

Client Alert

The 2020 Volcker Rule Amendments and the Congressional Review Act – Is Time on Our Side?

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On October 1, 2020, significant changes to the covered fund provisions of the Volcker Rule (the “**2020 Volcker Amendment**”) are expected to go into effect. The changes, which add exclusions for several new categories of private funds (such as qualifying credit funds and venture capital funds) and ease requirements for certain existing exclusions (such as the loan securitization and foreign public fund exclusions), were issued in late June by the five federal agencies responsible for implementing the Volcker Rule (the “**Agencies**”). The 2020 Volcker Amendment was submitted by the Agencies to Congress during July and published in the Federal Register on July 31, 2020.

These dates have significance, because they directly impact whether the amendment may be subject to reversal under the Congressional Review Act¹ (the “**CRA**”), a 1996 statute that establishes a window in which Congress can reject new rules adopted by federal agencies. This Client Alert considers the time period during which the 2020 Volcker Amendment may be vulnerable to the CRA process and the potential consequences if the CRA is, in fact, invoked.

CRA Basics

After any federal agency rule or amendment is published, the CRA permits Congress to invalidate it by vote of a simple majority in both houses, subject to Presidential veto. If a joint resolution of disapproval is passed by both the House and Senate and signed by the President, the CRA provides that:

- The disapproved rule “shall not take effect (or continue)”;
- If, like the 2020 Volcker Amendment, the rule amends a pre-existing rule, the amendment is reversed in its entirety and the rule reverts to its pre-amended form;² and
- If the disapproved rule has already gone into effect, the rule is treated as if it never took effect in the first place.³

¹ Congressional Review of Agency Rulemaking, 5. U.S.C. Chapter 8.

² See U.S. Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions* (R43992; Jan. 14, 2020), by Maeve P. Carey and Christopher M. Davis, text in: <https://fas.org/sqp/crs/misc/R43992.pdf> (last accessed September 10, 2020), p. 19, fn. 104.

³ 5 U.S.C. § 801(f).

The CRA also prevents any rule that is substantially similar to the overturned rule from being passed unless it is authorized by a law enacted after the date of the joint resolution disapproving the original rule.⁴

Congress can of course overrule any agency action taken under delegated authority without the need to use the CRA, but the CRA facilitates the process for rules adopted within a recent window.⁵ The initial window for disapproval under the CRA runs 60 “session days”⁶ after publication of a rule – a period considerably longer than 60 calendar days, as discussed in further detail below. If the initial window does not run in full during the Congressional session in which the applicable rule is published, the clock re-starts, giving the next session a “reset” window of 60 session days in which to introduce a resolution of disapproval for the rule.

Given that administrative agencies are extensions of the executive branch, and a President is unlikely to approve the repeal of his or her own administration’s rules, a disapproval is unlikely to occur – and indeed has never occurred – during the initial CRA window for a rule. The greatest risk of disapproval occurs during the “reset” window, in years where there is both a change in Presidential administration and the newly elected President’s political party holds a majority in both houses of Congress. It was under such conditions that the CRA allowed for 14 Obama-era rules to be nullified in the initial months of the Trump administration.⁷ Prior to the Trump administration, only one rule had been overturned under the CRA, when Congress overturned a Clinton-era regulation in George W. Bush’s first term.⁸

The CRA Timeline and the 2020 Volcker Amendment

To what extent is the 2020 Volcker Amendment vulnerable to retroactive repeal under the CRA process? The answer depends in large part on the answer to a related but equally critical question: whether the review period will reset into the next session of Congress and, potentially, a new Presidential administration. Under Section 802(d)(1) of the CRA, the review period for the 2020 Volcker Amendment will begin anew in 2021 if the rule in question (or in this case, the amended rule) was submitted to Congress in the last 60 “session days” of the current session for either the Senate or the House. Session days are generally, but not necessarily, the same as calendar days in which a chamber is in session.⁹

Although a precise count cannot be made until the current session ends, it appears very likely that the CRA window for the 2020 Volcker Amendment will run into the new year. Based on the tentative schedules currently posted, the estimated number of session days from the amendment’s publication on July 31, 2020¹⁰ through the end of the session would be close to 60 for the Senate, but less than

⁴ 5 U.S.C. § 801(b)(2).

⁵ For example, “[i]n the Senate, debate on the joint resolution...shall be limited to not more than 10 hours” making the vote immune to filibuster. 5 U.S.C. § 802(d). Furthermore, a CRA disapproval resolution requires a simple majority in order to pass. U.S. Congressional Research Service, R43992 at 1, 15.

⁶ Although for brevity we use the term “session days” to apply to both houses, the CRA uses the term “legislative days” as applied to the House of Representatives. See 5 U.S.C. § 801(d).

⁷ Eric Lipton and Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, The New York Times (May 17, 2017), <https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html> (last accessed September 10, 2020).

⁸ Coral Davenport, *Democrats Eye Trump’s Game Plan to Reverse Late Rule Changes*, The New York Times (Jul. 30, 2020), <https://www.nytimes.com/2020/07/17/climate/trump-regulations-election.html> (last accessed September 10, 2020).

⁹ A session day ends when a chamber adjourns, and a new session day begins when the chamber reconvenes, so that theoretically, a session day can last more than one calendar day, and a calendar day can include more than one session day. Ultimately “[t]he House and Senate Parliamentarians are the sole definitive arbiters” of the day-count for purposes of the CRA time periods. See U.S. Congressional Research Service, *Sessions, Adjournments, and Recesses of Congress* (R42977; Feb. 27, 2013), by Richard S. Beth and Jessica Tollestrup, text in: <https://fas.org/sqp/crs/misc/R42977.pdf> (last accessed September 10, 2020), pp. 6, 12, 17.

¹⁰ Arguably, the clock began to run on July 16 when notice was first submitted to Congress, although the two-week difference would not appear to affect whether the review period would continue into the 2021 session of Congress, as discussed below.

50 for the House.¹¹ As noted, 60 session days must elapse in *each* of the two chambers in order to avoid extension of the CRA window into the next Congress.¹²

Assuming the review period does roll over, the new CRA window will commence on the fifteenth session day after the next session of Congress convenes and last until 60 additional session days have elapsed in each chamber of Congress. Congress has not yet set its calendar for 2021, but based on the legislative calendar for 2019 (the last year in which the legislative calendar was not shortened by the COVID-19 pandemic), the period would run until sometime in June.¹³

In other words, depending on the outcome of the November elections, the period of potential uncertainty for the 2020 Volcker Amendment may extend well into 2021. Banking entities that rely on the changes set forth in the 2020 Volcker Amendment would risk falling out of compliance in the event of a later disapproval. The CRA's mandate that a disapproved rule is not only nullified, but treated as if it had never taken effect, appears to prohibit grandfathering of parties that relied in good faith on such rule or amendment. There is no clear precedent in the CRA's history that indicates how such violations would be treated. Prior CRA disapprovals – the 14 Obama-era rules overturned at the beginning of the Trump administration – involved repeals that generally reduced prior restrictive rulemaking and therefore did not have the *ex post facto* effect that would potentially result from retroactive repeal of the 2020 Volcker Amendment.

How real is the risk?

Senator Chuck Schumer has stated that he intends to use the CRA to overturn regulation enacted by the Trump administration, and Congressional staff, as well as aides to Joe Biden, are reported to be compiling lists of Trump-era rules to target.¹⁴ However, the list of rules subject to potential review will be long, and the CRA does not permit bundling of disapproval resolutions.¹⁵ Congress can only address one rule at a time and will have a limited number of legislative days in which to do so. Other rules likely to be on the table are considerably more consequential or controversial and are likely to be a higher priority.¹⁶ The 2020 Volcker Amendment is not, for example, included in the Brookings Institution's "Deregulatory Tracker," which lists "economically or politically significant, controversial, or otherwise newsworthy" deregulatory actions under the Trump administration.¹⁷

Moreover, for legislators that object to some but not all aspects of the 2020 Volcker Amendment, the CRA may be too blunt an instrument. The law does not allow for disapproval of select elements of a rule or amendment and could be used only to strike down the amendment in its entirety. Disapproval

¹¹ The Congressional Days in Session Calendar (<https://www.congress.gov/days-in-session> (last accessed September 10, 2020)) shows that 13 session days occurred in the Senate and 9 in the House during August. Tentative schedules for the remainder of the year indicate that 46 additional session days are scheduled for the Senate (United States Senate 116th Congress, 2nd Session 2020 Tentative Schedule, https://www.senate.gov/legislative/resources/pdf/2020_calendar.pdf (last accessed September 10, 2020)) and 38 are scheduled for the House (Legislative Calendar, <https://www.majorityleader.gov/calendar> (last accessed September 10, 2020)).

¹² 5 U.S.C. 801(d)(1).

¹³ It should be noted that this lookback period counts *actual* legislative/session days, rather than *scheduled* legislative/session days, so if either house of Congress adds unscheduled voting days, those days will be included in the voting total.

¹⁴ Coral Davenport, *Democrats Eye Trump's Game Plan to Reverse Late Rule Changes*, The New York Times (Jul. 30, 2020), <https://www.nytimes.com/2020/07/17/climate/trump-regulations-election.html> (last accessed September 10, 2020).

¹⁵ See U.S. Congressional Research Service, R43992 at 6.

¹⁶ These include, to name a few, a host of environmental deregulatory actions (including a rule limiting public review of federal infrastructure projects under the EPA) and, if adopted, rules that would reduce regulation of methane emissions, roll back protections for transgender patients seeking healthcare and significantly alter asylum standards. 85 FR 42210 (finalized July 13, 2020); 84 FR 50244 (proposed September 24, 2019); 84 FR 27846 (proposed June 14, 2019); 85 FR 36264 (proposed June 15, 2020).

¹⁷ Tracking deregulation in the Trump era, at <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/>; Explaining the Brookings Deregulatory Tracker, at <https://www.brookings.edu/blog/up-front/2018/10/18/explaining-the-brookings-deregulatory-tracker/>

of the 2020 Volcker Amendment under the CRA would nullify a multi-year effort in which the five Agencies solicited and extensively analyzed and documented input from a range of constituencies to arrive at a set of changes that, in their view (albeit with a few dissenting voices¹⁸), brought the rules more into line with the original Congressional intent imbuing the authorizing statute.

Practical Takeaways

Barring a major resurgence of anti-bank public and political sentiment, the risk of disapproval may seem remote today. But perhaps for that reason, the risk may be underappreciated, particularly given the potential length of the review period and the difficulty of predicting the political climate six to nine months from now. Until there is greater certainty regarding the CRA risk (which may come in early November), banking entities, and issuers that market to banking entity investors, may wish to discuss with their counsel possible exit strategies before taking steps in reliance on the new covered fund amendments.

¹⁸ CFTC Commissioners Rostin Behnam and Dan Berkovitz dissented from the CFTC's decision to approve the changes, expressing the view that the loosened regulations unnecessarily increase risks to banks and the financial system. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 85 FR. 46529-30 (finalized July 31, 2020).

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