



## What Happens to Agency Guidance Now?\*

Katie Wechsler

December, 2017

Recent interpretations of the Congressional Review Act (CRA) by the Government Accountability Office (GAO) have raised questions about the status of agency guidance. This article discusses the GAO's interpretations and implications for guidance issued by federal financial services regulators.

### CRA: A Quick Review<sup>1</sup>

Enacted in 1996, the CRA requires all federal agencies to submit a report on each new rule to both chambers of Congress and to the GAO before the rule can take effect. The report must contain: (1) a copy of the rule; (2) a concise general statement relating to the rule; and (3) the rule's proposed effective date.<sup>2</sup> Additionally, the agency promulgating the rule must provide the GAO with the cost-benefit analysis of the rule, if any, and additional information regarding procedural rulemaking requirements.<sup>3</sup>

The definition of "rule" under the CRA is the same under the Administrative Procedures Act (APA): "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."<sup>4</sup> The CRA excludes three types of rules from its 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 non-agency parties.<sup>5</sup>

---

\*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

<sup>1</sup>For more on CRA, see Mort Rosenberg, *Congressional Review After 15 Years: Background and Considerations for Reform*, prepared for the Administrative Conference of the United States (July 2012).

<sup>2</sup>5 U.S.C. §801(a)(1)(A).

<sup>3</sup>5 U.S.C. §801(a)(1)(B).

<sup>4</sup>5 U.S.C. §804(3), citing 5 U.S.C. §551(4).

<sup>5</sup>5 U.S.C. §804(3). Board rules governing monetary policy also are not subject to the CRA.

The CRA provides 60 legislative days for Congress to pass a resolution of disapproval of a rule. If a joint resolution of disapproval is passed and signed by the president, the rule does not take effect, or does not continue, and it may not be reissued in substantially the same form, unless the new rule is specifically authorized by a law enacted after the date of the joint resolution of disapproval.<sup>6</sup>

The CRA has gained much attention with the change in administration. Up until 2017, CRA had only been used once to overturn an agency rule.<sup>7</sup> In contrast, in 2017, Congress used it to overturn 15 rules, including the Consumer Financial Protection Bureau's (CFPB) arbitration rule.

### **GAO Guidance: Leveraged Lending and Indirect Auto Lending**

In October, in response to an inquiry from Senator Pat Toomey (R-PA), the GAO determined that the Interagency Guidance on Leveraged Lending (Interagency Guidance), issued jointly in March 2013 by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (the Board), and the Federal Deposit Insurance Corporation (FDIC), is a rule for purposes of the CRA.<sup>8</sup> GAO opinions such as this one are rare. According to the Congressional Research Services (CRS), as of November 2016, GAO had only issued 11 such opinions.<sup>9</sup>

The OCC, Board, and FDIC (collectively, the Agencies) did not submit the Interagency Guidance to Congress or the GAO because, in their opinion, the Interagency Guidance is not a rule under the CRA. The Agencies argued that since the Guidance is a general statement of policy, explaining how the Agencies will exercise their broad enforcement discretion, it is not subject to the CRA. While the GAO agreed with the Agencies that the Interagency Guidance is a general statement of policy, GAO concluded it still is a rule under CRA. This finding is consistent with previous GAO opinions, as the Interagency Guidance is a “statement of general . . . applicability and future effect designed to implement, interpret or prescribe law or policy.”<sup>10</sup>

Less than two months later, GAO issued a similar opinion in connection with the CFPB's Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (ECOA) (CFPB Bulletin).<sup>11</sup> The CFPB argues that the CFPB Bulletin is a non-binding guidance that identifies potential risk areas and provides general suggestions for compliance with ECOA, but that has no legal effect on regulated entities. The GAO agreed that the CFPB Bulletin is not legally binding, yet, as it is a general statement of policy, it is a rule under the CRA. The GAO relies on its previous opinions, including the opinion regarding the Interagency Guidance, and relevant case law regarding the definition of a general statement of policy, including a case in which the Supreme Court described such statements as ones that “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”<sup>12</sup> The GAO found that the CFPB Bulletin provides information on the manner in which CFPB plans to exercise its discretionary

---

<sup>6</sup>5 U.S.C. §801(b).

<sup>7</sup>In 2001, *Congress overturned an Occupational Safety and Health Administration rule regarding ergonomics*.

<sup>8</sup>*B-329272*, GAO (Oct. 19, 2017).

<sup>9</sup>*In Focus: Congressional Review Act*, Congressional Research Services (Nov. 2016).

<sup>10</sup>See *supra* note 4.

<sup>11</sup>*B-329129*, GAO (Dec. 5, 2017), <https://www.gao.gov/products/B-329129>.

<sup>12</sup>*Id.* at 4–5, citing *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993).

enforcement power by expressing the agency's views that certain indirect auto lending activities may trigger liability under ECOA. Like the Interagency Guidance, the CFPB Bulletin is an agency statement of future effect designed to implement, interpret, or prescribe law or policy, and therefore is a rule under the CRA.

### **APA Too?**

It is important to differentiate between the APA and CRA. While the CRA cross-references the APA for purposes of defining a rule, the APA definition includes certain exceptions that the CRA does not include. Most notably, under the APA, an agency rule must be promulgated through a process that provides for public input (notice and comment). However, the notice and comment process does not apply to certain types of rules, including, importantly, general statements of policy.<sup>13</sup> In short, all rules subject to CRA are not necessarily subject to the APA notice and comment requirements.

Therefore, while federal agencies likely will take additional steps to ensure their guidance is compliant with CRA, these agencies do not need to follow APA notice and comment procedures for such guidance.

### **What Next?**

The key issue now is what is the effect of these GAO opinions on the specific guidance of issue and other guidance from federal financial services regulators. Are the Interagency Guidance and CFPB Bulletin not in effect since they were never submitted to Congress and the GAO? Has the clock started for Congress to pass a joint resolution of disapproval regarding these agency guidance?

According to the statutory language of the CRA, **before a rule can take effect**, it must be submitted to GAO and Congress. Since these rules were never submitted, they have no effect and the agencies cannot enforce them or rely upon them in anyway. The Agencies and CFPB have not made any public comments regarding the GAO opinions, and the guidance documents are still on the agencies' websites.<sup>14</sup> These GAO opinions clearly have implications for other agency guidance, and it is safe to assume that the agencies are examining previously issued guidance and considering their options.

These are some ways the agencies and Congress could proceed.

#### Option One: Congress Considers a Joint Resolution under the CRA

The GAO opinions clearly open the door for Congress to consider joint resolutions of disapproval on these guidance documents. However, the timing of that consideration is interesting. According to the CRA, a joint resolution of disapproval can only be introduced after a rule is submitted. Assuming the relevant agency(ies) do not submit the guidance, the question is then whether Congress can move forward with a joint resolution. According to CRS, "in the past the Senate has considered

---

<sup>13</sup>5 U.S.C. §553(b).

<sup>14</sup>Websites last checked on December 29, 2017.

the publication in the Congressional Record of the official GAO opinions. . . as the trigger date” to introduce a disapproval resolution.<sup>15</sup>

It is important to remember that if a disapproval resolution is successful, there can be no substantially similar rule issued in the future, absent explicit direction from Congress. While there are often significant issues and concerns with agency guidance, they also can be useful and provide important insights to the industry. A CRA resolution would prevent any such guidance on the same topic to be issued. That may not be the outcome the industry wants for a particular guidance.

Of course, it’s possible that either the relevant agency(ies) submit the guidance under the terms of CRA or the GAO opinion is entered into the Congressional Record, and Congress does not act on or does not pass a disapproval resolution. It’s not easy to get much passed in Congress. For example, while the CRA disapproval resolution regarding CFPB’s arbitration rule passed the House by 231–190, Vice President Pence was needed to cast the tie-breaking vote in the Senate, 51–50. Once the 60 legislative days passes, the result would be that the guidance would be in effect.

#### Option Two: Agencies Formally Withdraw Guidance

Instead of submitting the guidance to Congress and GAO, the relevant agency(ies) could withdraw the guidance. That would provide the agency(ies) an opportunity to re-issue the guidance, or some form of it, now or at a later time. For example, in Treasury’s June report on core principles of financial regulation, Treasury recommended that the Agencies re-issue the Interagency Guidance for public comment. GAO’s opinion may make the Agencies consider such an option in the near future. The relevant agency(ies) also could simply withdraw it without reissuing and/or revising it. That may be an option used at CFPB, where Acting Director Mick Mulvaney has put a hold on all agency actions and is reportedly considering possible reversals and revisions to existing CFPB rules and guidance.

The lack of the use of CRA, at least up until 2017, creates much uncertainty regarding its process and implications. This is new territory for the federal financial services agencies, Congress, and administrative law experts. If the GAO opinions are applied broadly, this is an opportunity for those impacted to examine all agency guidance and consider whether improvements or revisions are needed, whether they should be withdrawn altogether, or whether they should be submitted to Congress and GAO as is to take full effect.

*Katie Wechsler is an associate with the law firm of **Barnett Sivon & Natter, P.C.***

---

<sup>15</sup>See supra note 9.