

Why the Use of the Congressional Review Act for the CFPB Indirect Auto Lending Guidance Is Justified – Support S.J.Res. 57

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Claim: Passage of S.J.Res. 57 would set a precedent that would allow Congress to rescind other guidance documents that have been deemed a “rule” by the Government Accountability Office (GAO) under the Congressional Review Act (CRA).

Fact: S.J.Res. 57 is a narrowly tailored joint resolution to disapprove the CFPB’s 2013 auto lending guidance that attempted to change the \$1.1 trillion-dollar auto loan market. The GAO found this guidance to be a “rule” under the CRA. S.J.Res. 57 only rescinds this specific CFPB guidance – it does not affect any other law or regulation.

This legislation is necessary for several reasons:

1. The CFPB guidance bypassed a transparent and public rulemaking process and is essentially a rule masquerading as a guidance.¹
2. The guidance assumed that the CFPB may unilaterally assert jurisdiction over auto dealers by dictating the manner of dealer compensation, despite Congress’ clear determination in Section 1029(a) of the Dodd-Frank Wall Street Act to place regulatory oversight of auto retailing with the Federal Reserve Board, Federal Trade Commission, and Department of Justice.
3. The guidance was issued in a manner that did not address legitimate concerns expressed during extensive Congressional oversight, relied on flawed methodology, and did not assess the potential for increasing the cost of credit for car buyers.

Courts and the Office of Management and Budget alike have contended that guidance documents that purport to have the rule of law and that can be used as the basis for enforcement are to be treated as the functional equivalent of a rulemaking. The precedent under CRA is even clearer, given that it adopts the definition of a “rule” as defined by the Administrative Procedure Act (APA).

The CRA “intentionally adopted the broadest possible definition of the term ‘rule’ when it incorporated the APA’s [the 1946 Administrative Procedure Act] definition,” and was “meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins, and the like—which as a legal or practical matter an agency wishes to make binding on the affected public.”²

¹ In issuing the guidance, the CFPB did not reveal the methodologies it employs to determine compliance with fair lending laws; provide the public and affected stakeholders an opportunity to comment to address concerns or issues; coordinate with the federal agencies that Congress vested with exclusive federal authority over vehicle dealers; ascertain the impact of its new policies on small business; or analyze the impact of its guidance on consumers, including the potential reduction of consumer access to auto loans.

² Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?*, 51 ADMINISTRATIVE LAW REVIEW 1051–1092 (Fall 1999).

Congress using the CRA to attempt to rescind a rule that was not issued as a rule is not new. For example, in 2001, GAO decided that a “record of decision” issued by the Fish and Wildlife Service in connection with a federal irrigation project was a rule under the CRA. In 2008, the GAO ruled that a Bush administration directive regarding the Children’s Health Insurance Program was a rule under the CRA. In response, Sens. Rockefeller (D-WV) and Baucus (D-MT) introduced S.J.Res. 44, bipartisan legislation to rescind this rule which was cosponsored by 49 Senators (including 41 Democrats).

Last year, GAO decided that Interagency Guidance on Leveraged Lending, issued jointly by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation, was a rule under the CRA. The GAO’s decision was issued some four years after that guidance was released. The GAO justified its decision by stating it is “[c]lear the CRA covers general statements of policy,” and that the leveraged-lending notice should have been submitted to Congress for an opportunity to review and disapprove.

On the other hand, not all guidance documents, memorandums, etc. fall under the definition of “rule” under the CRA. In 2003, Rep. Ted Strickland (D-OH) asked GAO if a Department of Veterans Affairs (VA) memorandum regarding the VA’s marketing activity was a rule. That same year, Rep. Lane Evans (D-IL) asked the GAO if a Department of Veterans Affairs memorandum terminating the Vendee Loan Program was a rule. In both cases, GAO decided these memorandums were not “rules” under the CRA.

Claim: The CRA allows Congress to overturn rules issued within sixty days of the rule being finalized. This legislation would repeal a guidance that is 5 years old.

Fact: Soon after the CFPB auto finance guidance was issued, members of Congress and industry stakeholders raised concerns that the CFPB guidance was a rule masquerading as guidance.³ The reason the 60-day clock for CRA review by Congress did not begin in 2013 was because the CFPB failed to submit its rule/guidance to Congress. In the event of failure to submit guidance or other regulatory actions to Congress, the sixty-day clock is not the relevant measure because it would start at the point of submission. No submission means the clock does not start. The agency did not take this step because CFPB officials purposely avoided a rulemaking and chose to make a policy change via guidance.⁴ The CFPB informed GAO that “in their opinion the Bulletin [guidance] is not a rule under CRA.” However, since the agency attempted to change and regulate the indirect auto loan market via guidance, the GAO found that opinion to be invalid.

³ “Yet, the decision to make a far-reaching change in the auto finance industry through informal guidance instead of a formal rule-making with a public notice and comment period seems lacking in transparency at best.” (Letter from Rep. Spencer Bachus (R-Ala.) to CFPB Director Richard Cordray, Sept. 24, 2013.)

⁴ COMMITTEE ON FINANCIAL SERVICES., UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING 51–52 (2015).
https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf

Claim: Passage of S.J.Res. 57 would result in numerous guidance documents being nullified under the CRA.

Fact: From a procedural standpoint, repealing a rule that was issued under the guise of a guidance is much more arduous than a rule that has been properly submitted to Congress pursuant to the CRA. To illustrate the difficulty to rescind a “rule” under the CRA, below are ten separate actions that must occur for each disapproval resolution to be successful:

1. An agency must issue a guidance that is actually a rule
2. An organized constituency must be aggrieved enough to petition Congress for review of the rule/guidance;
3. A Member of Congress must formally ask the GAO for a review of the rule/guidance to determine if it is suitable for repeal under the CRA;
4. The GAO must study and find that the guidance is a rule under the definition in the CRA by finding the guidance is:
 - a. an agency statement,
 - b. of future effect,
 - c. designed to implement, interpret, or prescribe law; and is not—
 - d. of particular applicability, or
 - e. concerns agency management, or
 - f. does not affect the obligations of non-agency parties;⁵
5. The Senate parliamentarian must agree that the rule/guidance is proper for consideration under the CRA;
6. A Member must introduce a resolution of disapproval;
7. If introduced in the Senate, absent action by the relevant committee of jurisdiction, 30 Senators must sign a petition discharging the resolution of disapproval from committee; the Majority Leader must be willing to dedicate up to ten hours of floor time for debate in the Senate;
8. A majority of one House must pass the resolution of disapproval;
9. A majority of the other House must pass the resolution of disapproval; and
10. The President must sign the resolution of disapproval.

To avoid a CRA resolution, an executive branch agency need only issue guidance properly. If that is done, the CRA would not apply.

Claim: Rescinding the CFPB auto finance guidance would create regulatory uncertainty.

Fact: According to the Congressional Research Service, “If a rule is disapproved after going into effect, it is ‘treated as though [it] had never taken effect.’” Since there was no regulatory uncertainty before the guidance was issued, coupled with the fact that the CFPB was statutorily prohibited to begin with from regulating most dealers under the Dodd-Frank Act (Sec. 1029), it is highly unlikely there will be any regulatory uncertainty should it be disapproved. In 2013, the issuance of the auto finance guidance caused great uncertainty in the auto industry, precisely

⁵ 163 Cong. Rec. S7888 (2017).

because the CFPB was attempting, without notice or prior comment, to eliminate a decades-old business practice of dealers discounting auto credit for their customers. Moreover, the CFPB's guidance offered no practical compliance options, other than the elimination of customer discounts on auto credit in the showroom. In addition, the best regulatory certainty is an agency following due process and the law.

Claim: Enactment of S.J.Res. 57 would preclude the CFPB from taking future regulatory action to address anti-discrimination actions in auto lending.

Fact: Passage of S.J.Res. 57 will reinforce the importance of following Congressional intent when regulating but will not impose a blanket prohibition against regulating in this area. Indeed, experts in regulatory law have observed that, "...Congress put so much detail in the CRA about when and how an agency could try to reissue a vetoed rule that it seems bizarre for analysts to interpret [the passage of a CRA resolution of disapproval] as a blanket prohibition against regulating in an area."⁶ While the re-adoption of identical or very similar rules are stopped by CRA, the CFPB would be free to entertain reasonable alternatives.

Claim: A CRA resolution is not necessary, as the current CFPB leadership can rescind the auto finance guidance at any time.

Fact: After more than 5 years of Congress debating this issue, including a 2015 House vote of 332-96 to rescind the flawed auto finance guidance, a House-passed appropriation amendment to withhold funding for guidance enforcement, 13 bicameral, bipartisan congressional letters, and numerous questions at CFPB oversight hearings regarding the consumer impact, passage of S.J.Res. 57 will bring a final resolution on this issue, as a future CFPB director will be barred from reissuing guidance that is substantially the same.

Additionally, enactment of S.J.Res. 57 sends a powerful message to all executive branch agencies that Congress expects an open and public process when issuing rules and the laws it passes to be followed.

⁶ Adam Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the Substantially Similar Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 UNIV. OF PENNSYLVANIA FACULTY SCHOLARSHIP(2011).