



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<sup>1</sup> is a rule for purposes of the Congressional Review Act (CRA).<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> CFPB Bulletin 2013-02 (Mar. 21, 2013) (Bulletin).

<sup>2</sup> 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.

<sup>3</sup> 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<sup>4</sup> “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.”<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> The term “creditor” is defined to include “any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.”<sup>10</sup> 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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<sup>4</sup> 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.

<sup>5</sup> *Bulletin* at 1.

<sup>6</sup> 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.*

<sup>7</sup> 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.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> 15 U.S.C. § 1691(a).

<sup>10</sup> 15 U.S.C. § 1691a(e).

setting the terms of the credit.”<sup>11</sup> 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.”<sup>12</sup>

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.<sup>13</sup>

### 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,”<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup> 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-

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<sup>11</sup> 12 C.F.R. § 1002.2(l).

<sup>12</sup> *Bulletin* at 2 - 3.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> 5 U.S.C. § 801(a)(1)(A)(ii).

<sup>15</sup> 5 U.S.C. § 801(a)(1)(B).

<sup>16</sup> 5 U.S.C. § 804(3)(citing 5 U.S.C. § 551(4)).

agency parties.<sup>17</sup> 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.<sup>18</sup> Moreover, the Bulletin is a general statement of policy that offers clarity and guidance on the Bureau’s discretionary enforcement approach.<sup>19</sup>

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.”<sup>20</sup> 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.”<sup>21</sup> 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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<sup>17</sup> 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.

<sup>18</sup> Letter from CFPB to Assistant General Counsel, GAO, July 7, 2017 at 1.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *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.”<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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).<sup>25</sup> 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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<sup>22</sup> *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.

<sup>23</sup> *Bulletin* at 3.

<sup>24</sup> *Id.*

<sup>25</sup> 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.<sup>26</sup>

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."<sup>27</sup> 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.<sup>28</sup> 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."<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> In deciding that a general statement of policy is a rule for CRA purposes, this and other

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<sup>26</sup> *Id.* at 3-4.

<sup>27</sup> 5 U.S.C. § 804(3)(citing 5 U.S.C. § 551(4)).

<sup>28</sup> B-329272, Oct. 19, 2017, at 5; see also B-287557, May 14, 2001, at 7.

<sup>29</sup> See B-329272, Oct. 19, 2017, at 4 - 5; see also 5 U.S.C. § 804(3).

<sup>30</sup> 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.

<sup>31</sup> Also, in B-316048, April 17, 2008, we considered whether a letter issued by the Centers for Medicare 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.<sup>32</sup>

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,

A handwritten signature in cursive script that reads "Thomas H. Armstrong". The signature is written in black ink and is positioned above the typed name.

Thomas H. Armstrong  
General Counsel

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<sup>32</sup> See, e.g., 142 Con. Rec. E578 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde).