

PUBLICATION

Indirect Auto Lending: GAO Opinion Sets Wheels in Motion for Regulatory Clarity

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A recent finding by the U.S. Government Accountability Office (GAO) could have a significant impact on the indirect auto lending industry. Last month, the GAO issued an opinion declaring that a Consumer Financial Protection Bureau (CFPB) Bulletin, issued on March 21, 2013, titled "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (the "Bulletin"), was a "rule" for the purposes of the Congressional Review Act (CRA).

The 2013 Bulletin from the CFPB provided guidance to indirect auto lenders concerning compliance with fair lending and the Equal Credit Opportunity Act. In particular, the Bulletin addressed the significance of marked-up interest rates charged by dealers which were above interest rates charged by indirect auto lenders, stating that there was the potential risk for pricing disparities to prohibited bases such as race or national origin. The Bulletin further declared that indirect auto lenders could be subject to liability under fair lending laws for being associated with dealers, which implement markups that create pricing disparities to protected classes.

The GAO opinion was triggered by a request from Senator Patrick Toomey to determine whether the Bulletin was subject to the CRA. The CFPB contended that the Bulletin did not qualify as a "rule" under the CRA since it only provided non-binding guidance which "identified potential risk areas and provides general suggestions for compliance" with ECOA and Regulation B. The GAO disagreed and noted in its findings that the CFPB is a "rule" for the purposes of the CRA because "it is a general statement of policy designed to assist indirect auto lenders to ensure that they are operating in compliance with [the] ECOA and Regulation B, as applied to dealer markup and compensation policies." Senator Toomey added that the "GAO's decision makes clear that the CFPB's back-door effort to regulate auto loans, which was based on a dubious legal justification, did not comply with the Congressional Review Act."

The GAO's decision that the Bulletin is subject to the CRA is significant. The CRA requires all federal agencies, including regulatory ones like the CFPB, to submit copies of proposed rules to Congress before it can take effect. The CFPB did not do this at the time the Bulletin was issued. The GAO's decision that the Bulletin is a rule now subjects it to Congressional review and Congress may vote to disapprove the Bulletin by issuing a joint resolution through a majority vote.

Given the current state of Republican leadership in Congress, including comments from Senator Toomey, there appears to be a strong chance that the Bulletin is disapproved by joint resolution. If the joint resolution is passed, the Bulletin would be void. After years of confusion concerning the impact of the Bulletin, a joint resolution under the CRA would provide some much-needed clarity to many within the industry.