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Congress of the United States
House of Representatives

Washington, DC 20515

June 13, 2018

COMMITTEE ON
FINANCIAL SERVICES

FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT
CHAIRMAN

HOUSING AND INSURANCE

COMMITTEE ON
SMALL BUSINESS
VICE CHAIRMAN

AGRICULTURE,
ENERGY AND TRADE

HEALTH AND TECHNOLOGY

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

The Honorable Joseph Otting
Comptroller
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20219

The Honorable Mark McWatters
Chairman
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

The Honorable Mick Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

The Honorable Jay Clayton
Chairman
Securities and Exchange Commission
100 F St, NE
Washington, D.C. 20549

Dear Chairman McWilliams, Comptroller Otting, Chairman McWatters, Acting Director Mulvaney, and Chairman Clayton:

I am writing with respect to the enforcement of agency guidance pursuant to the Congressional Review Act (CRA).

Many of my colleagues and I hear frequently from financial institutions that guidance promulgated by your agencies is treated as though it was a rule, a process that has been referred to as “regulation by enforcement.” This was evidenced in a 2017 determination by the Government Accountability Office that the Federal Reserve’s guidance on leveraged lending was technically a rule for purposes of the CRA but was not submitted to the Congress before it took effect.¹

I have raised these issues for several years, most recently to Federal Reserve Chairman Jay Powell and Vice Chairman for Supervision Randy Quarles. As I expressed during their recent appearances before the House Financial Services Committee, guidance is being treated by examiners as creating binding obligations on the institutions they supervise. I am contacting you to request that your respective agencies take several distinct actions in an attempt to reverse this unsettling trend.

¹ <https://www.gao.gov/assets/690/687879.pdf>

First, I encourage each of your agencies to issue and publish a clear statement affirming that agency statements – for example, guidance documents, supervisory letters or examination manuals – that have not gone through notice and comment rulemaking do not establish binding legal standards, and thus shall not be the basis of enforcement actions or supervisory directives, including but not limited to the issuance of “Matters Requiring Attention” or “Matters Requiring Immediate Attention”². The statement should also clarify that any failure to adhere to guidance shall not, directly or indirectly,³ form the basis of any other adverse supervisory determinations, such as ratings downgrades. Each agency should also establish a standard practice by which similar clarifying language addressing each of these points is included in any subsequently issued guidance.

Finally, I urge you to undertake dedicated efforts to ensure that examiners are appropriately educated about the use and role of guidance; and held accountable when guidance is applied inappropriately. Taking these steps will help to ensure that the law is observed in practice, and that regulated entities are aware of their rights and responsibilities, without having to wonder whether the line between guidance and rule remains blurred.

Over the years, a significant number of agency guidance, handbooks and circulars have been issued. Almost none has been withdrawn or rescinded; similarly, almost none went through notice and comment rulemaking or was submitted to the Congress pursuant to the Congressional Review Act. Greater clarity around the appropriate use and interpretation of such guidance is of the utmost importance. I urge you to make it a priority and implement these recommendations in the most expedient manner possible.

A similar letter has been sent to the Federal Reserve Vice Chairman for Supervision. I thank you for your consideration and look forward to prompt action on this matter.

Sincerely,



Blaine Luetkemeyer
Chairman
Subcommittee on Financial Institutions and Consumer Credit
House Financial Services Committee

² Recent examples of similar agency statements to this effect: <https://www.justice.gov/opa/press-release/file/1012271/download>; and <https://www.justice.gov/file/1028756/download>

³ This should include instances where an examiner purports that a determination is based on “safety and soundness,” with safe and sound practice equating with compliance with agency guidance.