and analogous agency policy guidelines are covered without qualification because they meet the definition of a 'rule' borrowed from section 551 of title 5, and are not excluded from the definition of a rule." [28]

We note that legal commentators also support the conclusion that CRA's requirements are applicable to general statements of policy. [29] They have pointed out that federal agency actions fitting CRA's definition of a rule include "such items as … general statements of policy," and that "the legislative history of the Act … makes clear that this scope was understood and intended."[30]

Nonetheless, the Agencies assert that because the Guidance does not establish legally binding standards, is not certain or final, and does not substantially affect the rights or obligations of third parties, it is not a rule under CRA. They cite to our decisions in which we found that agency actions that imposed binding requirements that were "both certain and final" were rules for CRA purposes.[31] However, while our decisions recognize those characteristics as indicative of certain types of rules subject to CRA requirements, they do not suggest that the absence of those characteristics requires a determination that an agency action is not a rule under CRA.[32] Moreover, when GAO has examined the issue whether an agency's action substantially affects the rights or obligations of third parties, it has been in the context of analyzing whether the

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[28] 142 Con. Rec. H3005 (daily ed. Mar. 28, 1996) (statement of Rep. McIntosh).

[29] *See, e.g.,* Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking,*164 (5th ed. 2012);*Congressional Review Act: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 133-144 (1997) [hereinafter *Hearings*] (statement of Peter L. Strauss, Betts Professor of Law, Columbia University); *Id. at* 144-147 (statement of Richard J. Pierce, Lyle T. Alverson Research Professor of Law, George Washington University. *See also* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 401.

[30] *Hearings, supra* note 26, at 138.

[31] *See, e.g.,* B-323772, Sept. 4, 2012; B-316048, Apr. 17, 2008.

[32] For example, in B-325553, May 29, 2014, we cited those attributes of rules to distinguish them from proposed rules, not to suggest that they are necessary to a determination that an agency action is a rule under CRA.

action falls within the CRA exception for agency rules of practice or procedure, not in deciding whether it meets the definition of rule.[33]

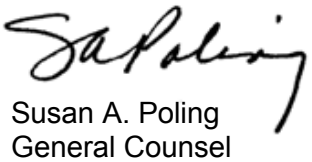
The Agencies also cite to language in certain court decisions to suggest that policy statements are not rules under APA.[34] However, those decisions do not support such a conclusion.[35] Indeed, the Supreme Court has recognized that rules under the APA include "'substantive [legislative] rules' on the one hand" as well as "general statements of policy" and other non-legislative rules on the other.[36]

We can readily conclude that the Guidance does not fall within any of the three exceptions in CRA.[37] We note here that the Interagency Guidance is of general and not particular applicability, does not relate to agency management or personnel, and is not a rule of agency organization, procedure, or practice.

CONCLUSION

The Interagency Guidance is a general statement of policy designed to assist financial institutions in providing leveraged lending to creditworthy borrowers in a sound manner. As such, it is a rule subject to the requirements of CRA.

Sincerely yours,



Susan A. Poling
General Counsel

[33] *See, e.g.*, B-275178, July 3, 1997 (holding that the Tongass National Forest Land and Resource Management Plan is a rule under CRA and that none of the exceptions apply).

[34] Letter from the Board to Assistant General Counsel, GAO, July 21, 2017, at 3.

[35] The issue in these cases was not whether a general statement of policy was a rule under APA, but whether an agency action was subject to judicial review, or was one that should have been promulgated in accordance with APA notice and comment rulemaking requirements. *See, e.g., Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002) (a Department of Agriculture "Notice of Program Implementation" on sugar cane subsidies should have been issued under APA notice and comment rulemaking requirements); *Guardian Fed. Sav. & Loan Ass'n. v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-68 (D.C. Cir. 1978) (insurance regulations issued by the Federal Savings and Loan Insurance Corporation, which specified the criteria to be used by auditors, were found to be a general statement of policy which could be issued without notice and comment rulemaking).

[36] *Chrysler Corp. v. Brown,* 441 U.S. 281, 302 (1979).

[37] The Agencies did not raise any claims that the Guidance would not be a rule under CRA pursuant to any of the exceptions.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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B-329129

December 5, 2017

The Honorable Patrick J. Toomey
United States Senate

Subject: *Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*

Dear Senator Toomey:

You asked whether a Bulletin issued by the Bureau of Consumer Financial Protection (CFPB or the Bureau) on March 21, 2013, on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act[1] is a rule for purposes of the Congressional Review Act (CRA).[2] CRA establishes a process for congressional review of agency rules and establishes special expedited procedures under which Congress may pass a joint resolution of disapproval that, if enacted into law, overturns the rule. Congressional review is assisted by CRA's requirement that all federal agencies, including independent regulatory agencies, submit each rule to both Houses of Congress and to the Comptroller General before it can take effect. For the reasons discussed below, we conclude that the Bulletin is a general statement of policy and a rule under the CRA.[3]

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[1] CFPB Bulletin 2013-02 (Mar. 21, 2013) (Bulletin).

[2] CRA was included as part of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, subtitle E, 110 Stat. 857, 868 (Mar. 28, 1996) *codified at* 5 U.S.C. §§ 801-808.

[3] Our practice when rendering opinions is to contact the relevant agencies and obtain their legal views on the subject of the request. GAO, Procedures and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at http://www.gao.gov/products/GAO-06-1064SP. We contacted the General Counsel of the CFPB who provided us with the Bureau's views. Letter from CFPB to Assistant General Counsel, GAO, July 7, 2017.

BACKGROUND

CFPB Bulletin

When consumers finance automobile purchases from an auto dealership, the dealer often facilitates indirect financing through a third-party lender, referred to as an indirect auto lender. In the Bulletin, CFPB[4] "provides guidance about indirect auto lenders' compliance with the fair lending requirements of the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B."[5] Specifically, the Bulletin relates to policies used by some indirect auto lenders that allow dealers to mark up the interest rate charged to the consumer above the indirect auto lender's "buy rate."[6] The lender then compensates the auto dealer based on the difference in interest revenues between the buy rate and the actual rate charged to the consumer in the contract executed with the auto dealer.[7] In the Bulletin, CFPB states that the incentives created by such policies allow for a significant risk for pricing disparities on the basis of race, national origin or other prohibited bases.[8]

The fair lending requirements of ECOA make it illegal for a creditor to discriminate in any aspect of a credit transaction on the basis of race or national origin, among other characteristics.[9] The term "creditor" is defined to include "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."[10] Regulation B, which implements ECOA, further defines a creditor to expressly include an "assignee, transferee, or subrogee of the creditor" who "in the ordinary course of business, regularly participates in a credit decision, including

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[4] CFPB is an independent bureau in the Federal Reserve System and is considered an Executive agency. 12 U.S.C. § 5491(a). CFPB regulates the offering and provision of consumer financial products and services under federal consumer financial laws. 12 U.S.C. § 5511.

[5] *Bulletin* at 1.

[6] The "buy rate" establishes a minimum interest rate at which the lender is willing to purchase the installment contract executed by the consumer for the loan to purchase the automobile. *Id.*

[7] This is typically referred to as "reserve," and it is one method lenders use to compensate dealers for the value they add by originating loans and finding financing sources. *Id*.

[8] *Id*. at 2.

[9] 15 U.S.C. § 1691(a).

[10] 15 U.S.C. § 1691a(e).

setting the terms of the credit."[11] In the Bulletin, CFPB states that there are a variety of practices used by indirect lenders, but that information collected "suggests that the standard practices of indirect auto lenders likely constitute participation in a credit decision under the ECOA and Regulation B."[12]

In the Bulletin, CFPB discusses the legal theories under which indirect auto lenders who are determined to be creditors under ECOA could be held liable for pricing disparities on a prohibited basis when such disparities exist within an indirect auto lender's portfolio. In its final section, the Bulletin states that indirect auto lenders "should take steps to ensure that they are operating in compliance with the ECOA and Regulation B as applied to dealer markup and compensation policies," and then lists a variety of steps and tools that lenders may wish to use to address significant fair lending risks.[13]

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory agencies, to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. The report must contain a copy of the rule, "a concise general statement relating to the rule,"[14] and the rule's proposed effective date. In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process.[15]

CRA adopts the definition of rule under the Administrative Procedure Act (APA), which states in relevant part that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[16] CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-

[11] 12 C.F.R. § 1002.2(l).

[12] *Bulletin* at 2 - 3.

[13] *Id.* at 4.

[14] 5 U.S.C. § 801(a)(1)(A)(ii).

[15] 5 U.S.C. § 801(a)(1)(B).

[16] 5 U.S.C. § 804(3)(*citing* 5 U.S.C. § 551(4)).

agency parties.[17] CFPB did not send a report on the Bulletin to Congress or the Comptroller General because, as stated in their letter to our Office, in their opinion the Bulletin is not a rule under CRA.

ANALYSIS

At issue here is whether a nonbinding general statement of policy, which provides guidance on how CFPB will exercise its discretionary enforcement powers, is a rule under CRA. CFPB states, and we agree, that the Bulletin "is a non-binding guidance document" that "identifies potential risk areas and provides general suggestions for compliance" with ECOA and Regulation B.[18] Moreover, the Bulletin is a general statement of policy that offers clarity and guidance on the Bureau's discretionary enforcement approach.[19]

CFPB argues, however, that because the Bulletin has no legal effect on regulated entities, the CRA does not apply. The Bureau asserts that "taken as a whole, the CRA can logically apply only to agency documents that have legal effect."[20] It suggests that there are two categories of general statements of policy: (1) those that are intended as binding documents, to which CRA applies, and (2) those, like the Bulletin, that are non-binding and not subject to CRA. CFPB claims that the Bulletin is the type of general statement of policy that is not a rule under CRA. However, as explained below, CRA requirements apply to general statements of policy which, by definition, are not legally binding.

The Supreme Court has described "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[21] In other words, as stated by the D.C. Circuit Court of Appeals in *Pacific Gas & Electric Company v. Federal Power Commission,* a statement of policy announces the agency's tentative intentions for the future:

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[17] 5 U.S.C. § 804(3). Although not applicable here, there is also an exception for "rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee." 5 U.S.C. § 807.

[18] Letter from CFPB to Assistant General Counsel, GAO, July 7, 2017 at 1.

[19] *Id*. at 5.

[20] *Id*. at 1.

[21] *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993)(*citing Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (*quoting* U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act at 30 n.3 (1947))).

> "A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy."[22]

The Bulletin provides information on the manner in which CFPB plans to exercise its discretionary enforcement power. It expresses the agency's views that certain indirect auto lending activities may trigger liability under ECOA. For example, it states that an indirect auto lender's own markup and compensation policies may trigger liability under ECOA if they result in credit pricing disparities on a prohibited basis, such as race or national origin.[23] It also informs indirect auto lenders that they may be liable under ECOA if a dealer's practices result in unexplained pricing disparities on prohibited bases where the lender may have known or had reasonable notice of a dealer's discriminatory conduct.[24] In sum, the Bulletin advises the public prospectively of the manner in which the CFPB proposes to exercise its discretionary enforcement power and fits squarely within the Supreme Court's definition of a statement of policy.

Moreover, as the *Pacific Gas & Electric Company* decision quoted above makes plain, general statements of policy by definition are not legally binding, and our prior decisions have held that non-binding general statements of policy are rules under CRA. For example, we recently decided that Interagency Guidance on Leveraged Lending, issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (referred to collectively as the Agencies), was a rule under CRA (Interagency Guidance decision).[25] We found that the Interagency Guidance was a general statement of policy describing the Agencies' expectations for the sound risk management of leveraged lending activities. It explained the types of financial transactions that concern the Agencies and that might motivate them to initiate a supervisory review. The Bulletin similarly states CFPB's concerns that indirect

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[22] *Pacific Gas & Elec. Co. v. Fed. Power Comm'n,* 506 F.2d 33, 38 (D.C. Cir. 1974). In another decision, the D.C. Circuit stated that a policy statement "genuinely leaves the agency and its decision makers free to exercise discretion." *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). In this regard, the general statement of policy serves a number of useful functions, including the facilitation of long range planning within the regulated industry and the promotion of uniformity in areas of national concern.

[23] *Bulletin* at 3.

[24] *Id.*

[25] B-329272, Oct. 19, 2017, at 4.

lenders' markup and dealer compensation policies may result in discriminatory lending practices, and sets forth its expectations that indirect auto lenders take steps to ensure that these policies do not result in pricing disparities on prohibited bases.[26]

We reached our conclusion in the Interagency Guidance decision, and in other prior GAO decisions, by examining CRA's definition of a "rule," which includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[27] This definition has three key components: (1) an agency statement, (2) of future effect, and (3) designed to implement, interpret, or prescribe law or policy. We noted that this definition is broad, and includes both rules requiring notice and comment rulemaking and those that do not, such as general statements of policy.[28] We decided that the Interagency Guidance fell squarely within CRA as an agency action that constituted a "statement of general . . . applicability and future effect designed to implement, interpret or prescribe . . . policy."[29] Similarly, the CFPB Bulletin at issue here is a statement of general applicability, since it applies to all indirect auto lenders; it has future effect; and it is designed to prescribe the Bureau's policy in enforcing fair lending laws.

Additionally, in a decision issued in 2001, we decided that a "record of decision" (ROD) issued by the Fish and Wildlife Service in connection with a federal irrigation project was a rule under CRA.[30] We found that the ROD was a general statement of policy regarding water flow and ecosystems issues in both the Trinity and Sacramento Rivers whose essential purpose was to set policy for the future.[31] In deciding that a general statement of policy is a rule for CRA purposes, this and other

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[26] *Id. at 3-4.*

[27] 5 U.S.C. § 804(3)(*citing* 5 U.S.C. § 551(4)).

[28] B-329272, Oct. 19, 2017, at 5*;see also* B-287557, May 14, 2001, at 7.

[29] *See* B-329272, Oct. 19, 2017, at 4 - 5; *see also* 5 U.S.C. § 804(3).

[30] The ROD was the culmination of a process covering nearly 20 years of detailed, scientific efforts documenting the selection by the Fish and Wildlife Service of actions determined to be necessary and appropriate to restore and maintain the anadromous fishery resources of the Trinity River. B-287557 at 3.

[31] Also, in B-316048, April 17, 2008, we considered whether a letter issued by the Centers for Medicate and Medicaid Services to state health officials concerning the State Children's Health Insurance Program was a rule under CRA. As a device that provides information on the manner in which an agency will exercise its authority or what the agency will seek to propose as policy, we noted that a general statement of policy would appear to fit squarely within the definition of a rule subject to CRA.

prior decisions cite to the legislative history of CRA, which confirms that rules subject to CRA requirements include general statements of policy.[32]

CFPB did not raise any claims that the Bulletin would not be a rule under CRA pursuant to any of the three exceptions, and we can readily conclude that the Bulletin does not fall within any of the those exceptions. The Bulletin is of general and not particular applicability, does not relate to agency management or personnel, and is not a rule of agency organization, procedure or practice.

CONCLUSION

The Bulletin is a general statement of policy designed to assist indirect auto lenders to ensure that they are operating in compliance with ECOA and Regulation B, as applied to dealer markup and compensation policies. As such, it is a rule subject to the requirements of CRA.

If you have any questions about this opinion, please contact Robert J. Cramer, Managing Associate General Counsel, at (202) 512-7227.

Sincerely yours,

Thomas H. Armstrong
General Counsel

[32] *See, e.g.*, 142 Con. Rec. E578 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde).