Hearing on "Guidance, Supervisory Expectations, and the Rule of Law: How do the Banking Agencies Regulate and Supervise Institutions?"
Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs

Prepared Statement of Patricia A. McCoy
Professor of Law
Boston College Law School

10:00 a.m., Tuesday, April 30, 2019 – Dirksen 538

Chairman Crapo, Ranking Member Brown, and Members of the Committee: Thank you for inviting me here today to discuss non-binding guidances by federal bank regulators.[1]

Imagine a world in which federal bank regulators did not provide guidances. They would still have statutory responsibility to administer and enforce the statutes and legislative rules under their jurisdiction. Regulated firms would still have to obey those statutes and rules. The only difference is, firms would not have insight into the agencies' interpretations, priorities, or positions in the form of guidances. In the process, financial providers would be deprived of an essential source of transparency that they vocally want and benefit from today.

Some are calling for changes that would require non-binding agency guidances to undergo notice-and-comment proceedings and Congressional Review Act oversight. Such changes would be badly misguided. Agencies would either respond by converting flexible, non-binding guidances into binding legislative rules or by continuing to discharge their supervisory and enforcement responsibilities without the illumination provided by guidances. In all likelihood, "regulation by enforcement" would become a self-fulfilling prophecy, for the reasons I explain.

I. Guidances Provide Vital Transparency In Banking Regulation

Guidances are informal agency statements that advise the public of an agency's construction of its statutes or rules or the agency's prospective plans to exercise discretion. As such, guidances are "an essential instrument of [F]ederal administration" and "facilitate[] stakeholders' knowledge of agency positions and intentions ahead of enforcement or similar actions."[2]

The term "guidances," the topic of this hearing, refers broadly to a variety of non-binding agency statements. Guidances encompass interpretive rules, policy statements, guidance, supervisory bulletins, opinion letters, frequently asked questions, and compliance guides, among other things.

The APA requires interpretive rules and policy statements of general applicability to be published in the *Federal* Register but expressly exempts them from the notice-and-comment

[1] I use the term "federal bank regulators" in this statement to refer to the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau (CFPB).

[2] Bureau of Consumer Financial Protection, *Request for Information Regarding Bureau Guidance and Implementation Support,* 83 Fed. Reg. 13959, 13959 (Apr. 2, 2018) (citations omitted) (hereinafter CFPB Guidance RFI).

requirements for legislative rules.[3] Nevertheless, sometimes federal bank regulators solicit public comment on proposed guidances at their discretion in order to refine the final versions.[4] Guidances are nonpartisan in nature and are issued by Republican and Democratic appointees alike.[5]

Guidances are distinguishable from notice-and-comment legislative rulemakings under Section 553 of the Administrative Procedure Act (APA) in at least two important respects. First, unlike legislative rules, which can affect individual rights and obligations, guidances are non-binding on third parties.[6] Second, guidances are highly flexible and allow agencies to more nimbly respond to changing market conditions because they can be amended without going through a time-consuming notice-and-comment process.[7]

Except in rare instances, federal bank regulators are not required to issue guidances.[8] Instead, they do so to provide transparency for what might otherwise be an opaque regulatory process. Agencies increased their use of guidances before the 2008 financial crisis, in response to industry requests for a "principles-based approach" to regulation. Guidances have continued to be important post-2008.

Guidances serve an essential function, given the intricacy of federal banking law. Federal bank regulators administer the federal banking statutes and implement those statutes through binding, notice-and-comment legislative rules. This thicket of banking statutes and rules is voluminous and complex.

Against this backdrop of statutes and rules, regulated entities find guidances valuable because they shed light on agencies' supervisory perspectives and concerns. When they are issued as policy statements, guidances can advise the public prospectively on how an agency proposes to exercise one of its discretionary powers.[9] When issued as interpretive rules, guidances apprise the public of an agency's construction of the statutes and rules it administers.[10] Other types of guidances provide a useful possible roadmap for compliance, while leaving companies free to propose alternative models or interpretations or consideration of additional facts. In this way,

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3 5 U.S.C. §§ 552(a)(1)(D), 553(b)(A); *see* CFPB Guidance RFI, *supra* note 2, at 13960.

4 CFPB Guidance RFI, *supra* note 2, at 13960.

5 *See, e.g.*, Bureau of Consumer Financial Protection, *Changes to Types of Supervisory Communications*, BCFP Bull. 2018-01 (Sept. 25, 2018) (issued by the CFPB under former Acting Director Mick Mulvaney), https://files.consumerfinance.gov/f/documents/bcfp_bulletin-2018-01_changes-to-supervisory-communications.pdf; Office of the Comptroller of the Currency, *Description: Cyber-Related Sanctions*, OCC Bull. 2018-40 (Nov. 5, 2018) (guidance on the potential impact of Office of Foreign Assets Control sanctions on financial institutions' operations; issued under Comptroller Joseph M. Otting), https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-40.html#; Securities & Exchange Comm'n, *TurnKey Jet, Inc.*, SEC No-Action Letter (Apr. 3, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm.

6 *See, e.g.*, Administrative Conference of the United States, *Agency Guidance Through Policy Statements*, Recommendation 2017-5, at 1 (Dec. 14, 2017) (hereinafter Administrative Conference); CFPB Guidance RFI, *supra* note 2, at 13960.

7 Administrative Conference, *supra* note 6, at 2.

8 Recently, however, in the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (2018), Congress urged or required federal agencies to provide additional guidance. *Id.* §§ 109(b) (on integrated mortgage disclosures), 209(e) (on shared waiting lists for public housing facilities),

9 ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

10 *Id.*

guidances "can make agency decisionmaking more predictable and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk . . ."[11] Finally, guidances can flag potential compliance issues for regulated entities' attention.

Guidances can emanate out of rulemaking or out of supervision. During the rulemaking process, for example, it is common for regulated firms to request guidance to help them comply with an agency's legislative rules (particularly new rules). This was especially important during the implementation of the Dodd-Frank Act, when Congress instructed federal bank regulators to adopt multiple complex rules. These industry requests for guidance are often time-sensitive, because firms are eager for guidance to be in place by a rule's effective date.

Other guidances come out of supervision. Bank supervision requires confidentiality, to protect regulated firms' sensitive proprietary information and to prevent bank runs. For this reason, bank examination reports and the findings of bank examinations are secret and may not be released to the public, on pain of criminal sanction.[12] Importantly, other financial institutions are not privy to the examination reports or findings of sister institutions. Against this backdrop, supervisory guidances provide a crucial sightline into the supervisory process by informing regulated companies of supervisors' viewpoints, priorities, and concerns.

For these reasons and more, regulated companies *want* guidance and they are vocal about asking for it. As the National Association of Realtors put it last year:[13]

> [I]t is imperative that necessary guidance, including interpretive rules and non-rule guidance, be provided to regulated entities to ensure compliance across the industry.

The American Financial Services Association (AFSA) has emphasized the importance of guidance to financial providers in similar terms: [14]

> There is undoubtedly a need for written, explanatory guidance. Written guidance can be a useful tool to help financial institutions obtain clarification on specific practices. With many regulations, particularly long and complex regulations, operational difficulties or unintended consequences arise. In these cases, clarifying guidance is need[ed] quickly.

As these industry statements stress, guidance serves important functions and we should be wary of jettisoning it.

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[11] Administrative Conference, *supra* note 6, at 2.

[12] *See*, *e.g.*, 12 C.F.R. §§ 4.32(b), 7.4000(d), 261.21(a), 309.6(b), 1070.42. There are narrow exceptions permitting public disclosure of the non-confidential portion of Community Reinvestment Act examination reports, 12 U.S.C. § 2906(a)–(b), and of summaries of capital adequacy stress test results, *see, e.g.*, 12 C.F.R. §§ 252.17, 252.46, 252.58.

[13] Letter from the National Association of Realtors to the CFPB on Docket No. CFPB-2018-0013, at 1 (July 2, 2018) (hereinafter NAR Comment Letter).

[14] Letter from AFSA to the CFPB on Docket No. CFPB-2018-0013, at 4 (July 2, 2018); *see also id.* at 3 ("There is a clear need for guidance that is responsive to operational difficulties or unintended consequences resulting from new regulations").

II. Regulated Entities Have Ample Recourse If Guidances Are Given Binding Effect

Despite the many benefits of guidances, agencies are sometimes criticized for penalizing third parties for failure to comply with guidances. Whether this is really a problem or its extent is unclear. Agencies are statutorily responsible for enforcing the statutes and legislative rules with which they are charged. The fact that those statutes and legislative rules may overlap with guidances does not relieve agencies of that statutory responsibility.

Criticisms of guidance often assert that examination reports downgrade companies for failure to follow guidance or that enforcement actions are based on guidance violations. This *might* raise concerns that guidances were being given binding effect against third parties without prior public input into their substance through the notice-and-comment process. In the more likely case, federal banking regulators base negative exam ratings, exam citations, and enforcement actions on violations of statutes or rules, on unsafe or unsound practices (in the case of the prudential banking regulators,) or on unfair, deceptive or abusive practices (in the case of the Consumer Financial Protection Bureau), and not on any guidances that happen to overlap.

At this juncture, it is critical to dispel the mistaken impression that financial institutions are helpless if they are penalized for violating guidances alone. To the contrary, if financial institutions are experiencing this problem, *they already have ample recourse*. Regulated entities have multiple avenues of review if agencies seek to penalize them for violating guidances:

- *Suits to invalidate guidances:* Affected parties can sue to invalidate guidances that are given binding effect for failure to comply with the notice-and-comment provisions of Section 553 of the APA.[15]

- *Informal meetings with regulators:* In addition, regulated entities can and do meet privately with federal bank regulators to request guidance, propose changes, and contest its use.

- *Agency ombudsmen:* All federal bank regulators maintain an ombudsman that provides an independent, impartial, and confidential resource to help firms resolve any problem they may have resulting from the regulatory activities of an agency.[16]

- *Supervisory appeals:* In the supervision context, proposed citations go through special scrutiny and multiple layers of agency review before they can be included in examination reports. Informally, this gives companies the opportunity to raise any concerns about the use of guidances with examiners' supervisors. In addition, all

[15] 5 U.S.C. §§ 704, 706(2)(A), (2)(D); *see, e.g.*, United States v. Gypsum Co. v. Muszynski, 209 F. Supp.2d 308, 310 (S.D.N.Y. 2002).

[16] *See* 12 U.S.C. § 4806(d) (requiring every federal bank regulator to establish an ombudsman); Consumer Financial Protection Bureau, Appeals of Supervisory Matters 5-6 (Oct. 28, 2015), https://files.consumerfinance.gov/f/documents/201508_cfpb_ApprovedSupervisoryAppealsProcess.pdf (CFPB Supervisory Appeals).

federal bank regulators provide formal procedures in which companies can appeal examination findings.[17]

- *Judicial review of enforcement actions:* In the enforcement process, aggrieved respondents have the right to judicial review to contest sanctions based on guidance violations.[18]

- *Legislation:* Finally, financial providers can petition Congress to enact legislation overturning guidances.

In short, financial institutions already have ample recourse for any agency misuse of guidances. Proposals to make it more difficult to issue guidances would throw the baby out with the bath water, as I discuss.

III. Recent Initiatives To Increase The Procedural Requirements For Guidances

Recently, some have proposed stringent curbs on guidances issued by federal bank regulators. The two leading initiatives in this regard involve Congressional reversal of agency guidances under the Congressional Review Act and mandatory notice-and-comment requirements for guidances akin to those for legislative rules in Section 553 of the APA. Above, I discussed the current APA requirements for guidances. In this section, I discuss the debate surrounding the Congressional Review Act's applicability to guidances.

a. The Provisions Of The Congressional Review Act

The Congressional Review Act (CRA)[19] is a major vehicle for Congressional oversight of agency rulemaking. Under the CRA, before a rule can take effect, every federal agency that promulgates a rule must submit a copy of the rule, "a concise general statement relating to the rule," and the proposed effective date of the rule to each House of Congress and the Comptroller General.[20] In the case of *major* rules, upon receipt, Congress has a statutorily specified time period to enact a joint resolution of disapproval of the rule.[21] If Congress allows the statutory time period to expire without enacting a joint resolution of disapproval, the rule will take effect.[22] If Congress enacts a joint resolution of disapproval and the joint resolution survives any veto, the rule will not take effect.[23]

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[17] 12 U.S.C. § 4806 (requiring every federal prudential banking regulator to establish a supervisory appeals process); CFPB Supervisory Appeals, *supra* note 16.

[18] 12 U.S.C. § 1818(h).

[19] 5 U.S.C. §§ 801-808.

[20] *Id.* § 801(a)(1)(A). The CRA requires other accompanying materials as well. *Id.*

[21] *Id.* §§ 801(b)(1), 802; *see also id.* § 801(a)(4).

[22] *Id.* § 801(a)(3). The statute sets forth a timeframe for effective dates. *Id.* §§ 801(a)(3), (d)-(e), 808. The same result occurs if the President vetoes a joint resolution of disapproval and Congress does not override the veto. *Id.* A rule that Congress disapproved may also take effect where the President makes a written determination that the rule is necessary based on narrow statutory grounds or was issued pursuant to any statute implementing an international trade agreement. *Id.* § 801(c).

[23] *Id.* § 801(b)(1); *see also id.* § 801(a)(3), (f).

Where Congress has struck down a major rule through a joint resolution of disapproval that has withstood any veto, the rule may not be reissued in substantially the same form unless it is specifically authorized by a law enacted after the date of the joint resolution. The same result holds for any new rule that is substantially the same as the original rule that Congress disapproved.[24]

The CRA's procedures for joint resolutions of disapproval only apply to major rules. For purposes of CRA review, a "major rule" is any rule that the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) finds has resulted in or is likely to result in:[25]

(1) An annual effect on the economy of $100,000,000 or more;
(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term "major rule" excludes any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.[26] In addition, nothing in the CRA applies to rules concerning monetary policy proposed or implemented by the Federal Reserve Board or the Federal Open Market Committee.[27]

No determination, finding, action, or omission under the CRA is subject to judicial review.[28]

On two recent occasions, Congress invalidated federal banking pronouncements under the CRA. In late 2017, Congress issued a joint resolution disapproving the mandatory arbitration rule issued by the Consumer Financial Protection Bureau (CFPB or the Bureau).[29] Last year, Congress invoked the CRA to nullify the CFPB's 2013 bulletin on indirect auto lending.[30]

b. <u>The Recent OMB Memorandum Interpreting CRA</u>

Under the CRA, Congress tasked OIRA with determining whether agency rules are "major rules" for purposes of the statute.[31] The CRA is silent on the timing of that determination vis-à-vis agency publication of final rules.

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24 *Id.* § 801(b)(2).
25 *Id.* § 804(2).
26 *Id.*
27 *Id.* § 807.
28 *Id.* § 805.
29 Pub. L. No. 115-74, 131 Stat. 1243 (2017); *see* CFPB, Arbitration Agreements, 82 Fed. Reg. 55,500 (Nov. 22, 2017); CFPB, Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017).
30 Pub. L. No. 115-172, 132 Stat. 1290 (2018) (disapproving CFPB, *Bulletin re: Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act* (Mar. 21, 2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf).
31 5 U.S.C. § 804(2).

On April 19, 2019, the Acting Director of OMB, Russell T. Vought, issued a memorandum that announced new, stricter procedures for Congressional Review Act compliance (OMB Memo).[32] OMB addressed the memorandum, which it termed a "guidance," to all executive departments and agencies, including all federal bank regulators and other independent federal agencies. According to OMB, the memorandum takes "full effect" on May 11, 2019.[33]

The OMB Memo took an aggressive position on CRA's compliance requirements in at least three respects. First, in the OMB Memo, Mr. Vought asserted that agencies "should not publish a rule—major or not major—in the *Federal Register*, on their websites, or in any other public manner before OIRA has made the final determination and the agency has complied with the requirements of the CRA."[34] Second, OMB required all independent federal agencies, when providing ORA with their analyses whether a rule is a "major rule" under the CRA, to comply with OMB's cost-benefit analysis methodology and requirements in OMB Circular A-4 and Part IV of the OMB Memo.[35] Finally, OMB took the position that "guidance documents, general statements of policy, and interpretive rules" are subject to CRA review, in addition to notice-and-comment legislative rules.[36]

c. <u>The Congressional Review Act Does Not Apply To Guidances</u>

This last OMB pronouncement followed two separate opinions by the Government Accountability Office (GAO) in 2017 finding that a guidance document[37] and a supervisory bulletin[38] by federal bank regulators were "rules" and therefore had to undergo CRA review.

The CRA only applies to "rules." The statute defines the term "rule" as having the same meaning as in 5 U.S.C. § 551.[39] In turn, 5 U.S.C. § 551(4) of the APA defines a "rule" as:

> 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 . . .

Section 551(4) sets forth three requirements to satisfy the definition of a rule. First, there must be an "agency statement of general or particular applicability." Second, that statement must have "future effect." Finally, the agency statement must be "designed to implement, interpret, or prescribe law or policy . . ."

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32 Memorandum from Russell T. Vought titled Guidance on Compliance with the Congressional Review Act, OMB Memorandum M-19-14 (Apr. 11, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf (OMB Memo).

33 *Id.* at 2.

34 *Id.* at 4; *see also id.* at 5.

35 *Id.* at 5.

36 *Id.* at 3.

37 GAO, *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*, GAO Opinion No. B-329272 (Oct. 19, 2017), https://www.gao.gov/assets/690/687879.pdf.

38 GAO, *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*, GAO Opinion No. B-329129 (Dec. 5, 2017), https://www.gao.gov/assets/690/688763.pdf.

39 5 U.S.C. § 804(3).

That is not the end of the story, however. CRA goes on to expressly exclude any rule of particular applicability, any rule relating to agency management or personnel, and any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties from its definition of a "rule."[40] Consequently, non-binding guidances are not rules under the CRA because they do not substantially affect the rights or obligations of non-agency parties.[41]

In an opinion letter last year, GAO affirmed that the Justice Department's zero-tolerance policy[42] was not subject to CRA review based on that exclusion.[43] According to GAO, "the rights and obligations in question [were] prescribed by existing immigration laws and remain unchanged by the agency's internal enforcement procedures at issue here."[44] In so concluding, GAO relied on federal case law holding that "rules were 'procedural' . . . when the rules did not have a 'substantial impact' on non-agency parties."[45] GAO reasoned: "Although the memorandum changes previous policy, there is no underlying change in the legal rights of aliens who cross the border."[46]

If we change the phrase "aliens who cross the border" in GAO's letter to "regulated financial institutions," it is hard to understand how a non-binding guidance by federal bank regulators is a "rule" for purposes of the CRA when the Justice Department's zero-tolerance policy is not. For as the CFPB emphasized under then-Acting Director Mick Mulvaney last year, "neither an interpretive rule nor a general statement of policy can create new rights and obligations for regulated entities."[47]

Other provisions in the CRA highlight why it is advisable to exclude guidances from the definition of a "rule" for purposes of that statute. Rules that Congress disapproves under the CRA may not be reissued in substantially the same form unless they are specifically authorized

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[40] 5 U.S.C. § 804(3).

[41] There is another reason why guidances are not "rules" under the CRA. Because guidances are non-binding by definition, they do not "take effect." As such, they lack "future effect" for purposes of Section 551(4) of the APA and the CRA. *See* Adam Levitin, *Congressional Review Act Confusion: Indirect Auto Lending Guidance Edition (a/k/a The Past & the Pointless)*, CREDIT SLIPS (Apr. 17, 2018), https://www.creditslips.org/creditslips/2018/04/congressional-review-act-confusion.html. This distinction between binding rules that "take effect" and non-binding guidances has real significance when it comes to the CRA. For the CRA states that a rule cannot "take effect" until the agency submits the rule and its "proposed effective date" to Congress and to GAO. 5 U.S.C. § 801(a)(1)(A). It is impossible, however, for an agency to transmit a "proposed effective date" for a guidance that does not take "effect." Strikingly, GAO did not explain how guidances have "future effect" in its 2017 opinions.

[42] The policy instructed federal prosecutors to give higher priority to certain immigration offenses with the goal of deterring first-time improper entrants along the southwest border. Department of Justice, Office of the Attorney General, Memorandum to Federal Prosecutors along the Southwest Border, *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)* (Apr. 6, 2018).

[43] GAO, *U.S. Department of Justice—Applicability of the Congressional Review Act to the Attorney General's April 2018 Memorandum*, GAO Opinion No. B-330190, at 1 (Dec. 19, 2018), https://www.gao.gov/assets/700/696164.pdf.

[44] *Id.*

[45] *Id.* at 4 (citing Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979)).

[46] *Id.* at 5.

[47] CFPB Guidance RFI, *supra* note 2, at 13960.

by a law enacted after the date of the joint resolution. Nor may an agency issue a new rule that is substantially the same as the original rule that Congress disapproved unless a later statute specifically authorizes the new rule.[48]

But what does it mean for Congress to disapprove a non-binding guidance? The answer is murky, to say the least. Take disapproval of a policy statement that adopts federal judicial decisions construing a statute that the agency is charged with enforcing. Nothing relieves the agency of its statutory duty to carry out the statute. Similarly, nothing prevents the agency from observing the case law discussed in the policy statement when enforcing the statute. This is doubly true when Congress does not amend the underlying statute or relieve the agency of its responsibility to enforce it. Under these circumstances, it is unclear what disapproval of the policy statement actually means.

For these reasons, the text and spirit of the CRA excludes guidances from the definition of "rules."[49] However, there is an even more important reason for not imposing added procedural hurdles such as CRA, which is the adverse effect that doing so would have on regulated parties and the larger financial system.

IV. Imposing More Procedural Hurdles To Adopting Agency Guidances Is Unwise

Both of the initiatives to put guidances through notice-and-comment proceedings and CRA review are overkill because they would result in serious negative effects on regulated companies and the financial system. In this section, I discuss why it would be counterproductive to impose stiffer procedural requirements on guidances.

If non-binding agency guidances had to undergo the notice-and-comment procedures in the APA plus CRA review, the negative effect on regulated persons would be palpable. Normally, a *fast-track* notice-and-comment procedure takes at least two years and many rulemakings take longer. Congressional Review Act transmission and review prolongs this process even further.

At a minimum, the new procedural requirements would result in protracted uncertainty and loss of transparency during the periods for notice and comment and CRA review. During the intervening two-plus years, the public would be in the dark as to the content of the final guidance and the agency's current position. The OMB Memo would prolong that uncertainty and loss of transparency by prohibiting agencies from even publishing final guidances until receiving a go-ahead from OIRA.

The adverse consequences for industry could be even worse, depending on how federal agencies respond. One way agencies might respond is by elevating non-binding guidances into binding legislative rules. This would increase the number of binding rules on financial providers and with it, their attendant legal risk and regulatory burden.

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48 5 U.S.C. § 801(b)(2).

49 *See* Levitin, *supra* note 41. GAO's and OMB's interpretations to the contrary are only opinions unless and until they are affirmed by the courts.

Alternatively, agencies might respond by declining to formulate guidances at all. Agencies would have strong internal pressures to choose this path, given the daunting staffing and budgetary challenges of what otherwise would be a vast increase in notice-and-comment proceedings.

Is this what companies really want? Federal bank regulators have statutory responsibility to enforce the existing statutory authorities and binding rules under their jurisdiction. If agencies stopped issuing guidances, they would still be responsible for enforcing those statutes and rules. In the meantime, regulated persons would lack any guidance about agency interpretation of those statutes and rules or about ways to achieve compliance. This could result in precisely the type of "gotcha" enforcement actions that regulated entities complain about and that guidances are designed to avoid. Moreover, we would lose the constraints that guidances may practically place on agency enforcement. Ironically, subjecting guidances to notice-and-comment procedures and CRA review would result in *less transparency*, not more. Doing so might well leave regulated entities to fend for themselves and produce the "regulation by enforcement" that they intensely dislike.

Putting guidances through notice-and-comment proceedings and CRA scrutiny also is a slippery slope. Clearly, statements of policy and interpretive rules are guidance. Generally, so are official *ex ante* agency announcements that are labelled as "guidance." But how about individually-tailored communications by regulators with specific regulated entities, such as no-action letters, which industry members find valuable?[50] Similarly, would concerns about issuing "guidance" cause examiners to clam up when companies ask them for compliance advice? The CFPB, under the leadership of Mr. Mulvaney, stated in 2018 that it "uses the term guidance . . . broadly to [also] refer to compliance guides and other materials and activities that it does not believe are rules within the meaning of the APA . . ."[51] A sweeping position that all such materials must undergo notice and comment and CRA review would have a severe chilling effect on those materials.

Undoubtedly for these reasons, the Mortgage Bankers Association (MBA) explained last year that "[t]here are times when the costs of public participation outweigh its benefits. . . [T]he extent of public participation should vary on the nature of the guidance document."[52] The National Association of Realtors has pointed out that "time is of the essence" in certain regulatory situations and argued for "quick responses" in the form of agency guidances in those situations.[53] The MBA similarly called on agencies (and specifically the CFPB) to "frequently revise implementation and compliance support materials to ensure they remain relevant."[54]

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50 Securities and Exchange Commissioner Hester Peirce recently described S.E.C. no-action letters as guidance. *SECret Garden: Remarks at SEC Speaks by Commissioner Hester M. Peirce* (Apr. 8, 2019), https://www.sec.gov/news/speech/peirce-secret-garden-sec-speaks-040819.

51 CFPB Guidance RFI, *supra* note 2, at 13960. These sorts of "non-rule guidances," to use the Bureau's term, include frequently asked questions, compliance guides, checklists, institutional and transactional coverage charts, webinars, staff manuals, and oral informal guidance in response to individual inquiries. *Id.*

52 Letter from the Mortgage Bankers Association to the CFPB on Docket No. CFPB-2018-0013, at 4 (July 2, 2018) (hereinafter MBA Comment Letter).

53 NAR Comment Letter, *supra* note 13, at 1. *See also id.* at 2 ("compliance bulletins "are often useful due to the expedited timeframe for issuance without formal notice and comment procedures . . . .").

54 MBA Comment Letter, *supra* note 52, at 6.

Needless to say, companies cannot have it both ways. Imposing notice-and-comment requirements on agency guidance indiscriminately would make these types of quick responses and frequent revisions impossible.[55]

Furthermore, erecting stringent procedural barriers to guidance would pose enormous risks to the financial system and the public writ large. Regulators issue guidance to increase the level of compliance with the law. Losing this vital information source for the bulk of companies that *want* to comply with banking law would likely increase the level of unsafe and unsound practices and raise the aggregate risk in the financial system.

We cannot afford to take that risk, especially after the devastating losses from the 2008 financial crisis. Currently, leveraged loans pose one of the biggest threats to U.S. financial stability.[56] But after GAO classified the leveraged loan guidance as a "rule" under the CRA, the Comptroller of the Currency lifted that guidance for the biggest players in that market, which are national banks.[57] This is not good for anyone, be it national banks or the financial system at large.

Part of the controversy about guidances involves Matters Requiring Attention (MRAs) and Matters Requiring Immediate Attention (MRIAs) that examiners issue from time to time in individual companies' examinations. Concerns have been raised that some examiners at the federal prudential banking agencies write up violations of guidance as MRAs and MRIAs.

In addressing this issue, it is important to stress the important role of MRAs and MRIAs in resolving safety and soundness problems and violations of statutes and rules short of initiating enforcement. Without those notices, problems could fester until sanctions were unavoidable or the institution flat-out failed. Requiring all MRAs and MRIAs to go through notice and comment—including those that address unsafe and unsound practices and violations of statutes and rules--would ban them for all intents and purposes. Instead, a better approach would be for senior bank regulators to carefully review proposed MRAs and MRIAs and to train examiners on their appropriate use. Supervised companies can also appeal MRAs and MRIAs through the supervisory appeals process.[58]

In sum, putting non-binding guidances through notice and comment and CRA review would result in the worst of both worlds. Either agencies would issue even more binding legislative rules or they would enforce their statutes and rules without the benefit of guidance. Given these undesirable results, this is an area where Congress should tread carefully.

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[55] Indeed, the Administrative Conference of the United States has advised that a "government-wide requirement for inviting written input from the public on policy statements is not recommended, unless confined to the most extraordinary documents." Administrative Conference, *supra* note 6, at 6.

[56] *See* FINANCIAL STABILITY OVERSIGHT COUNCIL, 2018 ANNUAL REPORT 11-12 (2018), https://home.treasury.gov/system/files/261/FSOC2018AnnualReport.pdf; OFFICE OF FINANCIAL RESEARCH, ANNUAL REPORT TO CONGRESS 18-20 (2018), https://www.financialresearch.gov/annual-reports/files/office-of-financial-research-annual-report-2018.pdf.

[57] *OCC Head Says Banks Need Not Comply with Leveraged Lending Guidance*, ROPES & GRAY (March 1, 2018), https://www.ropesgray.com/en/newsroom/alerts/2018/03/OCC-Head-Says-Banks-Need-Not-Comply-with-Leveraged-Lending-Guidance.

[58] *See, e.g.*, CFPB Supervisory Appeals, *supra* note 16, at 2; Comptroller of the Currency, OCC Banking Bull. 2013-15 (June 7, 2013), https://www.occ.treas.gov/news-issuances/bulletins/2013/bulletin-2013-15.html.

V. The OMB Memo Improperly Seeks To Curtail Federal Bank Regulators' Independence

In this final section, I close by discussing other problems with the OMB Memo and specifically its attempt to infringe on the independence of federal bank regulators.

In the OMB Memo, OMB purports to prohibit independent federal bank regulators from publishing their final rules on their websites or in the *Federal Register* before OIRA has made its major determination under the CRA.[59] In addition, the memorandum also seeks to prescribe the methodology independent agencies are to use when conducting their cost-benefit (impact) analyses through the back door.[60]

In adopting this stance, the OMB Memo improperly treads on federal bank regulators' independence and violates Executive Order No. 12,866. Historically, the courts and federal law have guarded the independence of federal bank regulators from the Executive Branch to shield the financial system from political intervention for short-term gain.[61] This is why federal bank regulators are exempt from the requirement that agencies submit their rules to OIRA for review and cost-benefit analysis.[62] This results from the express exemption in Executive Order 12,866 for agencies designated as "independent regulatory agencies" under the Paperwork Reduction Act.[63] The Paperwork Reduction Act's list of independent regulatory agencies includes the CFPB and all other federal bank regulators.[64]

Because OMB is an arm of the White House,[65] Executive Order 12,866 effectively shields federal bank regulators from White House review of their rules. The purpose of this carve-out is to ensure the expert neutrality of bank regulators and to insulate those rules from political manipulation by the White House and OMB. Instead, Congress, not the White House, retains ultimate control over federal bank regulators' rules.

The OMB Memo seeks to intrude on federal bank regulators' cost-benefit analyses by requiring them to submit a major rule analysis that is consistent with OIRA's cost-benefit analysis methodology. To begin with, it is not clear how federal bank regulators can even do a meaningful cost-benefit analysis of non-binding guidance. Beyond that, there are important reasons why Congress exempted cost-benefit analyses by federal bank regulators from OIRA and OMB oversight in Executive Order 12,866. In financial regulation, it is generally harder to quantify benefits in the form of harms avoided than it is to quantify costs. Federal bank regulators must make numerous rulemaking decisions under conditions of incomplete data and uncertainty. Requiring federal bank regulators to monetize all harms avoided—which might prove impossible—would dangerously tilt rulemaking analyses toward inaction and the status quo.

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59 *See* OMB Memo, *supra* note 32, at 4.

60 *See id.* at 5.

61 *See, e.g.*, Humphrey's Executor v. United States, 295 U.S. 602 (1935).

62 Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,753 (Oct. 4, 1993).

63 *Id.*

64 44 U.S.C. § 3502(5) (2012).

65 31 U.S.C. § 501 (2012) (establishing OMB as "an office in the Executive Office of the President"). Because OMB resides within the White House, its website is nested within the White House website. *See* OFFICE MGMT. & BUDGET, WHITE HOUSE, https://www.whitehouse.gov/omb.

In short, Executive Order 12,866 means that OIRA's standards for cost-benefit analyses *do not* apply to federal bank regulators' major rule analyses and may not be wielded as a threat to "delay OIRA's determination and an agency's ability to publish a rule and to make the rule effective." OMB's threat to hold up final rules by federal bank regulators indefinitely for "insufficient or inadequate analysis" in OIRA's view[66] poses the added, serious concern that OMB or OIRA might call a regulator's bluff and press to renegotiate the provisions of a final rule pending publication of the rule's text, with no judicial review. Any attempt to do so would be a blatant affront to federal bank regulator independence and a rank violation of Executive Order 12,866. Even more seriously, any such move by OIRA would represent an attempt under the unitary executive theory to bottle up rules, detaining them from Congressional review and wresting CRA oversight from Congress in the process. In that respect, it is well known that OIRA has mired final rules of executive agencies indefinitely while conducting its review.

In the OMB Memo, OIRA implicitly commits itself to making a CRA determination on independent agency rules within forty days.[67] Fortunately, if OIRA does not respect the forty-day timeframe, no statute or rule stops federal bank regulators from publishing their rules at that point and transmitting their rules directly to Congress for CRA review. Any suggestion in the OMB Memo to the contrary has no legal effect.

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To conclude, non-binding agency guidances bring important transparency to federal banking regulation and regulated firms depend heavily on them. In all likelihood, requiring those guidances to go through notice and comment and CRA review would backfire by causing agencies to scrap guidances altogether and increasing the likelihood of the "regulation by enforcement" that industry fears.

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66 OMB Memo, *supra* note 32, at 5.

67 *Id.* The memorandum states that OIRA may inform agencies that rules are not major within ten days of notification. Other rules must undergo the major rule determination, for which OIRA advises independent agencies to allocate thirty days. *Id.*