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Congressional Review Act: OMB Memo Would Make SEC, CFTC and Other Independent Agency's "Major Rule" Analyses Subject to Executive Branch Review

The Congressional Review Act (the "CRA") is an oversight tool that Congress may use to overturn a rule issued by a federal department or an agency, including rules issued by independent regulatory agencies, such as the SEC and CFTC. On April 11, 2019, the Office of Management and Budget ("OMB") issued a [memorandum](#) to the heads of all federal departments and agencies titled, "Guidance on Compliance with the [CRA]." The OMB memorandum's key assertions were as follows:

- Instead of an independent agency (each, an "Independent Agency") determining on its own whether a forthcoming rule is a "major rule" under the CRA criteria,¹ that determination must be coordinated with the Office of Information and Regulatory Affairs ("OIRA"), an office within OMB, "irrespective of whether a rule would otherwise be submitted [to OIRA] for regulatory review."
- If an Independent Agency believes one of its forthcoming rules is a major rule, or if OIRA has not previously designated the rule as non-major, the Independent Agency should submit the rule to OIRA at least 30 days prior to publication of the rule in the *Federal Register*. The Independent Agency also should include its "analysis with each rule sufficient to allow OIRA to determine whether the rule is major under the CRA criteria."
- If the Independent Agency's analysis is unsatisfactory to OIRA, then OIRA may defer publication of the rule until the Independent Agency's analysis is satisfactory, as determined by OIRA.

This Alert describes the OMB memorandum and its potential ramifications with respect to future SEC and CFTC rulemakings. Arguably, centralizing all Independent Agency "major rule" determinations would permit OIRA and, therefore, the Executive Branch, to affect the rules that an Independent Agency proposes to adopt. However, for the reasons explained in this Alert, we believe that the OMB memorandum is unlikely to have a material effect on the SEC and CFTC's rulemaking.

Background – The Congressional Review Act and Executive Order No. 12,866

Congressional Review Act. The CRA, enacted in 1996, provides Congress with authority to terminate rules promulgated by federal departments and federal agencies. Under the CRA, each "agency" must submit its "rules"² to Congress. Specifically, the CRA mandates that each agency submit to both houses of Congress and the Government Accounting Office ("GAO"), before a rule can become effective, a report containing (i) a copy of the rule, (ii) a brief general statement describing the rule, including whether it is a major rule and (iii) the proposed effective date of the rule. In

¹ Under the CRA, a "major rule" is one that OIRA determines "has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 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 on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets."

² The CRA relies on the definition of "agency" in the Administrative Procedure Act ("APA"). The CRA's definition of rules also closely tracks its APA counterpart to include notice-and-comment rules, as well as a wide range of regulatory actions, including guidance documents, general statements of policy and interpretive rules.

addition, on the date of the submission of this report, an agency must submit to the GAO a complete copy of the cost-benefit analysis of the rule, if any.

A non-major rule becomes effective as otherwise provided by law, following its submission to Congress. A major rule becomes effective 60 *legislative* (or *session*) days after Congress receives the rule report, or the rule is published in the *Federal Register*, whichever is later, *provided* that Congress does not pass a joint resolution of disapproval. If a joint resolution of disapproval is passed, the resolution must either be signed by the President or passed over the President's veto by two thirds of both Houses of Congress, both of which have the effect of terminating the rule.

Prior to 2017, Congress successfully relied on the CRA to terminate an agency's rule on only one occasion. During the first four months of 2017, fourteen joint resolutions were passed by Congress to invalidate various agencies' rules that had been issued by the Obama Administration.

While the CRA provides that OIRA is responsible for determining whether a rule is a major rule, the CRA does not require the Independent Agencies to submit their underlying analyses to OIRA. Moreover, as described below, the Independent Agencies are not required to submit their rules to OIRA for review under Executive Order 12,866. Nevertheless, OIRA is charged with making major/non-major determinations with respect to Independent Agencies rules. Therefore, according to the Congressional Research Service, "it is not clear whether and how rules issued by the [Independent Agencies] should be designated as major under the CRA."³

Executive Order No. 12,866. President Clinton issued Executive Order ("E.O.") 12,866 in 1993 to provide for a centralized review of regulations. E.O. 12,866 provides that "significant regulatory actions" must be submitted for review to OIRA. Generally speaking, the definition of a "significant regulatory action" is the same as the definition of "major rule" in the CRA. E.O. 12,866 sets forth the framework by which agencies promulgate regulations, including assessing both the costs and the benefits of the intended regulation and, "recognizing that some costs and benefits are difficult to quantify, propos[ing] or adopt[ing] a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

The centralized review of regulations contemplated by E.O. 12,866 and overseen by OIRA, does *not* apply to Independent Agencies. Indeed, in November 2016, the Congressional Research Service wrote:

Most notably for rulemaking purposes, the independent regulatory agencies do not submit their regulations to the [OMB] for review, unlike executive agencies such as Cabinet departments. Therefore, the independent regulatory agencies' regulations are considered to be more removed from presidential control than executive agencies', because the President – through OMB – does not have a direct influence over the content of their rules.⁴

³ *Id.* at 3. Accord Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 21 (Feb. 28, 2017) available at <https://fas.org/sgp/crs/misc/R43391.pdf> ("Notably, however, the requirement for OIRA review does not apply to the independent regulatory agencies – Presidents have chosen to respect the independence of those agencies while imposing requirements on the executive agencies. This independence from presidential review of rulemaking is considered to be one of the hallmarks of agency independence. The independent regulatory agencies, as a group, are exempted from OIRA review under the terms of E.O. 12866 (as they were under [President Reagan's] E.O. 12291).")

⁴ See OMB memorandum n.16 citing "Joint Statement for the Record by Senators Nickles, Reid, and Stevens," 142 Cong. Rec. S3683 (Apr. 18, 1996)." The CRA was signed by President Clinton on March 29, 1996. The three senators were, respectively, the sponsor of the senate bill, the prime cosponsor of that bill and the chairman of the Committee on Governmental Affairs. Their joint statement was offered as the legislative history of the CRA in view of the fact that no other expression of its legislative history exists "to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms."

The OMB Memorandum

There is no doubt that the CRA applies both to executive agencies and Independent Agencies. Where the OMB memorandum appears to break new ground is its assertion that the CRA requires an Independent Agency to coordinate with OIRA regarding whether an Independent Agency's forthcoming rule is a major rule, instead of the Independent Agency making that determination on its own.

The sole authority for the OMB memorandum's expanded view of OIRA's authority with respect to the Independent Agency rulemaking is a footnote citing a "Joint Statement for the Record" made by three senators nearly three weeks *after* President Clinton signed the CRA into law.⁵ In view of the historical removal of the Independent Agencies' regulations from presidential (and, therefore, OMB) control, OMB's assertion of authority to require a centralized review of the rulemaking of the Independent Agencies is questionable.⁶ Thus, in an April 23, 2019 editorial describing the OMB memorandum, former OIRA Administrator Cass R. Sunstein described the "authority" question unaddressed by the OMB memorandum as "the Trump administration sidestepp[ing] the big questions."⁷

The OMB memorandum also includes the following salient points:

1. The CRA applies to more than just APA notice-and-comment rules. According to the OMB memorandum, the law "encompasses a wide range of other regulatory actions, including, *inter alia*, guidance documents, general statements of policy and interpretive rules."
2. The OMB memorandum makes it clear that the "major increase" and "significant adverse effects" prongs within the definition of "major rule" must be analyzed, even if the rule does not satisfy the \$100 million prong.
3. The OMB memorandum indicates that a number of regulatory actions currently are not submitted to OIRA and, therefore, OIRA is creating a "systematic process" to ensure appropriate review, as follows:
 - a. Agencies "should" notify OIRA of upcoming rules, including a summary of the rule and the agency's determination of whether the rule is a major rule.
 - b. For rules that an agency determines are not major, within ten days of notification, OIRA may inform the agency that OIRA agrees with the agency and may designate such rules as not major. Otherwise, such rules become subject to OIRA's process for dealing with major rules.
 - c. For rules that an agency considers to be major, the agency "should" submit the rule to OIRA at least 30 days before the rule is published in the *Federal Register*.

⁵ See OMB memorandum n.16 citing "Joint Statement for the Record by Senators Nickles, Reid, and Stevens," 142 Cong. Rec. S3683 (Apr. 18, 1996)." The CRA was signed by President Clinton on March 29, 1996. The three senators were, respectively, the sponsor of the senate bill, the prime cosponsor of that bill and the chairman of the Committee on Governmental Affairs. Their joint statement was offered as the legislative history of the CRA in view of the fact that no other expression of its legislative history exists "to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms."

⁶ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2308-09 (2001); Congressional Research Service, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues* 12-15 (Sept. 12, 2012) available at <https://fas.org/sgp/crs/misc/R42720.pdf>.

⁷ Cass R. Sunstein, *Trump White House Seeks New Power Over Agencies*, Bloomberg Opinion (April 23, 2019).

- d. An agency “should” include an analysis with each rule that will allow OIRA to make a determination of whether the rule is major under the CRA. OIRA’s determination may be delayed if the agency fails to submit sufficient analysis, and OIRA may request additional information.
- e. OIRA will review each rule and the agency’s analysis and inform the agency of OIRA’s designation of the rule as major or non-major. Agencies should not publish a rule, whether major or non-major, in the *Federal Register* or on their websites before OIRA has made the major/non-major determination.
- f. Agencies may send the CRA report to Congress after OIRA’s designation and may then publish the rule in the *Federal Register*. If OIRA designates a rule as major, agencies “should” delay the effective date by 60 days from the later date that the rule is submitted to Congress or published in the *Federal Register*.
- g. The OMB memorandum concludes with several “regulatory analysis principles” that OIRA expects agencies to follow in analyzing whether a rule is a major rule within the meaning of the CRA. The memorandum directs agencies to follow OMB guidance that specifies the scope of the analysis, cost/benefit analysis, assessment of potential impacts, ancillary or indirect effects of the rule and the expected probabilities of the rule’s consequences.

Observations

The intent of the OMB memorandum seems clear – (i) to create within the Executive Branch a centralized system for tracking rules (broadly defined to include “guidance documents”) from all federal departments and agencies, including Independent Agencies and (ii) to clarify how OMB expects the departments and agencies to perform their analyses under the CRA (primarily relating to the determination of whether a rule is a “major rule”).

The main question is whether and how the memorandum will affect SEC and CFTC rulemaking, agency guidance documents, general statements of policy and interpretive rules.

We believe that the OMB memorandum is unlikely to result in material changes to SEC and CFTC rulemaking activities. There is, of course, the question of whether OMB has authority to require an Independent Agency to coordinate with OIRA regarding whether an Independent Agency’s forthcoming rule is a major rule, instead of the Independent Agency making that determination on its own.

The SEC already “has a statutory obligation to determine as best it can the economic implications of” its rules.⁸ In fact, when a federal court has found that the SEC’s rulemaking has not adequately assessed the economic effects of a new SEC rule, the rule has been vacated.⁹ Section 15(a) of the Commodity Exchange Act similarly requires the CFTC to consider costs and benefits before issuing regulations.

We also note that both agencies have taken efforts to observe the requirements of the CRA. For example, the GAO released a [report](#) in December 2013 titled, “Dodd-Frank Regulations: Agencies Conducted Regulatory Analyses and Coordinated but Could Benefit from Additional Guidance on Major Rules.” The report states that the SEC and CFTC had generally complied with the CRA (and OMB guidance at that time). However, as indicated by the report’s title, GAO concluded that regulators’ practices may vary – for example, some federal financial regulators submit rules to OMB only if they deem them to be major, while some of such regulators submit all rules to OMB.

⁸ *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citing, *inter alia*, section 2(c) of the 1940 Act requiring the SEC, in its rulemaking, to consider “in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”).

⁹ *See id.*; *Chamber of Commerce v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005).

The GAO report also notes that Independent Agencies, like the SEC and CFTC, are not subject to E.O. 12,866. A footnote in the GAO report notes that federal financial regulators informed GAO that they follow “the spirit” of OMB guidance as a best practice (and, presumably, the mandates set forth in E.O. 12,866, as well).

More recently, there are numerous instances of CRA-mandated communications from the SEC and CFTC to both the House and the Senate. For example, the SEC submitted a letter to the House Financial Services Committee in 2017 transmitting “the Commission's Major final rule – Amendment to Securities Transaction Settlement Cycle,” pursuant to provisions of the CRA. Further, the SEC submitted a report to the Senate Banking Committee in 2018, entitled “Commission Statement and Guidance on Public Company Cybersecurity Disclosures,” thus reflecting the broader definition of “rule” used in the CRA.

In brief, while the OMB memorandum raises a significant jurisdictional issue, our research suggests that both agencies have been diligent in notifying the House, Senate and GAO of their forthcoming rules, following the requirements set forth in the CRA. It is possible the OMB memorandum may draw more attention to rulemakings (including heightened congressional scrutiny), but this would have only marginal impacts. It is also possible that the SEC and the CFTC may fine-tune their current CRA analyses in light of the OMB memorandum, but it does not appear the memorandum will require a major overhaul by either agency.

Even were we to conclude that the memorandum could have greater consequences, it is unclear whether or how its provisions could be enforced. As noted above, the OMB memorandum itself uses flexible terms instead of mandates – for example, by stating that agencies “should” take some action, as opposed to stating that agencies “shall” be required to act in certain ways. Additionally, the CRA does not provide OMB or OIRA with any enforcement powers.

Nonetheless, the biggest takeaway is that the CRA has become a greater factor for all federal agencies, including the SEC and the CFTC. Given the number of regulations that have been invalidated by legislative action under the CRA, both the SEC and CFTC must remain mindful of potential congressional action relating to any rule, guidance document, general statements of policy and interpretive rules.

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