

Crapo Statement at Hearing on Guidance and Supervision
April 30, 2019

WASHINGTON – U.S. Senator Mike Crapo (R-Idaho), Chairman of the U.S. Senate Committee on Banking, Housing and Urban Affairs, delivered the following remarks at a hearing entitled: “Guidance, Supervisory Expectations, and the Rule of Law: How do the Banking Agencies Regulate and Supervise Institutions?”

The text of Chairman Crapo’s remarks, as prepared, is below.

“Today, the Committee will turn its focus to guidance, supervisory expectations, the rule of law, and how banking agencies regulate and supervise institutions.

“Banks receive significant forms of government support and benefits, including deposit insurance and access to the Fed’s discount window.

“In exchange for these benefits, which ensure that American consumers have stable access to their deposits, banking agencies supervise banks and in return expect them to operate in a safe and sound manner.

“The nature of the supervisory process and the need for trust between supervisor and supervised institution means that sometimes supervisory expectations are communicated in an informal and confidential manner between supervisor and supervised institution, which can be appropriate in certain circumstances, especially when protecting Confidential Supervisory Information.

“With that being said, there appears to be a number of situations where the banking agencies have enacted guidance or other policy statements that are being enforced as rules and therefore do not comply with notice-and-comment rulemaking processes and do not comply with the Congressional Review Act (CRA).

“In addition, there are a number of situations where supervisors make verbal ‘recommendations’ to banks that are inappropriate given the tremendous power supervisors have over banks.

“All rulemaking authority at the banking agencies derives from authority delegated to the banking agencies by Congress, which means Congress has the authority to disapprove any rule a banking agency enacts.

“In addition to the absolute authority Congress has to disapprove any agency action, Congress enacted the CRA in 1996 to provide Congress with an expedited process to disapprove agency rules.

“Under the CRA, before a rule can take effect, agencies must submit it to Congress for review.

“Congress then has 60 days to disapprove the rule with a majority vote.

“A rule is defined, with a few exceptions, 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.’

“That is a very broad definition.

“The CRA applies to more than just notice-and comment rules. It encompasses a wide range of other regulatory actions, including, among others, guidance documents, general statements of policy, and interpretative rules.

“Even though the text itself is clear about the broad scope of what constitutes a rule, during the floor debates leading up to the passage of the CRA, then-Senator Reid reinforced this point and said: ‘[t]he authors are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, ‘guidelines,’ and agency policy and procedure manuals. The authors admonish the agencies that the APA’s broad definition of ‘rule’ was adopted by the authors of this legislation to discourage circumvention of the requirements’ of it.

“Too often, we see banking regulators implementing policy through guidance and other informal means without following the requirements in the CRA.

“For instance, some in the agencies may argue that guidance is not binding, but as a practical matter, supervised institutions and supervisors know that informal guidance and other communications between supervised institutions and supervisors change behaviors within institutions.

“Legal departments at the banking agencies often assert that guidance is non-binding, but the language the supervisors at the agencies use often suggest that supervisors treat guidance as binding and expect supervised institutions to treat it as binding.

“Actions like this within agencies are problematic and require Congressional oversight, including by ensuring banking agencies comply with the CRA.

“Recognizing the importance of agencies complying with the CRA, Acting Director of the Office of Management and Budget (OMB) Russell Vought issued a memorandum recently, which ‘reinforces the obligations of Federal agencies under the CRA in order to ensure more consistent compliance with its requirements across the Executive Branch and sets forth guidelines for analysis that the Office of Information and Regulatory Affairs (OIRA) will use to properly classify regulatory actions for purposes of the CRA.’

“This memorandum is a step in the right direction.

“The abuse of government and agency power should not be a partisan issue and no administration or agency should be able to use their powers to influence the private market.

“I continue to encourage the regulators to follow the CRA and submit all rules to Congress, even if they have not gone through a formal notice and comment rulemaking.

“In addition, I encourage the banking regulators to provide more clarity about the applicability of guidance and ensure that supervisors throughout the agencies (especially outside of Washington, D.C.) know about how guidance should be treated and do not inappropriately use their significant discretion.

“As a final note, during the Obama Administration, I fought against Operation Choke Point, an initiative in which Federal agencies pressured banks to ‘choke-off’ politically disfavored industries’ access to payment systems and banking services.

“Operation Choke Point initially began in the supervisory process.

“Operation Choke Point was inappropriate, and demonstrates why supervisory staff at the agencies need to be transparent and accountable.

“I look forward to hearing from each of you on your views of what can be done to ensure that there is greater transparency and accountability in the regulatory and supervisory process.”

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