Our Perspectives:
Commentary on the economy & regulatory policies affecting financial companies

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Dodd-Frank Regulations and the Congressional Review Act*

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What are the chances that one or more of the over 200 rules mandated by the Dodd-Frank Act rules could be overturned by Congress through the use of the Congressional Review Act?

Passed in 1996, the Congressional Review Act establishes special procedures for Congress to review and disapprove rules issued by federal agencies. For a definitive analysis of this Act, see Congressional Review After 15 Years: Background and Considerations for Reform, which was written by our colleague, Mort Rosenberg for the Administrative Conference.

Under the Act, all "major" rules are subject to review by Congress for 60 days before they can be effective. An agency rule is a "major" rule if the Director of the Office of Information and Regulatory Affairs determines that the rule has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

More importantly, the Act establishes procedures for Congress to consider resolutions of disapproval for agency rules. These procedures provide for expedited consideration of a resolution of disapproval in the Senate. As a result, Senate votes on resolutions of disapproval are not unusual. Within

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the past two years, for example, the Senate has voted upon resolutions to overturn a "net neutrality" regulation issued by the Federal Communications Commission, and a union election regulation issued by the National Labor Relations Board. In both of those instances, the resolutions were defeated.

The Act does not, however, provide for expedited consideration of a resolution of disapproval in the House. As a consequence, since 1996, while there have been dozens of resolutions of disapproval introduced in Congress to overturn specific regulatory actions, only two such resolutions have been voted on and passed in the House. Moreover, only one rule, a 2001 "ergonomics" rule issued by OSHA, has been approved by both the House and Senate.

Additionally, only a handful of the resolutions filed since 1996 have related to banking matters. The most prominent were companion resolutions introduced in 2004 by Senator Edwards and Representative Gutierrez to overturn the OCC's state law preemption regulation, and those resolutions were never voted upon.

While the odds may be against the passage of a resolution of disapproval, the introduction of a resolution can have an impact on a rule. In his article for the Administrative Conference, Mort Rosenberg cites several instances in which the sponsors of resolutions were able to exert pressure on agencies to modify or withdraw rules even though the resolutions were never voted upon.

Thus, with more than 200 proposals and rules mandated by the Act, it is possible that one or more could be the subject of a resolution, and even if the odds are against passage of any such resolution, the introduction of a resolution could have some impact on the shape of the regulation.

Insights from Mort Rosenberg:

In addition to the potential influence of the mere introduction of a resolution, the House passage of the REINS Act (which requires that all major rules proposed by agencies must be enacted into law before they can become effective) may signal that the current House leadership is more amenable to

taking the lead on challenging agency rules, including those that result from the Dodd-Frank Act. In the past, the few positive votes against rules have been in the Senate because of the fast-track provisions in effect there. House approval of the REINS Act may open the door to more votes on resolutions filed pursuant to the Congressional Review Act.

Also, if some of the Dodd-Frank rules are "mandated" rather than discretionary, there is a provision in the Congressional Review Act that provides that such mandated rules are exempt from the Act's prohibition against ever being re-promulgated (without a new law allowing it). In such cases the agency is given a year to "try again." This may soften the draconian effect of the absolute prohibition that applies to discretionary rulemaking authority and encourage veto votes even if there is a clear threat of a presidential veto.

Finally, it should be noted that there is a special "carry over" provision in the Congressional Review Act: If a final rule is issued within 60 session days of the end of a session of the Congress, and it is not acted upon before the end of that session, it automatically carries over to the next session and the consideration period starts all over. Since 1996, the carry over period has started no later than mid-June of every session.

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