Center for Progressive Reform CPR

March 16, 2020

Board of Directors

John Applegate
Robert Glicksman
Alice Kaswan
Alexandra Klass
Thomas McGarity
Sidney Shapiro
Amy Sinden
Robert R.M. Verchick

Advisory Council

Patricia Bauman
Frances Beinecke
Eula Bingham
W. Thompson Comerford, Jr.
Sally Greenberg
John Passacantando
Henry Waxman
Robert Weissman

Submitted via email to rule-comments@sec.gov.

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-24-19

Dear Secretary Countryman:

Thank you for the opportunity to comment on the Security and Exchange Commission's (SEC) proposed rule for Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2522 (January 15, 2020) ("the proposal").

We the undersigned are Member Scholars and staff with the Center for Progressive Reform (CPR), a non-profit research and educational organization as described above in the opening paragraph of these comments. Collectively, we have considerable expertise in administrative law and regulatory policy in general and on the Congressional Review Act (CRA) in particular.

CPR's mission is to educate, collaborate and advocate with the goal of driving public policy reform through rigorous and accessible legal analysis. CPR's 60 plus member scholars are working professors at institutions of higher learning across the nation who volunteer their time in order to advance a shared set of values regarding the protection of health, safety and the environment. Our website may be visited at www.progressivereform.org. Responses to the comments below may be sent to CPR Senior Policy Analyst James Goodwin at jgoodwin@progressiverefom.org.

Background

This proposal seeks to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which requires the SEC in fairly specific terms to require companies engaged in commercial development of fossil fuels and other resource extraction activities to annually disclose any payments they make to the United States government or foreign government in conjunction with those development or extraction activities. The SEC had previously issued a rule to implement this section in 2016, but it was among the 16 existing rules that President Donald Trump and the 115th Congress repealed using the specified procedures of the CRA.

A unique feature of this CRA process is that not only does it serve to repeal existing rules; it further bars the rulemaking agency from issuing a replacement that is "in substantially the same form" without first receiving specific congressional authority to do so. Many refer to this bar on future rulemakings as the CRA's "salt the earth" provision. Yet, despite this provision, the SEC is still subject to a non-discretionary legal obligation under Section 1504 of the Dodd-Frank Act to issue *some* replacement rule.

The conundrum that the SEC now faces is designing a replacement that simultaneously satisfies Section 1504 of the Dodd-Frank Act and is sufficiently different from the 2016 rule to overcome the CRA's bar on "substantially the same" replacement rules. As the SEC explains, the new reporting requirements it would impose differ in many respects from those that were included in the 2016 rule. In fact, as other commenters have persuasively argued, the reporting requirements it would impose are so weak that they are plainly not in accordance with the fairly specific terms of Section 1504 of the Dodd-Frank Act.

In effect, the proposal seeks to defeat these concerns by arguing this result is nonetheless compelled by the CRA's "salt the earth" provision. In other words, the SEC appears to be interpreting the phrase "substantially the same" so broadly that it serves to displace the clear language of Section 1504 of the Dodd-Frank Act. As explained below, we reject the argument that a repeal pursuant to the CRA presents a rulemaking agency with a blank check to disregard the enacting Congress and rewrite its own legal authority. We would note that, since the CRA is not specifically addressed to the SEC, its interpretation of the CRA is not entitled to deference under the *Chevron* doctrine.

The SEC's Proposal is Based on an Improperly Broad Reading the CRA's Bar on "Substantially the Same" Replacement Rules

When it comes to giving effect to the CRA's prohibition on "substantially the same" replacement rules, existing case law regarding the kind of "implied repeals" at issue here as well as relevant policy considerations unmistakably point to construing this phrase narrowly in all cases. Moreover, when a particular statutory authorization confers relatively little discretion on the implementing agency to design the replacement regulation in the first place – as is the case for Section 1504 of the Dodd-Frank Act – then the construction of this term must necessarily be narrow enough to leave some residual rulemaking discretion that permits for faithful execution of the clear instructions that Congress has laid out in the statutory authorization.

As a preliminary matter, there is no generally accepted definition of what the CRA means by "substantially the same." The CRA itself does not define this concept, nor has it ever been tested in court. (Indeed, another of the CRA's unusual provisions states that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." It is thus possible that this provision would prohibit courts from resolving disputes over how an agency has interpreted this term.)

The Supreme Court has long recognized a principle of minimizing implied repeals, such as what the SEC would have the CRA accomplish with regard to Section 1504 of the Dodd-Frank Act. For example, in *Epic Systems v. Lewis*,[1] the Supreme Court was presented with the issue of whether the National Labor Relations Act of 1935, which guarantees private sector workers certain rights to take collective action in support of their interests against employers, served to override the 1925 Federal Arbitration Act, which governs judicial supervision of private dispute resolution through arbitration. The Court began its analysis by noting that the employees, to prevail in their claim, faced a steep hill in showing that the latter law served to displace the former:

> A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention' that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). The intention must be "'clear and manifest.'" *Morton* [*v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)].[2]

The Court went on to note its longstanding presumption against "repeals by implication" given that "'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Id*. (internal citations omitted). Instead, the Court's preferred path was "to give effect to both," *Id*. (internal quotes and citations omitted), laws at issue to the extent possible.[3]

This analysis applies equally to the CRA resolution of disapproval that the 115th Congress passed and President Trump signed repealing the 2016 rule.[4] Nothing about this resolution evinces a "clear and manifest" intention to repeal any of the specific requirements of Section 1504 of the Dodd-Frank Act. If the 115th Congress had wished to repeal that statutory provision, there is ample evidence that it knew how to do so. Indeed, the 115th Congress considered several bills that would have overhauled the Dodd-Frank Act to varying degrees.[5] The most prominent of these bills, the Financial CHOICE Act, would have expressly repealed Section 1504 of the Dodd-Frank Act.[6] Tellingly, this bill was introduced two months after the CRA resolution repealing the 2016 rule had been signed into law, suggesting that not even

[1] 138 S. Ct. 1612 (2018).
[2] *Id*. at 1624.
[3] *Id*.
[4] To be sure, the Court's position here was rooted in separation of powers concerns that would be implicated by having judges decide on their own which of two competing statutes should be given effect. *Id*. Nevertheless, similar separation of powers concerns arise here with the prospect of agencies taking upon themselves to define their own statutory authorities in clear disregard of Congress's previously expressed views on the subject.
[5] *See*, *e.g.*, H.R, 10, 115th Cong. (2017); H.R. 1030, 115th Cong. (2017); H.R. 4289, 115th Cong. (2017); H.R. 4746, 115th Cong. (2018).
[6] H.R. 10, 115th Cong. §862(a)(3) (2017).

the bill's sponsors believed that the CRA resolution had served to repeal the SEC's statutory obligations under Section 1504.[7]

More broadly, agencies in the SEC's position should be especially wary of interpreting the CRA's salt-the-earth provision as repealing their existing legal authority. After all, nothing in the law suggests that its drafters intended for this provision to function in this manner. Instead, the better interpretation is that it serves merely as a means for a later Congress to circumscribe a previously granted zone of decision-making discretion, not that it serves as a covert means for a later Congress to repeal statutory mandates. As such, agencies should strive to give some meaning to legal authorities that have served as the basis for rules that were repealed pursuant to the CRA to any degree that they can.

Last but not least, the CRA's defining feature – the "streamlined" process by which resolutions of disapproval are adopted – should further discourage the SEC from giving the CRA's salt-the-earth provision anything but the narrowest construction possible when deciding how to replace the 2016 rule.

- The SEC spent more than six years developing the 2016 rule.[8] In contrast, the process for repealing it under the CRA took just 15 days from beginning to end.[9]

- The CRA resolution was the subject of no hearings and the language of the CRA itself limited Senate floor debate on the resolution to no more than 10 hours total (split evenly between supporters and opponents of the resolution).[10] In contrast, the Dodd-Frank Act was the product of over a year-and-a-half of legislative work, which included consideration by eight different House committees and one Senate committee, floor debate and amendments in the House and Senate respectively, consideration by a conference committee, and passage of the conference version by both the House and the Senate.[11]

- The CRA resolution would not have overcome a filibuster and instead passed by a margin of just five votes in the Senate. The Dodd-Frank Act overcame a filibuster in the Senate and passed by a margin of 21 votes.[12]

As these data points indicate, Congress did not expect CRA resolutions to receive the careful deliberation and consideration that ordinary bills are likely to receive under the conventional legislative process. This process is designed to ensure that these resolutions can reach the

---

[7] President Trump signed H.J. Res. 41 repealing the 2016 rule pursuant to the CRA on February 14, 2017. H.R. 10 was introduced by Rep. Jeb Hensarling (R-TX) on April 26, 2017.

[8] The SEC began work on the 2016 rule in 2010 following passage of the Dodd-Frank Act. An earlier version of the rule was struck down and remanded in July 2013. The SEC completed the revised version of the rule that responded to the adverse 2013 court decision in July 2016.

[9] Rep. Bill Huizenga introduced H.J. Res. 41 on January 30, 2017. It was enacted into law February 14, 2017.

[10] *See* Actions Overview: H.J.Res.41 — 115th Congress (2017-2018), Congress.gov, https://www.congress.gov/bill/115th-congress/house-joint-resolution/41/actions?KWICView=false (last visited Mar. 12, 2020).

[11] *See* Actions Overview H.R.4173 — 111th Congress (2009-2010), Congress.gov, https://www.congress.gov/bill/111th-congress/house-bill/4173/actions (last visited Mar. 12, 2020).

[12] James Goodwin, *CRA by the Numbers: The Congressional Review Act Assault on Our Safeguards* (Issue Alert 1705), http://www.progressivereform.org/CRA_numbers.cfm#CRANumbers (last visited Mar. 12, 2020).

president's desk without the need for the committee process, extended floor debates and amendments, and conference committee consideration. Congress evidently thought this streamlined process was appropriate to curb abuses of discretion by agencies. The price of this truncated process is to reduce public accountability by undermining the ability of the press and civil society to alert the public's attention even when a CRA resolution might be broadly unpopular with a majority of Americans. The SEC should not presume that Congress meant the CRA as a legislative shortcut through which interest groups might seek permanent changes in legislative mandates.

The SEC's notice of proposed rulemaking in the instant matter provides an apt illustration of this very problem. The agency cited a smattering of statements from several members of Congress and a letter from several senators expressing concerns that the 2016 rule imposed excessive compliance costs, would harm job growth, and would place U.S. firms at a competitive disadvantage.[13] In effect, the SEC has used these vague and indeterminate remarks as a basis for rewriting the carefully wrought *statutory* language of Section 1504.

The most reasonable interpretation instead is that the salt-the-earth provision was an effort to prevent agencies from deliberately using cosmetic changes in the hope that Congress would eventually tire of overriding essentially the same rule. That potential for abuse is not present when the similarities between the old rule and the new one are dictated by the underlying statute.

Even if the SEC's judgment that its new proposal falls within the edges of its legal authority under Section 1504 were correct, the SEC's current rationale for this proposal should be rejected as arbitrary because the agency seriously misunderstands the zone of rulemaking discretion that it possesses to implement Section 1504 in the aftermath of the CRA rejection of the 2016 rule. A better understanding of the CRA's salt-the-earth provision is that it blocks the SEC from adopting a new rule that is "formally" different but practically equivalent as a matter of substance to its 2016 rule. Based on a handful of legislator remarks made during the CRA process, however, the agency has incorrectly concluded that, as a matter of law, it must adopt a new rule that is radically different in effect from the 2016 rule. An agency cannot reasonably exercise discretion where, due to a mistake of law, the agency does not understand the scope of that discretion.[14] It follows that the SEC cannot exercise its discretion under Section 1504 in a reasoned, non-arbitrary way so long as it starts its analysis from the incorrect premise that the CRA rejection has stripped it of most of its statutory discretion.

---

[13] Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2522, 2525-26 (proposed Jan. 15, 2020) (to be codified at 17 C.F.R. pts. 240 and 249b).

[14] *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 522 (2009) (holding that the Board of Immigration Affairs' statutory construction was not eligible for *Chevron* deference because, rather than exercise independent judgment to choose it, the agency had thought itself bound by prior judicial precedent); Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006) (holding that *Chevron* deference at Step 2 does not apply where an agency wrongly concludes that it lacks discretion because a statutory construction is required by Step 1).

Conclusion

We urge the SEC to abandon the current proposal insofar as it exceeds its narrow authority under Section 1504 of the Dodd-Frank Act. We have commented specifically to explain how the salt-the-earth provision of the CRA does not compel this result. Instead, the SEC should consider re-approaching the implementation of Section 1504 with a much narrower construction of the term "substantially the same," one that allows for some residual discretion that fits within the narrow boundaries set out in Section 1504 of the Dodd-Frank Act. As explained above, the SEC might consider a definition of the term "substantially" as something more than a "formal" change to a repealed rule. The CRA was designed as a congressional remedy for agency rules that violate statutory mandates or clearly abuse agency discretion. That was the rationale for the truncated legislative procedure. It was not intended as a way for a later Congress to express its policy disagreements with an earlier one. The salt-the-earth provision should not be converted from a discipline on agency abuse to a device for smashing existing legal requirements.

We appreciate your attention to these comments.

Sincerely,

Daniel Farber
Sho Sato Professor of Law and
Director of the California Center for Environmental
Law and Policy
University of California, Berkeley

James Goodwin
Senior Policy Analyst
Center for Progressive Reform

Richard Murphy
AT&T Professor of Law
Texas Tech University School of Law

**University Affiliations are for identification purposes only*