

Client Alert

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Senate Passes Joint Resolution Disapproving CFPB Indirect Auto Lending Guidance

On Wednesday, April 18, 2018, the Senate passed S.J. Res. 57, a joint resolution disapproving Consumer Financial Protection Bureau (“CFPB”) Bulletin 2013-02 (the “Bulletin”) on indirect auto lending and compliance with the Equal Credit Opportunity Act (“ECOA”).¹ The resolution, which was approved by a 51-47 vote, was introduced by Senator Jerry Moran, R-Kan., on March 26, 2018 in response to a December 2017 determination by the Government Accountability Office (“GAO”) that the Bulletin is a “rule” that should have been reported to Congress and subject to review under the Congressional Review Act (“CRA”).²

The CRA requires all federal agencies, including independent regulatory agencies, to report to the GAO and Congress on new rules before they can become effective.³ A “rule” is broadly defined as “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.”⁴ Congress has 60 legislative session days from receipt of a rule to introduce a joint resolution of disapproval that, if passed by both houses and signed by the President (or passed by a two-thirds majority in both houses to overcome a presidential veto), overturns the rule.⁵ In the past, when the GAO has determined that an agency pronouncement satisfies the CRA definition of a rule, “the Senate has considered the publication in the Congressional Record of the official GAO opinions . . . as the trigger date for the initiation period to submit a disapproval resolution and for the action period during which such a resolution qualifies for expedited consideration in the Senate.”⁶ Thus, there is an argument (though arguably a tenuous one) that the GAO determination on December 5, 2017 effectively restarted the congressional review clock.

A number of trade associations, including the American Bankers Association, had written to Senate majority and minority leaders Mitch McConnell, R-Ky., and Charles Schumer, D-Ny., to express support for S.J. Res. 57, arguing that, while the Bulletin was to provide lenders with fair lending compliance “guidance,” it was, in practice, “applied as far more than guidance, asserting with regulatory effect, highly controversial legal theories and methodologies to allege that banks and finance companies that purchase motor vehicle installment sales contracts may be liable under the [ECOA] for purported, but

¹ S.J. Res. 57, 115th Cong. (2018), available at <https://www.congress.gov/115/bills/sjres57/BILLS-115sjres57es.pdf>.

² *Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, GOV'T ACCOUNTABILITY OFFICE, B-329129 (Dec. 5, 2017), available at <https://www.gao.gov/products/B-329129>.

³ 5 U.S.C. § 553.

⁴ 5 U.S.C. § 804(3), citing 5 U.S.C. § 551(4).

⁵ 5 U.S.C. § 802(a).

⁶ Mauve P. Carey, Alissa M. Dolan & Christopher M Davis, CONG. RESEARCH SERV., R43992, *The Congressional Review Act: Frequently Asked Questions* 12 (2016), available at <https://fas.org/sqp/crs/misc/R43992.pdf>.

undemonstrated racial disparities in the interest rates that the automobile dealers charged consumers.”⁷ The joint resolution must now be considered by the House, which is expected to pass it quickly, and signed by President Trump.

As we recently wrote, this Congress has exhibited an enthusiastic willingness to wield the power provided by the CRA—*i.e.*, to use the CRA to override agency rules.⁸ Although the CRA was signed into law over two decades ago, 15 of the 16 resolutions of disapproval that have been enacted since 1996 were enacted in 2017 (the sixteenth occurred in 2001).⁹ The most recent was also the first to overturn a rule submitted by a federal bank regulatory agency—on November 1, 2017, President Trump signed a joint resolution passed by Congress invalidating the CFPB’s final rule regarding arbitration agreements in contracts for certain consumer financial products and services (commonly known as the “Arbitration Rule”), which had been issued by the CFPB on July 19, 2017.¹⁰

Just as Congress has been willing to use the CRA to overturn agency guidance, so too has the GAO been willing to issue determinations that agency guidance should have been reported and reviewed under the CRA. On October 19, 2017, about seven weeks before its decision on the Bulletin, the GAO issued a determination, in response to a request by Senator Pat Toomey, R-Pa., that the *Interagency Guidance on Leveraged Lending* was also a rule subject to review under the CRA. The leveraged lending guidance was issued jointly in March 2013 by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, and has had a significant impact on the banking industry. Given the success of S.J. Res. 57, it seems likely that a joint resolution disapproving the leveraged lending guidance could be on the horizon (though time may have already run out here). Also up in the air is the fate of the CFPB’s rule on *Payday, Vehicle Title, and Certain High Cost Installment Loans*, which, on December 1, 2017, a month after the Arbitration Rule’s demise, a bipartisan group of lawmakers introduced a joint resolution to override.¹¹ In any event, it is clear that the CRA has become Congress’s weapon of choice to overturn agency guidance with which it disagrees.

For a more detailed discussion of the CRA and the recent GAO determinations thereunder, which we argue bring into question the validity of banking agencies’ approach to “guidance” and are likely to have a chilling effect on the issuance of new guidance, please refer to our article—“*If It Walks Like A Duck . . .*”: *The Demise Of The Guidance Masquerade*—available [here](#).

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⁷ Letter from James C. Ballentine (American Bankers Association) to Mitch McConnell and Charles Schumer (April 17, 2018), available at <https://www.aba.com/Advocacy/LetterstoCongress/Documents/senate-supporting-sjres-57.pdf>.

⁸ Peter Weinstock & Marysia Laskowski, “*If It Walks Like A Duck . . .*”: *The Demise Of The Guidance Masquerade*, 135 THE BANKING LAW JOURNAL 215, 220 (April 2018), available at <https://www.hunton.com/images/content/3/6/v2/36602/if-it-walks-like-a-duck-the-demise-of-the-guidance-masquerade.pdf>.

⁹ Congressional Review Act FAQs, U.S. GOV’T ACCOUNTABILITY OFFICE, <https://www.gao.gov/legal/congressional-review-act/faq>.

¹⁰ H.J. Res. 111, 115th Cong. (2017).

¹¹ H.J. Res. 122, 115th Cong. (2017).