Using the Congressional Review Act to Invalidate or Repeal Informal Agency Guidance

In December 2017, the US Government Accountability Office ("GAO") released a letter[1] stating that a Consumer Financial Protection Bureau ("CFPB" or "Bureau") bulletin[2] discussing indirect auto lending and compliance with the Equal Credit Opportunity Act ("ECOA") qualifies as a "rule" for purposes of the Congressional Review Act ("CRA"). The GAO's December letter is similar to a letter the GAO released in October 2017 stating that guidance on leveraged lending issued jointly by three banking regulators is a rule for purposes of the CRA.[3] The GAO's interpretation provides an avenue for Congress to use the CRA to invalidate or repeal informal agency guidance, such as the Bureau's indirect auto lending bulletin, that does not rise to the level of a regulation adopted through notice-and-comment rulemaking. Some in Congress seem to intend to do just that. Senator Toomey (R-PA) responded to the GAO letter stating that he will "do everything in [his] power to repeal this ill-conceived rule using the CRA."[4]

CFPB Bulletin on Indirect Auto Lending

The CFPB bulletin that was the subject of the GAO's recent letter discusses indirect auto lenders' compliance with the fair lending requirements of ECOA and Regulation B.[5] According to the CFPB, the bulletin offers "guidance about compliance with the fair lending requirements"[6] of existing law and "is a non-binding guidance document."[7] The bulletin explains that the Bureau believes some indirect auto lenders may be subject to ECOA and Regulation B and advises indirect auto lenders to "take steps to ensure that they are operating in compliance" with ECOA and its implementing Regulation B. Most significantly, the bulletin states that indirect auto lenders may have direct liability under ECOA for allegedly discriminatory pricing disparities caused by third-party auto dealers. The bulletin offers guidance on how indirect auto lenders can manage this risk, such as by imposing controls on compensation policies or eliminating dealer discretion to mark up rates and by developing strong fair lending compliance programs.[8]

Mechanics and Use of the CRA

President Clinton signed the Congressional Review Act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act. Congress reportedly intended the law to increase its power over the regulatory processes and "redress the balance [between the branches], reclaiming for Congress some of its policymaking authority."[9]

Mechanics of the CRA. The CRA requires agencies to submit to Congress and the GAO reports on the rules they promulgate before the rules can "take effect."[10] In addition, the CRA allows Congress to introduce a resolution of disapproval of a rule within 60 legislative session days of the publication of the rule that, if passed by both houses of Congress and signed by the President (or passed by a two-thirds majority

in both houses to overcome a presidential veto), invalidates the rule.[11] Significantly, the disapproval resolution prohibits the issuance of any rule that is "substantially the same" as the invalidated rule unless the rule has subsequent statutory authorization.[12]

Of course, Congress does not need to utilize the CRA to write legislation that reverses or modifies agency regulation, but passing new legislation is a cumbersome and time-consuming process. The CRA allows Congress to use expedited procedures to send a resolution of disapproval to the President. For example, CRA disapproval resolutions are not required to go through the full committee process in the Senate. Moreover, the CRA limits debate time to 10 hours in the Senate, effectively prohibiting filibusters.[13]

Sixty-Day Clock. The CRA provides that the 60-day clock for introduction of a disapproval resolution in Congress begins on the "submission or publication date" of the rule, which it defines as *the later of* the date on which Congress receives the agency's report related to the rule or the date the rule is published in the Federal Register, if it is published.[14] Because the CFPB did not submit to Congress a report on its indirect auto lending bulletin or publish it in the Federal Register, the 60-day clock arguably did not begin in 2013, when the CFPB issued the bulletin. Instead, the clock may have started when the GAO released its letter concluding that the CFPB bulletin is a rule under the CRA. According to *The Wall Street Journal*, the Senate Parliamentarian found that a GAO letter requested by Senator Toomey and stating that an agency issuance is a "rule" counts as the official report for purposes of the CRA. This would mean the 60-day clock started when the GAO issued its letter on December 5, 2017.[15]

Use of the CRA. Prior to the Trump administration, the CRA had been used only once to invalidate a rule. In 2001, President George W. Bush signed a CRA disapproval resolution invalidating a rule promulgated by the Occupational Safety and Health Administration during the Clinton administration that was designed to reduce repetitive motion stress injuries in the workplace.[16] To date, President Trump has signed 15 resolutions of disapproval under the CRA,[17] including, among others, those invalidating a CFPB rule that would have effectively prohibited arbitration agreements in contracts for certain consumer financial products and services,[18] an Office of Surface Mining Reclamation and Enforcement rule designed to protect water supplies from coal,[19] and a Federal Communications Commission rule that would have required broadband companies to take certain steps to protect consumer data.[20]

What Is a Rule?

The rules that have been invalidated by disapproval resolutions under the CRA thus far are rules that the respective agencies viewed as legislative rules subject to the notice-and-comment requirements of the Administrative Procedures Act ("APA"). The APA, passed in 1946, requires agencies to follow certain procedures when promulgating rules.[21] The APA exempts "interpretative rules" and "general statements of policy" from the notice-and-comment requirements, but the statute does not define these terms.[22] The distinction between legislative rules, which require notice and comment, and interpretive rules and policy statements, which do not, has been described as "enshrouded in considerable smog"[23] and perhaps the most "vexing conundrum in the field of administrative law."[24] Many refer to legislative rules requiring notice and comment as "regulations." As a general matter, such legislative rules have the force of law – they create rights, impose obligations or effect a change in existing law.[25] Interpretive rules, by contrast, which do not require notice-and-comment rulemaking, "advise the public of the agency's construction of the statutes and rules which it administers."[26]

That distinction, however, is not the subject of the GAO letter. In other words, the GAO letter does not conclude that the CFPB bulletin is a legislative rule of the kind that would be subject to notice and comment, because it imposes legal obligations. Instead, the GAO letter appears to conclude that, despite the fact that the CFPB bulletin is not the type of rule that is subject to the APA's notice-and-comment requirements, it nonetheless is a rule under the CRA and subject to the CRA's reporting requirements for rules; until such report is issued, the Congressional right to express disapproval of a rule is not triggered.

The CRA defines the term "rule" by referencing Section 551 of the APA with certain exceptions for rules of "particular applicability"; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.[27] Section 551 of the APA defines a rule broadly as "the whole or 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."[28] This definition does not distinguish between legislative rules (i.e., regulations) and interpretive rules or policy statements. Instead, interpretive rules or policy statements are types of rules that are exempted from the notice-and-comment requirements addressed in a subsequent section of the APA.[29] Because the CRA references only the definition of the term in Section 551 of the APA, under a literal reading of the CRA advocated by Senator Toomey, interpretative rules and policy statements are also considered rules for purposes of the CRA.[30]

The GAO letter acknowledges as much. Although the GAO finds that the CFPB's indirect auto lending bulletin is a rule subject to the CRA, the GAO also states that the bulletin is a non-binding document offering "clarity and guidance on the Bureau's discretionary enforcement approach."[31] Courts have held that the non-binding nature of an agency issuance is a hallmark of policy statements that are not subject to notice-and-comment rulemaking requirements.[32]

As noted above, with respect to the action taken by the GAO last year in the context of the interagency guidance on leveraged lending, the GAO's letter discussing the CFPB's bulletin on indirect auto lending is not the first time the GAO has addressed the question of whether agency guidance constitutes a rule under the CRA. In fact, the GAO has responded to requests from members of Congress to opine on the status of agency issuances by consistently noting that the scope of the definition of a rule under the CRA is broad. In a 2012 letter, the GAO explained that the "definition of a rule has been said to include 'nearly every statement an agency may make.'"[33]

Implications of Applying the CRA to Interpretive Rules and Policy Statements

Applying the CRA to interpretive rules and policy statements likely implicates most of the agency informal guidance documents issued since the passage of the CRA for which agencies neither submitted reports to Congress nor published such guidance in the Federal Register. As discussed above, the CRA requires agencies to submit reports to Congress and the GAO before rules can take effect[34] and provides that the 60-day clock for purposes of CRA disapproval resolutions begins on the "submission or publication date" of the rule, which it defines as *the later of* the date on which Congress receives the agency's report related to the rule or the date the rule is published in the Federal Register, if it is published.[35] If an agency failed to set the clock, the rule does not take effect, the argument goes.

What does it mean if informal agency guidance does not go into effect? Does it impair the ability of an agency to enforce its interpretation of a legal

requirement, particularly if the agency had no legal requirement to issue its interpretation for public consumption and the issuance purportedly only clarifies the agency's view of requirements under existing law? More fundamentally, can an agency enforce noncompliance with its informal agency guidance, which, under the CRA, never took effect?

Take, for example, Department of Housing and Urban Development ("HUD") Handbooks pertaining to the Federal Housing Administration mortgage insurance program. Could HUD (or the Department of Justice ("DOJ") under the False Claims Act) base an administrative (or court) action against a lender or servicer on the failure to follow the "requirements" in the HUD Handbooks? If not, many of HUD's prior administrative enforcement actions may have been based on a legal falsity. Similarly, what would invalidation of the CFPB's indirect auto lending guidance mean? That the CFPB is prohibited from bringing enforcement actions based on the interpretation of ECOA set forth in the guidance, which the CFPB was not required to issue? Little wonder that the CFPB argued that its indirect auto lending bulletin has no legal effect and that, "[t]aken as a whole, the CRA can logically apply only to agency documents that have legal effect."[36]

Interestingly, the CRA states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[37] A broad reading of this provision could impair efforts of regulated entities to challenge before a court an agency's rules as unenforceable, because they were not submitted to Congress or the GAO in accordance with the CRA.[38] While this suggests agencies' failure to submit interpretive guidance to Congress may not fatally undermine such guidance, it leaves open the possibility that Congress will slowly pick away at past agency guidance.

Whether or not Congress seeks to rescind agency guidance documents using the CRA, the United States Supreme Court has confirmed that agencies themselves can reverse interpretive rules and policy statements immediately without notice and comment procedures. In addition, if Congress proceeds to consider interpretive rules and policy statements to be covered by the CRA, agencies may issue less guidance and instead turn primarily to enforcement actions as an alternative forum to announce their views of regulated entities' obligations and their enforcement priorities.

Regardless of Congress' actions, we expect the CFPB under Mick Mulvaney to take a less aggressive approach to ECOA enforcement with respect to indirect auto lenders. So, do Congressional attempts to rescind informal guidance it deems objectionable really matter if the agencies themselves are not likely to enforce the rules in question? Maybe not, but remember that the DOJ, the Federal Trade Commission ("FTC") and the 50 states also have ECOA enforcement authority. While the Trump administration's DOJ and the FTC may be unlikely to pursue indirect auto lenders, regulated entities nevertheless may be subject to scrutiny from other governmental actors, as well as private plaintiffs.

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Endnotes

[1] GAO, Letter to the Hon. Patrick Toomey (Dec. 5, 2017). http://www.gao.gov/assets/690/688763.pdf.

[2] CFPB, Bulletin 2013-02 (Mar. 21, 2013). http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[3] GAO, Letter to Hon. Patrick Toomey (Oct. 19, 2017). https://www.gao.gov/assets/690/687879.pdf.

[4] GAO to Toomey: CFPB Failed to Comply with Law on Indirect Auto Lending Regulation (Dec. 5, 2017). https://www.toomey.senate.gov/?p=news&id=2066.

[5] CFPB, *supra* note 2.

[6] *Id.* at 1.

[7] GAO, *supra* note 1, at 4 (quoting CFPB letter).

[8] CFPB, *supra* note 2, at 4-5.

[9] *The Mysteries of the Congressional Review Act*, 122 Harv. L. Rev. 2162, 2166 (2009) (citing 142 Cong. Rec. 8197 (1996) (statement of Sens. Don Nickles (R-OK), Harry Reid (D-NV) and Ted Stevens (R-AK)).

[10] 5 U.S.C. § 801(a)(1) (requiring agencies to submit a report containing a copy of the rule, a concise general statement relating to the rule and the rule's proposed effective date).

[11] *Id.* § 802. If an agency submits its report fewer than 60 legislative session days before a session of Congress adjourns, the rule is treated as if it were submitted on the 15th legislative session day of the following session of Congress. *Id.* § 801(d)(2).

[12] *Id.* § 801(b).

[13] *Id.* § 802(c), (d). *See* Charles Tiefer, *How to Steal A Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & Pol. 409, 472 (2001) (stating that the CRA prevents a filibuster, because debate is limited to 10 hours).

[14] *Id.* § 802.

[15] The Wall Street Journal, Toomey's "Guidance" Repeal Guide (Oct. 27, 2017). https://www.wsj.com/articles/toomeys-guidance-repeal-guide-1509312087.

[16] Ergonomics Program, 66 Fed. Reg. 20,403-01 (Apr. 23, 2001) (removing program standard from Code of Federal Regulations).

[17] The Regulatory Studies Center at George Washington University tracks the Trump administration's use of the CRA. The Center's most recent tracker can be found here: https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/CRA%20Tracker%2011-01-2017.pdf.

[18] Arbitration Agreements, 82 Fed. Reg. 55,500-01 (Nov. 22, 2017) (removing the rule from the Code of Federal Regulations).

[19] Congressional Nullification of the Stream Protection Rule Under the Congressional Review Act, 82 Fed. Reg. 54,924 (Nov. 17, 2017) (removing the rule from the Code of Federal Regulations).

[20] Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 82 Fed. Reg. 44,118 (Sept. 21, 2017) (removing the rule from the Code of Federal Regulations).

[21] 5 U.S.C. § 553.

[22] *Id.* § 553(b)(3)(A).

[23] *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 88 (D.D.C. Mar. 15, 2016).

[24] David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 278 (2010).

[25] *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003).

[26] *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995) (internal quotations and citations omitted).

[27] 5 U.S.C. § 804(3).

[28] *Id.* § 551(4).

[29] *Id.* § 553(b)(3)(A).

[30] *See, e.g.*, Daniel Cohen & Peter Strauss, *Congressional Review of Agency Regulations*, 49 Admin. L. Rev. 95, 97 (1997) (stating that the definition of "rule" encompasses "regulatory actions, such as interpretive rules, technical amendments, grant rules, and rules that other laws exempt from 5 U.S.C. § 553.")

[31] GAO, *supra* note 1, at 4.

[32] *See Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (stating that "A properly adopted substantive rule establishes a standard of conduct which has the force of law. ... A general statement of policy, on the other hand, does not establish a 'binding norm.'").

[33] GAO letter to the Hon. Orrin Hatch and the Hon. Dave Camp (Sept. 4, 2012) (quoting *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980), and concluding that an "information memorandum" issued by the Department of Health and Human Services relating to the Temporary Assistance for Needy Families program was a rule under the CRA). https://www.gao.gov/assets/650/647778.pdf.

[34] 5 U.S.C. § 801(a)(1).

[35] *Id.* § 802.

[36] GAO, *supra* note 1, at 4 (quoting CFPB letter).

[37] 5 U.S.C. § 805.

[38] *See Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (holding that the language of Section 805 is "unequivocal" and that it precluded review of plaintiff's claim). *See also United States v. Am. Elec. Power Serv. Corp.*, 218 F. Supp. 2d 931, 949 (S.D. Ohio 2002) (stating that "the language of § 805 is plain"). One federal district court has reached the opposite conclusion in an unpublished opinion. *See United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692CMS, 2002 WL 31427523, at *6 (S.D. Ind. Oct. 24, 2002).