

Nuquist might have considered a chapter titled "Titans of the Trail." Instead, she opted for the less obvious and more graceful approach of weaving their stories throughout her chapters as their ages and achievements suggest.

To cite a few examples, the aforementioned Dean was probably the editor of the very first guidebook. Dr. Louis J. Paris was "the glue that held the GMC together in the early years." Charles P. Cooper, "the hardest working executive the Club has had," spent weeks, in all weather, nailing hand-painted white discs to trees and rail-crossing posts. "The GMC was his hobby," writes Nuquist, but, judging by his actions, it was much more than that.

The same could easily be said of Nuquist, for whom, over nearly half a century, the Long Trail has meant work, play, adventure, friendships, family and joy. All of which makes reading her new book nearly as much fun as hiking the trail itself.

#### CONFIRMATION OF KIRSTJEN NIELSEN

Mr. VAN HOLLEN. Mr. President, I rise in opposition to the nomination of Kirstjen Nielsen to serve as Secretary of Homeland Security. While I believe that Ms. Nielsen has a solid understanding of the Department that she seeks to lead, I am not yet convinced that she will be a counterweight to the rabid anti-immigration policies coming out of the White House.

I appreciated the opportunity to speak to Ms. Nielsen prior to the vote about my concern over the status of the Dreamers and temporary protected status, TPS, recipients. Dreamers were brought to this country through no fault of their own and are in limbo after the President abruptly canceled DACA and set arbitrary renewal and termination deadlines. TPS recipients, many of whom have been here for almost two decades, would have their lives endangered if forced to return to their home countries.

While I understand that Ms. Nielsen cannot make ironclad commitments on how she would handle these issues, I could not in good faith support her nomination without clearer guidance and assurances about how she and the administration intend to resolve these matters. Many of my colleagues who supported her predecessor, General Kelly, have complained bitterly that promises he made to them have not been kept. Moreover, both as General Kelly's chief of staff at DHS and later as his deputy at the White House, I have to assume the Ms. Nielsen has been very involved in the development and implementation of the immigration policies of this administration. My vote yesterday was not so much a vote against Ms. Nielsen, as it was a vote to protest the anti-immigration policies flowing from the Trump administration.

I am hopeful that, in the coming months, Ms. Nielsen will be able to provide a check on the worst impulses of this White House. I am not yet convinced that will happen and hope to be proven wrong. I do look forward to

working with Ms. Nielsen once she is sworn in.

#### GAO CFPB RESPONSE

Mr. TOOMEY. Mr. President, I ask unanimous consent that a letter from the Government Accountability Office, GAO, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. GOVERNMENT  
ACCOUNTABILITY OFFICE,  
Washington, DC, December 5, 2017.

Subject: Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act

Hon. PATRICK J. TOOMEY,  
U.S. Senate.

DEAR SENATOR TOOMEY: You asked whether a Bulletin issued by the Bureau of Consumer Financial Protection (CFPB or the Bureau) on March 21, 2013, on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act is a rule for purposes of the Congressional Review Act (CRA). CRA establishes a process for congressional review of agency rules and establishes special expedited procedures under which Congress may pass a joint resolution of disapproval that, if enacted into law, overturns the rule. Congressional review is assisted by CRA's requirement that all federal agencies, including independent regulatory agencies, submit each rule to both Houses of Congress and to the Comptroller General before it can take effect. For the reasons discussed below, we conclude that the Bulletin is a general statement of policy and a rule under the CRA.

#### BACKGROUND CFPB Bulletin

When consumers finance automobile purchases from an auto dealership, the dealer often facilitates indirect financing through a third-party lender, referred to as an indirect auto lender. In the Bulletin, CFPB "provides guidance about indirect auto lenders' compliance with the fair lending requirements of the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B." Specifically, the Bulletin relates to policies used by some indirect auto lenders that allow dealers to mark up the interest rate charged to the consumer above the indirect auto lender's "buy rate." The lender then compensates the auto dealer based on the difference in interest revenues between the buy rate and the actual rate charged to the consumer in the contract executed with the auto dealer. In the Bulletin, CFPB states that the incentives created by such policies allow for a significant risk for pricing disparities on the basis of race, national origin or other prohibited bases.

The fair lending requirements of ECOA make it illegal for a creditor to discriminate in any aspect of a credit transaction on the basis of race or national origin, among other characteristics. The term "creditor" is defined to include "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." Regulation B, which implements ECOA, further defines a creditor to expressly include an "assignee, transferee, or subrogee of the creditor" who "in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit." In the Bulletin, CFPB states that there are a variety of practices used by indirect lenders, but that information collected "suggests that the standard practices of indirect

auto lenders likely constitute participation in a credit decision under the ECOA and Regulation B."

In the Bulletin, CFPB discusses the legal theories under which indirect auto lenders who are determined to be creditors under ECOA could be held liable for pricing disparities on a prohibited basis when such disparities exist within an indirect auto lender's portfolio. In its final section, the Bulletin states that indirect auto lenders "should take steps to ensure that they are operating in compliance with the ECOA and Regulation B as applied to dealer markup and compensation policies," and then lists a variety of steps and tools that lenders may wish to use to address significant fair lending risks.

#### The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory agencies, to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process.

CRA adopts the definition of rule under the Administrative Procedure Act (APA), which states in relevant part that a rule is "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." CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of nonagency parties. CFPB did not send a report on the Bulletin to Congress or the Comptroller General because, as stated in their letter to our Office, in their opinion the Bulletin is not a rule under CRA.

#### ANALYSIS

At issue here is whether a nonbinding general statement of policy, which provides guidance on how CFPB will exercise its discretionary enforcement powers, is a rule under CRA. CFPB states, and we agree, that the Bulletin "is a non-binding guidance document" that "identifies potential risk areas and provides general suggestions for compliance" with ECOA and Regulation B. Moreover, the Bulletin is a general statement of policy that offers clarity and guidance on the Bureau's discretionary enforcement approach.

CFPB argues, however, that because the Bulletin has no legal effect on regulated entities, the CRA does not apply. The Bureau asserts that "taken as a whole, the CRA can logically apply only to agency documents that have legal effect." It suggests that there are two categories of general statements of policy: (1) those that are intended as binding documents, to which CRA applies, and (2) those, like the Bulletin, that are non-binding and not subject to CRA. CFPB claims that the Bulletin is the type of general statement of policy that is not a rule under CRA. However, as explained below, CRA requirements apply to general statements of policy which, by definition, are not legally binding.

The Supreme Court has described "general statements of policy" as "statements issued