

APRIL 18, 2018

Chairman Crapo on the CFPB Auto Lending CRA

WASHINGTON - Idaho Senator Mike Crapo, Chairman of the Senate Banking Committee, delivered remarks on the Senate Floor today, encouraging his colleagues to support S.J. Res. 57, a Congressional Review Act Resolution to disapprove the CFPB's 2013 Auto Bulletin.

Senator Crapo's remarks, as prepared, are below.

“Mr. President, I rise today to offer my support for Senator Moran’s and Toomey’s resolution using the Congressional Review Act to disapprove the CFPB’s 2013 auto finance guidance.

“It is important that Congress disapprove this guidance because it was an attempt by the CFPB to make substantive policy changes through guidance rather than through the rulemaking process governed by the Administrative Procedures Act.

“It was also an attempt to regulate auto dealers who were explicitly exempted from CFPB supervision and regulation under the Dodd-Frank Act.

“According to an internal CFPB memo, the CFPB rejected developing a rule using its statutory authority to regulate unfair, deceptive, and abusive acts and practices because “the potentially unfair, deceptive, or abusive actions are ostensibly those of the dealers, over whom we have no regulatory authority.”

“As the Wall Street Journal Editorial Board noted, “That didn’t stop former CFPB chief Richard Cordray, who used the back door of auto-financing to regulate dealers.”

“Make no mistake, the CFPB’s decision to develop guidance instead of a rule was intentional.

“At Senator Toomey’s request, the Government Accountability Office evaluated the bulletin to see if it should have been submitted to Congress as required by the Congressional Review Act.

“The GAO concluded, ‘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 practices. As such, it is a rule subject to the requirements of the CRA.’

“Plainly, the CFPB failed to follow the law by failing to submit the bulletin to Congress.

“Furthermore, issuing guidance instead of formulating a rule allowed the CFPB to side-step important aspects of the administrative rulemaking process that provides for accountability, transparency, and thorough evaluation.

“Federal agency rules are governed by the Administrative Procedures Act, which generally requires an agency to publish notice of a rulemaking, take comments from the public, and establish an effective date for a rule.

“Notice and comment is a vital step in the process because it gives individuals and businesses subject to rulemakings the opportunity to provide feedback on the practical effect of a rule’s implementation and allows an agency to adjust the rule as necessary to avoid any undue consumer harm.

“In contrast, bulletins generally do not afford the public an opportunity to lend their voice to the process and have historically been used by federal agencies to simply restate existing law to aid covered companies’ compliance.

“The CFPB’s indirect auto bulletin represents a departure from typical federal agency practice, as reflected in the GAO’s conclusion that it is a rule subject to CRA requirements.

“Without the opportunity for public comment and the ability for the bulletin to be revised to avoid any unintended consequences, auto dealers’ incentive to act as an intermediary has been greatly diminished.

“As a result, consumers will be inconvenienced and have fewer and more expensive financing options when shopping for a vehicle.

“Some people opposed to this resolution are concerned about what this means for regulatory guidance more generally.

“I would note that almost all guidance issued by agencies may qualify as a ‘rule’ under the Congressional Review Act and must be submitted to Congress for potential disapproval.

“The CRA’s definition of a ‘rule’ includes, with some limited exceptions, ‘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.’

“Explaining the Congressional Review Act’s definition of a ‘rule,’ the GAO said ‘this definition is broad, and includes both rules requiring notice and comment rulemaking and

those that do not, such as general statements of policy.’

“This particular bulletin, according to GAO, ‘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.’

“Congress has the power to overturn *any* agency rule.

“Under the Congressional Review Act, Congress has the power to overturn agency rules using an expedited procedure.

“There is nothing special about ‘guidance’ issued by agencies that should cause people to be concerned, especially a ‘rule’ masquerading as guidance.

“Article I grants Congress legislative power and by disapproving this rule we are ensuring that the CFPB cannot issue a rule that is substantially the same.

“There have also been questions raised regarding the flawed methodology the CFPB used in its supervisory and enforcement activities based on this bulletin to allege discriminatory auto loan pricing.

“In November 2015, the House Financial Services Committee’s majority staff issued a report exploring the CFPB’s approach to enforcing ECOA against indirect auto lenders.

“The report focuses on the controversial use of disparate impact theory and the CFPB’s use of a flawed statistical methodology, which only takes into account an individual’s last name and zip code in order to determine a probability for race and ethnicity.

“This approach is less reliable than other, more proven methodologies.

“A November 2014 study estimated that only 24 percent of African Americans and 50 percent of Asians were correctly identified using this methodology.

“In light of such significant concerns, the House introduced legislation in 2015 to nullify the effect of the bulletin and place guardrails around the development of any future indirect auto lending guidance.

“That bill garnered significant bipartisan support, passing the House by a vote of 332 to 96, including 88 Democrats.

“This resolution has attracted substantial support, including from 12 different organizations involved with helping consumers buy a vehicle, and an endorsement via Statement of Administration Policy from the White House.

“For example, the Chamber of Commerce notes that ‘internal documents [at the CFPB] demonstrate that even Bureau staff found the data and methodology intended to support

the rule unconvincing.’

“The Independent Community Bankers of America notes that ‘Since the issuance of the Bulletin, many community bankers have reported added difficulty in meeting the varying borrowing needs of their customers based on confusing and overly-burdensome guidance.’

“The National Association of Auto Dealers notes that ‘extensive bipartisan congressional engagement has identified several reasons to disapprove the CFPB rule/guidance, including a lack of due process, concerns about the CFPB’s failure to adhere to Section 1029 of Dodd-Frank, and the negative impact on consumers and small business dealers.’

“The American Bankers Association says, ‘The regulatory and enforcement uncertainty caused by this Guidance has caused many banks to exit or curtail their indirect auto lending, which limits consumer choice and increases the cost of credit.’

“And, the American Financial Services Association says that ‘The guidance is harmful because it pressures vehicle finance companies to limit consumers’ ability to receive discounted auto loans from dealers. Furthermore, the guidance threatens to raise credit costs and push marginally creditworthy consumers out of the vehicle financing market, and has the potential to harm the vehicle industry and its associated U.S. jobs.’

“At this time, I ask permission to enter into the record these five letters, as well as a joint letter from the National Auto Dealers Association, the National RV Dealers Association, the American International Automobile Dealers, the Auto Alliance Driving Innovation, the National Independent Automobile Dealers Association, the National Auto Auction Association, the American Financial Services Association, the Recreational Vehicle Industry Association, and the Motorcycle Industry Council all expressing their strong support for S.J. Res. 57.

“Finally, President Trump’s Statement of Administration Policy also endorses this resolution.

“I am going to read a few highlights from the Statement: ‘This bulletin limits the ability of auto dealers to offer auto loans to their customers and was not issued pursuant to notice-and-comment rulemaking. As a result, the CFPB failed to allow the public to comment before it made significant changes to an important sector of the economy.

‘Dodd-Frank explicitly excludes the regulation of auto dealers from the CFPB’s jurisdiction. Disapproving this bulletin, therefore would provide consumers with more options for auto financing while ensuring that the CFPB abides by congressional limits on its jurisdiction.’

“Mr. President, this rule should be disapproved and any future action on the matter go through the appropriate rulemaking process established by Congress.

“If this rule stands, banks, credit unions, and finance companies holding nearly \$1.1 trillion in outstanding loans will needlessly face significant liability, and the ability of auto dealers

to play a valuable role by matching buyers and lenders will be diminished.

“I urge my colleagues to support this resolution.”

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