ALERT MEMORANDUM

GAO Determines Interagency Leveraged Lending Guidance is a Rule, Subject to CRA Review

October 23, 2017

On October 19, 2017, the U.S. Government Accountability Office (the "GAO") issued a relatively rare legal determination concluding that the federal banking agencies' 2013 "Interagency Guidance on Leveraged Lending" (the "Interagency Guidance") is a rule subject to the Congressional Review Act (the "CRA").[1] The GAO's conclusion that the Interagency Guidance is a rule subject to the CRA potentially could open the door for Congress, with the President's approval, to disapprove and invalidate the Interagency Guidance.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

Michael H. Krimminger
+1 202 974 1720
mkrimminger@cgsh.com

Patrick A. Fuller
+1 202 974 1534
pfuller@cgsh.com

Brian Kesten
+1 202 974 1595
bkesten@cgsh.com

The GAO's finding that the Interagency Guidance is a "rule" subject to the CRA could have much broader consequences given the significantly greater use of the CRA to challenge agency rules during the early months of the Trump Administration. Most importantly, since the agencies have not previously considered supervisory guidance to be subject to the CRA, they have rarely submitted such guidance for Congressional review. Given the GAO's broad reading of the applicability of the CRA, the ruling could greatly expand the scope of supervisory guidance that could be challenged.

[1] Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending, B-329272 (GAO, Oct. 19, 2017) (the "Leveraged Lending Opinion"). The Leveraged Lending Opinion is the eighth GAO opinion since 1996 to find that the reviewed action was a "rule" under the CRA.

The Interagency Guidance on Leveraged Lending

The Interagency Guidance was jointly issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (collectively, the "Agencies") on March 22, 2013.[2]

The Interagency Guidance replaced previously issued joint guidance from April of 2001 to guide banks and examiners in their treatment of leveraged lending activities.[3] Leveraged lending typically involves significant loan balances relative to the size of the borrower's cash flow and may fund a variety of activities, including mergers and acquisitions, buyouts, recapitalizations and other generally one-time transactions. As a result, regulators tend to view these loans as more risky and therefore warranting closer supervision.

The Interagency Guidance identified several metrics for analyzing leveraged transactions. In practice, the Agencies have been criticized for rigidly applying these leveraged lending metrics as bright line tests to be enforced through the supervisory process. As applied, the Interagency Guidance imposed significant implementation burdens through supervisory initiatives requiring banks to thoroughly revise policies for risk management, underwriting, stress testing and reporting.

The Agencies solicited and considered public comments in developing the Interagency Guidance, but did not consider the Interagency Guidance to be a "rule" for purposes of the CRA. As a result, the Agencies did not submit a rule report to Congress as required under the CRA.

Senator Pat Toomey (R-Pa.) requested the GAO to evaluate the applicability of the CRA to the Interagency Guidance on March 31, 2017.

The Congressional Review Act

Enacted in 1996, the CRA requires agencies—including independent regulatory agencies—to submit a report on each new "rule" to both houses of Congress and the Comptroller General of the GAO before the rule can take effect. Upon receipt of the report, Congress generally has 60 calendar days, while Congress is in session, to issue a joint resolution opposing the rule.

If a CRA joint resolution is adopted disapproving a final rule that is timely submitted to Congress, and the President signs the resolution, the rule would simply not take effect.[4] If Congress does not act, the rule will take effect as scheduled.

The CRA provides that a rule must be submitted to Congress "[b]efore [the] rule can take effect."[5] Thus, if an agency fails to submit a rule to Congress that is subject to the CRA, the CRA provides that the rule would not become effective until after submission and an opportunity for Congress to consider enacting a joint resolution. As a result, if an agency action is later determined to be a "rule" under the CRA but was never submitted for Congressional review, Congress would then have an opportunity to adopt a resolution opposing the rule. In this case, a CRA joint resolution would terminate the effect of the rule, and critically, the rule "shall be treated as though such rule had never taken effect."[6] Given that the regulatory agencies did not previously consider "guidance" to be subject to the CRA, the GAO opinion and related analysis potentially could have far-reaching effects on many areas involving agency supervisory standards.

[2] Interagency Guidance on Leveraged Lending, 78 Fed. Reg. 17766, 17775 (Mar. 22, 2013).
[3] *Id*.
[4] 5 U.S.C. § 801(b)(1).
[5] 5 U.S.C. § 801(a)(1)(A).
[6] 5 U.S.C. § 801(f).

From its enactment in 1996 until 2016, the CRA was only successfully invoked once, in 2000, to overturn an agency regulation.[7] However, the CRA has gained prominence since the inauguration of the Trump Administration, as Congress has invoked the CRA to overturn 14 rules originally promulgated under the Obama Administration.

What is Considered a "Rule" Under the CRA?

The CRA defines a "rule" by cross-reference to the definition in the Administrative Procedures Act (the "APA") as, in relevant part, "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."[8]

The CRA definition notably adopts the broadest definition of "rule" found in the APA. The APA specifically defines only a subset of such "rules" as requiring notice and comment rulemaking, explicitly excluding "interpretive rules, general statements of policy [and] rules of agency organization, procedure, or practice" from the requirements of the notice and comment process.[9] As a result, the CRA definition of "rule" encompasses many agency actions that are not subject to the notice and comment process.

As a result, the GAO has repeatedly taken the view, relying on the legislative history of the CRA, that the CRA applies broadly to interpretive rules, guideline documents, procedure manuals and general statements of policy, in addition to traditional notice and comment rulemaking.[10]

In its opinion on the Interagency Guidance, the GAO referenced two prior GAO opinions expressing the view that general statements of policy are rules under the CRA and potentially subject to a joint resolution within the requisite time period.[11] In those opinions, and in its Leveraged Lending Opinion, the GAO noted that rules subject to the CRA include "three key components: (1) an agency statement, (2) of future effect, and (3) designed to implement, interpret, or prescribe law or policy." This reasonably could be interpreted to include many forms of guidance provided by the banking, and other, agencies.

In determining that the Interagency Guidance is a rule under the CRA, the GAO favorably cited the Supreme Court's description of "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[12] Given this broad definition, the GAO reiterated its view, in the context of its opinion on the Interagency Guidance, that forward-looking statements of policy can be considered rules under the CRA, and potentially subject to Congressional disapproval.

If the Interagency Guidance is a Rule, What Comes Next?

In prior circumstances when the GAO has opined that a currently effective agency action, such as the Interagency Guidance, is a rule subject to the CRA,

[7] *See* CONGRESSIONAL RESEARCH SERVICE, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS (Nov. 17, 2016) (the "CRS CRA FAQ") at 5.
[8] 5 U.S.C. § 801(a)(1)(A)-(B), from 5 U.S.C. § 551. The CRA definition of "rule" excludes (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. 5 U.S.C. § 804(3).
[9] 5 U.S.C. § 553(b)(3)(A).
[10] The Leveraged Lending Opinion at 4-5.
[11] *See, e.g.*, Opinion on Whether Trinity River Record of Decision is a Rule, B-287557 (GAO, May 14, 2001); Applicability of the Congressional Review Act to Letter on State Children's Health Insurance Program, B-316048, (GAO, Apr. 17, 2008).
[12] *See* CRS CRA FAQ 4, n. 19 (citing *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993), citing *Chrysler Corporation v. Brown*, 441 U.S. 281, 302 (1979) (quoting U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act at 30 n.3 (1947))).

members of Congress have sometimes submitted a CRA joint resolution without waiting for the agency to submit a report to Congress related to the rule.[13] As a matter of practice in the Senate, the chamber has viewed the publication of the official GAO opinion in the *Congressional Record* as the trigger date starting the 60-day period for passing a joint resolution.[14]

The GAO's Leveraged Lending Opinion casts a shadow of uncertainty over the applicability and future viability of the Agencies' leveraged loan supervision regime, and critically, other agency actions that could be characterized as "rules" subject to Congressional disapproval. In fact, if Congress seeks to address other agency "rules" that were never submitted to Congress under the CRA, the total volume of agency interpretations and statements of policy that could potentially become subject to Congressional disapproval would be very large indeed. The prospect that the CRA could be applied to invalidate supervisory guidance and other policy statements also raises important questions about the practical impact of invalidating agency statements that were not, unlike regulations subject to notice and comment under the APA, expressly designed to have the force of law.

Although Congress has successfully invoked the CRA in the early months of the Trump Administration, it is unclear how Congress will navigate the uncharted legal and policy consequences of overturning an agency action, such as the Interagency Guidance, that has been in effect for several years. The consequences could be significant and may limit the interest in pursuing the broadest possible effort to reopen existing guidance. However, the GAO analysis does not have natural limitations given the breadth of its interpretation.

Given that Congress has only successfully used the CRA once prior to this year, it is not surprising that many interpretative issues remain. For example, the CRA does not define who may determine whether a particular agency action is a "rule". Normally, such questions would be resolved by the courts. However, the CRA includes a broad prohibition of judicial review, which specifies that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[15] Does this effectively make Congress the arbiter of which provisions are subject to the CRA?

The application of the CRA's judicial review provision itself has been questioned. The Congressional Research Service notes that two federal appeals courts and multiple district courts have considered this provision and determined that the CRA contains an absolute prohibition on any judicial review.[16] On the other hand, one district court ruled that it could review an agency's claim that the CRA did not apply because the statute only barred judicial review of Congress' own determinations under the CRA. While this district court analysis has itself been questioned, it illustrates the uncertain law governing the CRA.[17]

Although it is unclear whether any joint resolution regarding the Interagency Guidance will be proposed, Senator Pat Toomey released the following statement regarding the GAO's opinion: "This is an important reminder that agencies have a responsibility to live up to their obligations under the Congressional Review Act. When they don't, Congress should hold them accountable. I will explore steps to do so."

…

CLEARY GOTTLIEB

[13] *See, e.g.*, CRS CRA FAQ at 12.
[14] *Id*.
[15] 5 U.S.C. § 805.
[16] *See, e.g.*, CRS CRA FAQ at 18.
[17] *See United States v. Southern Indiana Gas & Electric Company*, 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. 2002).