



Center for Responsible Lending

Congressional Review Act Effort to Nullify Auto Lending Guidance Is Unprecedented, Dangerous

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Overview

Congressional Review Act (CRA) H.J. Res. 132/S.J. Res. 57 seeks to nullify the Consumer Financial Protection Bureau's 2013 guidance addressing indirect auto lending. This guidance describes auto lenders' responsibility, established by the Equal Credit Opportunity Act, to avoid discriminatory lending practices. Lending discrimination in the auto market, substantiated by data time and again, has long been prevalent.

The Congressional Review Act (CRA) was not intended to overturn longstanding agency actions.

The Congressional Review Act was intended, and has only been used, to overturn recent agency actions taken within the last 60 legislative days. But in 2017, Senator Toomey asked the Government Accountability Office (GAO) for an opinion as to whether the longstanding CFPB auto lending guidance was a rule under the CRA's broad definition of "rule"; the GAO responded that it was; and the opinion was determined to have started the 60-legislative-day clock during which a CRA could nullify the agency action—even though the guidance is over five years old.¹

The CRA has never been used to undo guidance, and doing so sets a dangerous precedent.

Until 2017, the CRA had been used to overturn an agency rule only once, in 2000. Last year, it was used to overturn 14 agency rules. No CRA has never been used to challenge agency guidance. Doing so sets a dangerous precedent, putting thousands of guidances, across many federal agencies dating back to 1996, at risk. Senator Toomey (R-Pa.) recently described the auto lending CRA as follows: "It's a hugely important precedent . . . It's potentially a big, big opening."² This approach is already being used in other contexts: In November, Senator Murkowski (R-Alaska) requested and received a GAO opinion stating that a plan from the Bureau of Land Management issued in 2016 is a "rule" under the CRA.

Overriding guidance through the CRA is a radical component of a broader effort to deregulate.

Senate Majority Leader Mitch McConnell (R-Ky.) recently described the auto lending CRA as part of a broader deregulation effort, stating: "Our whole economy is getting a tune-up. And now it's time for the front end of the auto industry to come along for the ride."³

Abuse of the CRA will have far-reaching consequences for years to come.

The Congressional Review Act is already an extraordinary law, allowing Congress to bypass normal legislative order and override regulations with a simple majority vote. Expanding the CRA to override longstanding agency actions, and to override administrative guidance, will create broad regulatory uncertainty. It will also stifle the issuance of future guidance—which is often intended to provide clarity to industry about how to comply with the law, and, relatedly, how to avoid enforcement actions. Notably, some industry attorneys have recently suggested that a CRA on the auto lending guidance may ultimately backfire, preventing industry from having the clarity that guidance provides.⁴

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¹ That 60-day clock began in December 2017 but, per the CRA, resets 15 days into the new Congressional session in 2018, setting the final expiration of the clock at mid- to late-May, depending on which days Congress is in session.

² <https://www.politico.com/story/2018/04/17/congressional-review-act-fallout-485426>.

³ <http://thehill.com/policy/finance/383522-senate-to-vote-on-repeal-of-cfpb-auto-loan-guidance>.

⁴ <https://www.law360.com/articles/1035143/undoing-cfpb-guidance-may-yield-unintended-effects>.