Novel use of the Congressional Review Act to repeal CFPB Indirect Auto-Lending Guidance

April 27, 2018

On April 18, the Senate voted to repeal the Consumer Financial Protection Bureau's (CFPB) 2013 Guidance on Fair Lending Practices to Indirect Auto Lenders (2013 Guidance)[1] using the Congressional Review Act (CRA). The vote was 51-47, along party lines except Joe Manchin (D-WV) voted with the Republican bloc.[2] The House is expected to pass this bill before Memorial Day. Rep. Hensarling (R-TX), the Chairman of the House Financial Services Committee, issued a statement on April 18 praising the Senate's action and expressing confidence that the House would pass the measure.[3]

This vote is important for several reasons, but especially because it marks a change in the use of the CRA. In the past, the CRA has been used to repeal recent rulemakings from agencies.[4] Specifically, the CRA can be used to repeal regulations issued by the Executive Branch in the last 60 days of the previous legislative session. The 2013 Guidance was issued more than five years ago and is guidance, as opposed to a formal rulemaking, which would subject it to the requirements of the Administrative Procedure Act (APA). In order to use the CRA to repeal the 2013 Guidance, Sen. Pat Toomey (R-PA) requested a determination from the Government Accountability Office (GAO) that the 2013 Guidance was, in fact, a rule and should have been subject to the APA when it was drafted. The GAO issued its determination in December.[5] Sen. Toomey has requested such a determination from GAO with respect to multiple agencies' informal guidance or bulletins, which would allow Congress to use the CRA to repeal long-standing guidance that would otherwise not be subject to their oversight.[6] Democrats have expressed concern that Republicans will use the CRA to repeal guidance that has been agency policy for decades.

The 2013 Guidance addressed the activities of indirect auto-lenders. If an auto dealer directs a consumer to a third-party lender to finance his or her vehicle purchase, the dealer is usually privy to the interest rate the lender plans to charge a consumer. However, the dealer can impose a

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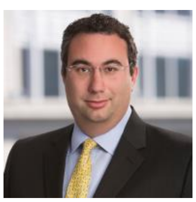
[1] CFPB Bulletin 2013-02.
[2] News Release: Senator Moran's Auto-Lending Regulation Rollback Passes Senate (April 18, 2018)
[3] Press Release: Hensarling Applauds Reversal of Harmful CFPB Action on Auto Lending (April 18, 2018)
[4] Although it was only successfully used once prior to the Trump Administration, it has been used more than a dozen times during this Congress.
[5] GAO, Letter to the Hon. Patrick Toomey (Dec. 5, 2017).
[6] *See e.g.* GAO, Letter to Hon. Patrick Toomey (Oct. 19, 2017).

higher interest rate (the dealer markup) and, if the consumer accepts, split that additional charge with the lender. The CFPB found that the dealer markup, which was not tied to creditworthiness, could violate the Equal Credit Opportunity Act and lead to discriminatory pricing. The CFPB issued multiple enforcement actions based on the 2013 Guidance, including against Ally Financial, and, with the Department of Justice, against Honda, Toyota, and Fifth Third Bank. In response, some lenders have eliminated dealer markups. Others have argued that the 2013 Guidance hurts consumers because auto dealers are less willing to offer discounts for fear of allegations of discrimination. Congressional Republicans have argued that the initial research on which the CFPB based its guidance was flawed and that there is no evidence of widespread racial discrimination in indirect auto lending.

If the House passes the bill before Memorial Day, as is anticipated, President Trump is expected to sign it. The 2013 Guidance would be repealed effective immediately (usually, the CRA is used before the regulation becomes effective) and the CFPB would be barred from introducing any similar rulemakings or informal guidance. Auto dealers were specifically exempted from the CFPB's supervision and regulation by the Dodd-Frank Act. The 2013 Guidance was a sort of "back door" into regulating auto dealers exercised by the previous Director, Richard Cordray. Acting Director Mick Mulvaney has explicitly stated his desire to scale back the CFPB's purview and the agency has scaled back enforcement under his leadership. Thus, auto dealers are unlikely to find themselves subject to any further oversight or enforcement from the CFPB, regarding any aspect of their activities.

If you would like more information on the 2013 Guidance or the status of its repeal, please reach out to the contacts below.

Contacts



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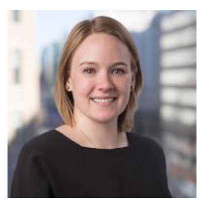

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