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Client Alert

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Dodd-Frank Reform Via Change to the Congressional Review Act Changes in Agency Rulemaking Authority

This is the fourth in a series of articles from Hunton & Williams LLP discussing reform efforts related to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The first three articles discussed reform efforts as they relate to restructuring the Consumer Financial Protection Bureau (CFPB), which was created as a brand-new, start-up independent agency under Dodd-Frank. In keeping with the theme of Dodd-Frank reform, this article discusses the Financial CHOICE Act's (FCA) proposed changes in agency rulemaking authority via modifications to the Congressional Review Act (CRA).

It should be emphasized that the FCA does not propose a wholesale disbanding of the CFPB or repeal of Dodd-Frank; rather it proposes reforms of a number of issues in Dodd-Frank, including Congress's authority to set aside rules issued by various financial agencies through the CRA and reducing the CFPB's "legislative powers" by giving Congress direct oversight over agency-proposed regulations.

Current Structure of the CRA

The CRA, passed in 1996 as part of then-Speaker Newt Gingrich's "Contract with America," was intended to create an easier method for Congress to review and perhaps overturn agency regulations, specifically by avoiding the necessity of passing a new law and possibility of a lengthy filibuster. This was a response to wide concern about Congress's ability to control what many viewed as a rapidly growing set of administrative rules.[1] The CRA established streamlined procedures that allowed Congress to void a wide range of regulatory rules issued by federal agencies by enacting a joint resolution of disapproval.[2] The "fast-track" procedure limits the debate and amendment process and ensures that a simple majority can reach a final *yes* or *no* vote on the joint resolution of disapproval.[3] If a disapproval resolution is enacted, the regulatory rule will not take effect, and the enacting agency will not issue a substantially similar rule, without subsequent statutory authorization.[4] A rule disapproved after taking effect is "treated as though [it] had never taken effect."[5] If either the House of Representatives or the Senate rejects a disapproval resolution, the rule may immediately take effect.[6] However, if the president vetoes the resolution, the rule will not take effect for 30 days of session, unless the House or Senate vote to sustain the veto.[7]

The CRA's fast-track disapproval process has been exceptionally active as the new Trump administration and Republican-controlled Congress have been trying to undo many of the previous administration's last-

[1] Richard S. Beth, Cong. Research Serv., RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act 1-2 (2001).
[2] Subtitle E ("Congressional Review") of the Small Business Regulatory Enforcement Fairness Act of 1996, Title II of the Contract with America Advancement Act of 1996, P.L. 104-121, 101 Stat. 847 at 868-874, codified at Title 5 U.S.C. §§ 801-808. The congressional disapproval procedure is contained in § 802.
[3] *Id.*
[4] 5 U.S.C. § 801(b).
[5] 5 U.S.C. § 801(f).
[6] 5 U.S.C. §§ 801(a)(3) – (a)(5).
[7] *Id.*

minute regulatory efforts. However, the FCA, if enacted, would alter this process by withdrawing power from the agencies, and arguably the executive branch, and returning it to Congress.

The FCA's Proposed Changes

The FCA proposes changes to the CRA's disapproval process of regulations issued by certain financial agencies, such as the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC) and the CFPB.[8] Rather than certain agency rules' becoming effective in the absence of congressional action to overturn the regulations under the CRA, certain rules will not become effective unless and until Congress approves such rules.[9] By replacing a passive disapproval process with an active approval process, a significant amount of power to impose regulations will be retained by Congress rather than granted to the executive branch and the agencies. The proposed change in rulemaking authority is clearly another method of limiting the scope of the authority granted to the CFPB, the FDIC and other agencies with authority over the financial services industry.

The FCA's reform efforts begin with initially bifurcating proposed regulations issued by financial agencies into two types: major rules and nonmajor rules. Major rules are defined as those that will result in (a) an annual cost on the economy of $100 million or more, (b) a major increase in costs or prices for consumers; individual industries; federal, state or local government agencies; or geographic regions or (c) significant adverse effects on competition, employment, investment, productivity, innovation or the ability of US-based enterprises to compete with foreign-based enterprises in domestic or export markets.[10] Nonmajor rules are any rules that do not fit within the scope of a major rule.[11]

Under the reform, major rules will not become effective unless a resolution to approve the rule is passed by both the House of Representatives and the Senate by a simple majority vote.[12] The joint resolution approving the rule must be passed within 70 session or legislative days of its submission.[13] However, the FCA would allow a major financial rule to take effect for a 90-calendar-day period without congressional approval, if the president determines by executive order that the major rule is necessary because of an imminent threat to health or safety, enforcement of criminal laws or national security, or to aid an international trade agreement.[14] Otherwise, the president's exercise of authority has no effect on the proposed procedures.[15] The process currently in place will still apply to nonmajor rules.[16] Nonmajor regulations will automatically go into effect unless both the House and Senate pass a resolution nullifying the rule.[17]

What does this mean for the financial sector?

Federal rulemaking is one of the key tools that federal financial agencies use to implement public policy. Despite its expedited disapproval process, prior to 2017 Congress has only used the CRA to overturn one

[8] The FCA's proposed changes in rulemaking authority would also affect other federal banking agencies such as the Office of the Comptroller of the Currency (OCC) , the National Credit Union Association, the Office of Thrift Services, the Commodity Futures Trading Commission (CFTC), the Securities Exchange Commission (SEC), and the Federal Housing Finance Agency (FHFA).
[9] Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 332 (2017).
[10] 5 U.S.C. § 804(2).
[11] *Id.*
[12] Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 332 (2017).
[13] *Id.*
[14] *Id.* at § 331 (c)(2).
[15] *Id.* at § 331 (c)(3).
[16] *Id.* at § 332.
[17] *Id.* at §333.

agency rule in the past 20 years.[18] Because a president is likely to exercise his veto power to strike down a joint resolution disapproving a rule proposed by his own administration or concordant independent agency, it has been argued that the CRA's disapproval process tilts power away from Congress and toward the executive branch.[19]

Supporters of this change argue that amending the CRA would correct the balance of power in rulemaking to favor Congress as the lawmaking branch. In contrast, opponents of the proposed changes have voiced concern that agencies will find it difficult or impossible to issue needed rules and might significantly increase Congress's workload. Overall, if enacted, the FCA would reduce financial regulators' independence and increase their accountability to Congress. Congress will have substantially more influence over agency action, especially when Congress and the White House are controlled by different political parties. Nevertheless, even when both branches are the same party or at least cooperating, the proposed reform could make it increasingly difficult for major rules to become effective, particularly due to constraints on Senate floor time.

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[18] US Congress, House Committee on the Judiciary, *Regulations from the Executive in Need of Scrutiny Act of 2015*, report to accompany H.R. 427, 114th Cong., 1st sess., H.Rept. 114-214, Part 1 (Washington: GPO, 2015), p. 8.

[19] *See* CRS Report RS22188, *Regular Vetoes and Pocket Vetoes: In Brief,* by Meghan M. Stuessy.