

United States Senate

WASHINGTON, DC 20510

December 11, 2020

The Honorable Jerome H. Powell
Chair
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue, NW
Washington, DC 20551

The Honorable Randal K. Quarles
Vice Chair for Supervision
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue, NW
Washington, DC 20551

The Honorable Jelena McWilliams
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

The Honorable Rodney E. Hood
Chairman
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

The Honorable Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Mr. Brian P. Brooks
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, DC 20219

Dear Chair Powell, Vice Chair for Supervision Quarles, Chairman McWilliams, Chairman Hood, Director Kraninger, and Acting Comptroller of the Currency Brooks:

Thank you for issuing the proposed interagency rule, “Role of Supervisory Guidance” (Proposed Rule), which would promote the rule of law, transparency, and fairness in the supervision of financial institutions.¹ Importantly, the Proposed Rule clearly states that supervisory guidance does not create binding, enforceable legal obligations and non-compliance with such guidance cannot form the basis of examiner criticisms or enforcement actions. In the final rule, I encourage your agencies to go further in clarifying the role of supervisory guidance. I write with several suggestions for improvement to the Proposed Rule.

I have long opposed agencies using guidance as a backdoor way to impose regulatory requirements and subvert the rule of law. For example, in 2013 the Consumer Financial Protection Bureau (CFPB) issued guidance on indirect auto lending that inappropriately

¹ 85 FR 70512, November 5, 2020, available at <https://www.federalregister.gov/documents/2020/11/05/2020-24484/role-of-supervisory-guidance>.

regulated third-party auto lenders.² In 2018, I led the successful effort to invalidate this guidance using the Congressional Review Act (CRA).³ This was only possible years later because the CFPB did not comply with the CRA's requirement to submit this guidance to Congress for review in 2013, even though as a general statement of policy it met the CRA's definition of a rule.⁴ Similarly, in 2013, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve), and the Federal Deposit Insurance Corporation (FDIC) issued interagency guidance regarding the leveraged lending activities of financial institutions. In 2017, at my urging, the Government Accountability Office concluded this guidance was a rule subject to the requirements of the CRA, including that it be submitted to Congress before it could lawfully take effect.⁵ In response, the OCC, the Federal Reserve, and the FDIC did not submit the leveraged lending guidance to Congress in order to put it into effect and at least two of these agencies have indicated this guidance is not binding on supervised financial institutions.

The final rule should be crafted to prevent such misuse of supervisory guidance, which can unduly and unfairly burden the financial institutions under your supervision. Guidance cannot be a substitute for rulemaking. To improve the Proposed Rule, I recommend making the following changes to it.

- **Any communications from your agencies that function as a rule under the Administrative Procedure Act (APA)⁶ must go through a meaningful opportunity for comment.⁷** Supervised financial institutions must have a mechanism

² CFPB Bulletin 2013-02: Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act, March 21, 2013, available at https://files.consumerfinance.gov/f/201303_cfpb_march_-_Auto-Finance-Bulletin.pdf.

³ S.J. Res. 57, 115th Congress, available at <https://www.congress.gov/bill/115th-congress/senate-joint-resolution/57>; See also Office of Senator Pat Toomey, *Trump Signs into Law Toomey-Moran Bill Repealing Obama-Era Auto Lending Rule*, May 21, 2018, available at <https://www.toomey.senate.gov/newsroom/press-releases/trump-signs-into-law-toomey-moran-bill-repealing-obama-era-auto-lending-rule>.

⁴ See U.S. Government Accountability Office, *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*, December 5, 2017, available at <https://www.gao.gov/assets/690/688763.pdf>.

⁵ U.S. Government Accountability Office, *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*, October 19, 2017, available at <https://www.gao.gov/assets/690/687879.pdf>.

⁶ 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." See 5 U.S.C. § 551(4). A statement can be a rule under the APA without being statutorily required to go through the APA notice and comment rulemaking process. See 5 U.S.C. § 553.

⁷ See, e.g., Executive Office of the President, Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, October 9, 2019, available at <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents> ("[Significant guidance documents shall require] a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest . . .").

to provide input, based on their practical experience and expertise, on proposed rules that will affect them.

- **Review all existing supervisory guidance and either immediately rescind guidance that operates as a rule under the APA but has not gone through a meaningful opportunity for comment or subject the guidance to such a process.** While not expressly binding, these communications modify the conduct of financial institutions but they have not benefited from the insights that come from going through a meaningful opportunity for comment.
- **All supervisory guidance must be available online in a user-friendly format that is searchable, indexed, and contains links to all guidance documents in effect.** The guidance documents made available online should clearly note that supervisory guidance does not have the force and effect of law.

Thank you for consideration of these suggestions and for your work in this area. I stand ready to answer any questions you may have.

Sincerely,

Pat Toomey
U.S. Senator
Chairman, Subcommittee on Securities, Insurance, and Investment
U.S. Senate Committee on Banking, Housing, and Urban Affairs