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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

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December 5, 2017

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Dear Director Mulvaney:

I am writing regarding the need for federal agencies to comply with the statutory mandate under the Congressional Review Act of 1996 (CRA) that all federal agencies submit regulatory guidance to Congress and the Comptroller General for review before the guidance takes effect. As Chairman of the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management I have seen a troubling trend toward federal agencies use of guidance (in all forms, including interpretive rules, FAQs, policy statements and the like) to bind regulated entities rather than follow the rulemaking procedures as prescribed under the Administrative Procedures Act (APA). At the same time, agencies have failed to follow CRA notification requirements for such guidance. Agency guidance is covered by the CRA's definition of a "rule" to protect taxpayers against this type of bureaucratic work-around that has become too common across all federal agencies. As such, any agency guidance issued without compliance with CRA notification requirements never took effect and is illegal and unenforceable.

The CRA specifically requires that before a rule can take effect the federal agency must submit a report to each House of Congress and the Comptroller General containing a copy of the rule, a concise general statement relating to the rule, and the proposed effective date of the rule. The CRA also provides for a review period of sixty legislative days for Congress to pass a resolution of disapproval.¹ The CRA adopts the same broad definition of a "rule" as that provided under the APA, as follows:

"rule" means 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..."²

Agency guidance falls under this definition of a "rule." This interpretation is supported by the Government Accountability Office, which has found that "agency pronouncements may be rules within the definition of 5 U.S.C. 551, and the CRA, even if they are not

¹ 5 USC 801 *et seq.*

² 5 USC 804(3); 5 USC 551.

subject to the notice and comment rulemaking requirements under Section 553.”³ Most recently, the GAO in responding to a request from Senator Pat Toomey on the applicability of the CRA to Interagency Guidance on Leveraged Lending cites the statutory language, legislative history, legal precedent and past GAO determinations in concluding unequivocally that guidance is subject to the CRA.⁴

The purpose of the CRA is to provide for Congressional review to ensure that federal agencies are implementing federal laws in a way consistent with the statutory language and Congressional intent. This objective is consistent with those of President Trump’s January 30, 2017 Executive Order, “Reducing Regulation and Controlling Regulatory Costs.”⁵

The Executive Order directly addresses those rules and agency actions subject to APA notice and comment procedures. However it does not address the myriad guidance, policy statements and other agency actions that constitute a rule under the CRA and which require the “imposition of private expenditures required to comply with Federal regulations.”⁶

In order to halt federal agencies circumventing the CRA’s Congressional notification mandate I respectfully request that you direct each agency to provide the Office of Management and Budget and this Committee with the following information not later than January 31, 2018:

1. An inventory of all guidance documents (as defined in 5 U.S.C. 804(3)) issued by that agency from January 25, 2007 to the present;
2. A statement citing the statutory or regulatory authority to issue such guidance;
3. A statement as to whether each guidance was submitted to Congress pursuant to the requirements of the CRA;
4. For those guidance documents not submitted to Congress under the CRA (“Non-Effective Guidance”), a statement as to whether the agency intends to submit that guidance in the future, or whether it intends to modify or withdraw that guidance;
5. For those Non-Effective Guidance documents the agency intends to submit to Congress, a statement of how the public will participate in that process under the OMB’s January 25, 2007 Bulletin with respect to Agency Good Guidance Practices (“Good

³ Gov’t Accountability Office, B-323772, Letter to Senator Orrin Hatch and Representative Dave Camp regarding an Information Memorandum issued by The Department of Health and Human Services concerning the Temporary Assistance for Needy Families program, September 4, 2012.

⁴ Gov’t Accountability Office, B-329272, Letter to Senator Patrick Toomey regarding the Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending, October 19, 2017.

⁵ Exec. Order No. 13,771, 82 FR 9339 (2017).

⁶ Ibid.

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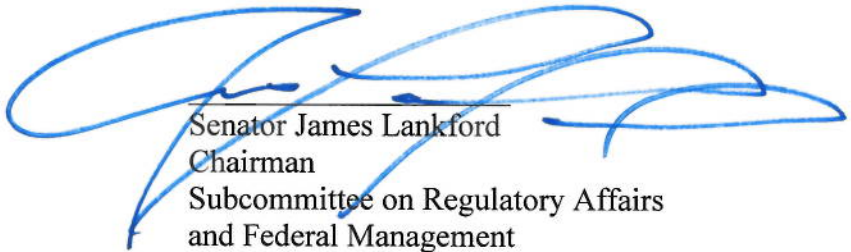
Guidance Bulletin”);

6. For each Non-Effective Guidance, an inventory of all enforcement action taken by the agency based on such guidance; and

7. A description for how each agency will ensure future compliance with the requirements of the CRA as it relates to guidance.

The framework for such a review already exists and has been expressed in Executive Orders 12866 and 13563, which require agencies to regularly undertake a retrospective analysis of existing rules so that they may modify or repeal those rules that are outmoded or ineffective. Moreover, as noted above OMB's Good Guidance Bulletin provides a roadmap for how agencies can and should develop guidance, including robust public participation in the process – a feature that is specifically and intentionally absent under the current agency guidance process. If you have any question about this request, please contact James Mann at (202) 224-3823. Thank you for your attention to this matter.

Sincerely,



Senator James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management

cc: The Honorable Heidi Heitkamp
Ranking Minority Member
Subcommittee on Regulatory Affairs
and Federal Management