JEB HENSARLING, TX , CHAIRMAN

United States House of Representatives
Committee on
Financial Services
2129 Rayburn House
Office Building
Washington, D.C. 20515

MAXINE WATERS, CA, RANKING MEMBER

November 2, 2017

The Honorable Janet Yellen
Chair
Board of Governors of the Federal Reserve System
Constitution Avenue and 20th Street, NW
Washington, D.C. 20551

Mr. Keith Noreika
Acting Comptroller
Office of Comptroller of the Currency
Corporation
400 7th Street, SW
Washington, D.C. 20219

The Honorable Martin Gruenberg
Chairman
Federal Deposit Insurance

550 17th Street, NW
Washington, D.C. 20429

Dear Chair Yellen, Acting Comptroller Noreika, and Chairman Gruenberg:

I write with respect to a legal determination issued by the Government Accountability Office on October 18 concerning the Interagency Guidance on Leveraged Lending your agencies' collectively issued in 2013.

As you know, the GAO determined that the leveraged lending guidance is a "rule" for purposes of the Congressional Review Act (CRA). That determination is significant, because under the clear statutory language of the CRA, any such "rule" must be submitted to the Congress before it may take effect. Thus, because the guidance has not yet been submitted to Congress, it is not yet legally effective or valid.

Thus, I am writing to confirm that your respective agencies are not in any way applying the guidance as if it were a rule or otherwise in effect. For example, because the guidance is not yet effective, I would like to confirm that your agency is not issuing Matters Requiring Attention (MRAs) or Matters Requiring Immediate Attention (MRIAs) on the basis of a bank's noncompliance with the guidance (and is rescinding any MRAs or MRIAs that did rely on the guidance), and not making any examiner criticism or other supervisory determination (e.g., ratings downgrade) based in whole or in part on noncompliance with the guidance.

This request is especially urgent in light of evidence suggesting that your agencies have historically treated the guidance as though it were legally effective and binding – that is, not just a rule in the broader sense of a policy statement or interpretive rule, but also a binding regulation. That evidence includes, among other things, a press account of your repeated efforts to force banks to conform their lending activities to the requirements and prohibitions of the guidance,[1] as well as Federal Reserve research that found that the guidance directly caused large U.S. banks to curtail their leveraged lending activity.[2] Indeed, the "FAQs" that your agencies issued in 2014 on the guidance seem to make absolutely clear that, to date, guidance has been applied as though it were a binding regulation: the stated purpose of those FAQs was to "[address] many questions relating to how the agencies are interpreting and implementing the guidance" and "promote consistent application of the guidance"; moreover, the FAQs describe at length how the agencies assess and monitor banks' "implementation" and "conformance" with the guidance.[3] I would note such actions would not only appear to be inconsistent with the CRA and Administrative Procedure Act, but also appear to be inconsistent with representations you made to the General Accounting Office in letters submitted in the course of its deciding this issue.[4]

Finally, and most significantly, I note that in recent years, your agencies have also issued many other guidance and supervisory letters that were never submitted to the Congress pursuant to the CRA, and therefore are also not yet effective. I urge you to conduct a zero-based review of that guidance, which is presumably now ineffective and unenforceable, to determine which issuances should be submitted to the Congress pursuant to the CRA. Of course, submission to the Congress is only sufficient to make such a guidance or letter an effective interpretive rule or general statement of policy under the Administrative Procedure Act. For those guidance or letters to bind in the way you have apparently applied

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[1] Ryan Tracy, WALL ST. J., *Feds Win Fight over Risky-Looking Loans* (Dec. 2, 2015) ("Starting in late summer [of 2015], roughly a dozen big banks received a "Matters Requiring Attention" letter from the OCC and the Fed. The letters chided the banks for putting the financial system at risk because of lax and inadequate application of the leveraged loan guidelines, regulators claimed.... At the OCC, the task of bringing banks in line fell to Martin Pfinsgraff, who worked on leveraged loans while an executive at Prudential Financial Inc. and came to the OCC after the financial crisis. Mr. Pfinsgraff, senior deputy comptroller for large bank supervision, favored a "no exceptions" approach, meaning banks should never make a leveraged loan that fell outside the standards...")

[2] Kim, Plosser, and Santos, Federal Reserve Bank of New York Liberty Street Economics, *Did the Supervisory Guidance on Leveraged Lending Work?* (May 16, 2016).

[3] *Frequently Asked Questions (FAQ) for Implementing March 2013 Interagency Guidance on Leveraged Lending* (Nov. 13, 2014). The FAQs also established a range of new specific requirements and prohibitions, including an express ban on banks' originating certain leveraged loans (i.e., those with a non-pass risk rating at origination).

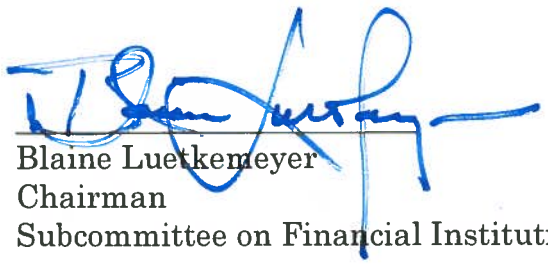
[4] According to the GAO, "The focus of the arguments made by the Agencies is that the Interagency Guidance is a general statement of policy and is not subject to the CRA. They assert that the Guidance is a statement that explains how they will exercise their broad enforcement discretion. They maintain that it does not establish legally binding standards, is not certain or final, and does not substantially affect the rights or obligations of third parties."

the leveraged lending guidance, they would also need to go through notice and comment rulemaking.

I look forward to working with each of you to better understand your plans in connection with such other guidance. As such, please provide by December 5, 2017, a response and preliminary plan outlining steps your individual agencies will take to address this matter, along with a timeframe for completion of a comprehensive review of agency guidance.

Thank you for your prompt attention to this matter.

Sincerely,



Blaine Luetkemeyer
Chairman
Subcommittee on Financial Institutions and Consumer Credit