OMB Guidance on CRA Compliance Imposes New Rule Review Requirements on Independent Agencies

Monday, April 15, 2019

A memorandum issued by the Office of Management and Budget entitled “Guidance on Compliance with the Congressional Review Act” creates a new “speed bump” for final rules issued by the CFPB as well as other independent regulatory agencies such as the Federal Reserve, the FCC, the FDIC, the FTC, and the OCC. The new review process set forth in the memo will take effect on May 11, 2019.

The CRA provides a mechanism for Congress to overturn federal regulations by enacting a joint resolution of disapproval. (A recent notable example is Congress’ use of the CRA to override the CFPB’s arbitration rule.) The CRA requires that “major” rules be accompanied by a GAO report and have a delayed effective date of at least 60 days to give Congress additional time to consider whether to overturn a major rule before it goes into effect. The CRA defines a major rule as a rule determined by the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget to meet certain criteria such as that the rule “is likely to result in an annual effect on the economy of $100,000,000 or more.”

The CRA does not, however, specifically require agencies to submit their rules to OIRA for such a determination to be made. Pursuant to Executive Order 12866, agencies must submit a list of their planned regulatory actions to OIRA and indicate which actions, if any, an agency believes is a “significant regulatory action.” OIRA must then review the list to determine whether any actions that the agency has not designated as “significant” should be considered a “significant regulatory action.” The Executive Order defines a “significant regulatory action” to include an action that is likely to result in a rule that may “have an annual effect on the economy of more than $100 million or more.” A “significant regulatory action” is subject to certain requirements set forth in the Executive Order. According to a 2016 Congressional Research Service (CRS) report, in most cases, a rule determined to be “economically significant” under the Executive Order will also be major under the CRA, and vice versa.” (The CRS prepares reports for members of Congress and Congressional committees.)

Most notably, the requirement for OIRA review does not apply to independent regulatory agencies. The CRS report states that because the Executive Order exempts independent agencies but “OIRA is still tasked [by the CRA] with determining whether an independent regulatory agency’s rule is major...it is not clear whether and how rules issued by the independent regulatory agencies should be designated as major under the CRA.” The report then notes that “recent accounts suggest...that at least some of the independent agencies no longer appear to be acknowledging a role for OIRA in the determination of rules as major. Rather, these agencies appear to be making the determination themselves.”

The exemption of independent agencies from the Executive Order’s requirements for “significant regulatory actions” has been criticized for removing independent agency rules from Presidential control, because the President, through OMB, does not have direct influence over such rules. It is this criticism that the new OMB memo is intended to address.

The memo applies to all final “rules” subject to the CRA. For purposes of the CRA, a “rule” can include agency guidance. (The GAO determined that CFPB’s indirect auto finance guidance was a “rule” subject to the CRA. The
guidance was subsequently disapproved by Congress pursuant to a joint CRA resolution.

The memo provides that for rules submitted for review pursuant to Executive Order 12866, OIRA “will continue to incorporate the CRA major determination into its standard process.” For “rules that would not be submitted to OIRA under Executive Order 12866” (i.e. rules of independent agencies), the memo sets forth a process for determining whether such rules are major. This process includes the following requirements:

- An independent agency must provide a recommended designation of whether a rule is major. If the agency has designated a rule as not major, OIRA must inform the agency within 10 days whether it agrees with the agency’s designation. Otherwise, the rule becomes subject to the major rule determination process using the “regulatory analysis principles” set forth in the memo.

- If a rule is considered major by an agency or OIRA does not agree with an agency’s determination that a rule is not major, the agency must submit the rule and an analysis to OIRA for a CRA determination at least 30 days before the agency publishes the rule in the Federal Register or otherwise publicly releases the rule.

- Once OIRA makes a designation, the agency can publish the rule in the Federal Register or otherwise publicly release the rule. If the rule is designated major, the agencies must delay the effective date for 60 days from the date of the rule’s submission to Congress or its publication in the Federal Register, whichever is later (subject to applicable CRA exceptions.)

The memo indicates that OIRA anticipates that it will designate certain categories of rules “as presumptively not major” and therefore not subject to the major determination process set forth in the memo.

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