Novel Interpretation of Once Obscure Law Targets Agency Guidance by Financial Regulators

Summary: In May, the U.S. Senate used a novel interpretation of the Congressional Review Act ("CRA") to pass a measure repealing a 2013 guidance document issued by the Consumer Financial Protection Bureau ("CFPB") regarding rules for auto lending. Although this is only one of many recent efforts by congressional Republicans and the Trump Administration to scale back the CFPB’s role, use of the CRA to strike down informal agency guidance may signal a new strategic approach to deregulation. This article analyzes this new approach and what it might mean for the future of agency guidance issued by financial regulators.

A Novel Interpretation of What Was Once an “Obscure” Law

The CRA, which was passed in 1996, gives Congress 60 legislative days—that is, days actually in session, not calendar days—to use expedited procedures to overturn newly promulgated federal agency regulations and to prevent an agency from creating substantially similar regulations thereafter. Until the beginning of the Trump Administration, the CRA had only been successfully deployed by Congress once. However, over the past year and a half, President Trump and the Republican-controlled Congress have dusted it off and have used it to overturn a slew of Obama-era rules still eligible for repeal under the rules of the CRA. Most recently, congressional Republicans used the CRA in October to block the CFPB’s rule regulating mandatory arbitration provisions in the terms and conditions underlying use of financial services products or services.

Now, Senate Republicans have successfully set forth a novel interpretation of the CRA—an interpretation that effectively enables Congress to knock down years- or even decades-old policies by regulators. In this case, the target was an informal 2013 bulletin issued by the CFPB that restricts the ways in which car dealers can markup auto loans. Senate Republicans argue that, although promulgated by the CFPB as indirect auto lending “guidance,” the policy in fact operates like, and is thus, effectively, a rule, even though the CFPB circumvented the notice-and-comment and other requirements associated with formal rulemaking. The Government Accountability Office (“GAO”)—the nonpartisan audit arm of Congress—agreed, issuing an opinion at the request of Sen. Pat Toomey (R-PA) finding that the guidance fell squarely within the definition of a rule, because even though it was non-binding, it was a general statement of policy that prescribed how the agency plans to exercise its discretionary enforcement power (in this
case, by identifying certain auto-lending activities that could trigger liability). In April, utilizing the GAO opinion as its legal basis, the Senate passed a resolution under the rules of the CRA to overturn the policy. In turn, the House passed the CRA resolution repealing the CFPB auto lending guidance on May 8 and President Trump signed the repeal resolution on May 22.

**What it Means for Agency Guidance Issued by Financial Regulators**

The Senate’s use of the CRA to repeal agency guidance provides an entirely new strategic avenue for congressional Republicans and the Trump Administration to roll back or eliminate many policies issued by financial regulators. Further, because a GAO determination effectively resets the 60-day CRA clock, guidance issued during the Obama era is not the only guidance subject to attack—theoretically, Congress could target longstanding policies. Already, there has been discussion that Congress could use this strategy to attack longstanding policies related to subprime lending, brokered deposits, and more.

Some commentators have expressed concern that use of the CRA to eliminate agency guidance could be disruptive to the safety and soundness of the financial system, especially because of the CRA’s prohibition against an agency issuing a rule that is substantially similar to an overturned rule. This means that an agency would be unable to turn to the formal rulemaking process to issue a rule that was substantially similar to a policy in any overturned agency guidance; Congress would have to pass a law that specifically authorizes the reissued or new rule. Accordingly, one possible effect of this new interpretation might be to discourage regulators from issuing overly-broad guidance. Another effect might be to incent regulators to use the formal rulemaking process, instead of issuing guidance, to promulgate any policies.

Several questions remain regarding the limits of this new interpretation of the CRA. For example, it is unclear whether even less formal agency policies, such as interagency guidance or Frequently Asked Questions publications, will be subject to attack by Congress and whether the GAO would issue similar opinions in the future. Additionally, some industry members have suggested that the vote to overturn the auto lending guidance might be a special case because its repeal had substantial backing from the powerful auto lending industry, which argued that the guidance was impermissible because the law establishing the CFPB explicitly forbids the Bureau from regulating auto dealers. However, financial regulators in the Trump Administration appear to have doubled down on the Senate’s new interpretation, with regulators from the Federal Reserve Board stating that, in many instances, agencies have used guidance to supplant, instead of supplement, the rulemaking process and that a clearer distinction between agency rules and guidance is necessary.

Although the exact contours of this novel approach to deregulation remain to be seen, it is clear that congressional Republicans and the Trump administration are willing to break new ground in order to achieve their goal of substantial financial deregulation.

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