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CRA RESOLUTIONS AGAINST AGENCY GUIDANCE

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After years of dormancy, the Congressional Review Act (“CRA”) suddenly plays a prominent role in agency policymaking. Under the CRA, Congress has overturned multiple major regulations adopted by the Obama Administration,¹ and the campaign continues. The next stage in this rollback appears to be a program of invalidating agency guidance documents, policy statements, and interpretations. That possibility has frightened many observers because it appears to expose an enormous additional amount of policymaking to CRA attack. We argue that, to the contrary, using the CRA in an attempt to overrule agency policy statements and interpretations will be fruitless, and the effort will, in the long run, reveal important limits on the CRA.

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¹ See, e.g., Pub. L. No. 115-4, 131 Stat. 9 (2017) (disapproving rule, Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July 27, 2016) (to be codified at 17 C.F.R. pt. 240 and 249b), requiring disclosure of payments to foreign governments by resource extraction issuers for oil and gas development); Pub. L. No. 115-8, 131 Stat. 15 (2017) (disapproving rule, Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91,702 (Dec. 19, 2016) (to be codified at 20 C.F.R. pt. 421), adding certain requirements to report to the National Instant Criminal Background Check System).

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I. A CRA PRIMER

The CRA was part of the Contract with America, the program of reform—or overhaul—under which Republicans swept into power in Congress in 1994. The CRA requires every agency that promulgates a rule to submit a report on it to Congress, in which the agency includes a copy of the rule, a brief summary of the rule, and the intended effective date of the rule.² A rule cannot “take effect” until the agency has transmitted this report.³ At the same time, the agency must also send to the Government Accountability Office a copy of the rule’s cost-benefit analysis, its analysis or certification under the Regulatory Flexibility Act, and other similar analyses.⁴

The report gives Congress an opportunity to pass a joint resolution disapproving the rule. This joint resolution is a law like any other; it requires the President’s signature or a vote overriding a veto. A rule that is the subject of a disapproval resolution is essentially nullified; the resolution says the rule “shall have no force or effect.”⁵ The CRA gives two special privileges to disapproval resolutions. First, an agency apparently cannot resurrect a disapproved rule: “A rule that does not take effect (or does not continue)” thanks to a CRA resolution “may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued.”⁶ Second, for a limited time window, a CRA resolution receives expedited treatment and an exemption from certain legislative procedures—most significantly from Senate filibusters.⁷

² 5 U.S.C. § 801(a).

³ If a rule is “major,” it cannot take effect until at least 60 days after the agency sends the report. § 801(a)(3).

⁴ § 801(a)(1)(B).

⁵ § 802(a).

⁶ § 801(b)(2).

⁷ § 802(c), (d).

To receive these benefits, a CRA resolution must have a specific, simple form. It resolves “[t]hat Congress disapproves the rule submitted by the [agency in question] relating to [the title or subject of the rule at issue], and such rule shall have no force or effect.”⁸ It cannot say anything else. In addition, a CRA resolution must be introduced during a window beginning “on the date on which the report” is received or the date the rule was published in the Federal Register, whichever is later, and ending on the 60th day afterwards.⁹

The principal function of the CRA is to make it easier, in a transfer of power between political parties, for the incoming majority party to undo the regulatory policies of the outgoing party. The CRA is chiefly useful only if the incoming President is of the same party as majorities in both Houses of Congress. If either House majority is of the outgoing party, and thus an opponent of the incoming party, that House is fairly unlikely to approve a CRA resolution. If the President is of the outgoing party, the President is unlikely to sign the resolution. Of course, Congress could overrule a veto. But if there were enough votes to do that, the CRA’s procedural benefits (such as avoiding the filibuster) would be worth little—and probably not worth the straitjacket that the CRA places on the content of a disapproval resolution. Thus, a CRA resolution is unlikely unless the Presidency changes parties and the new President is of the same party as majorities in both Houses.

The CRA resets the clock with respect to rules in the last months of a congressional session, which allows the incoming Congress the ability to undo a substantial volume of past policy. If an agency submits a rule less than 60 Senate session days or House legislative days before the end of a session, the time for joint resolutions begins in the next session, on the 15th session day or legislative day.¹⁰ This 60-session-day period captures far more than so-called “midnight rules” (the common nickname for rules that an outgoing administration issues in its final days).¹¹ At the end of the Obama Administration, the 60th session day before the end of the session was in mid-June.¹²

⁸ § 802(a).

⁹ *Id.* Days on which either House of Congress is adjourned for more than three days during a session don’t count toward the 60 days. A resolution gets expedited, filibuster-free treatment only during the 60-day window.

¹⁰ § 802(e)(2).

¹¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-183, OMB SHOULD WORK WITH AGENCIES TO IMPROVE CONGRESSIONAL REVIEW ACT COMPLIANCE DURING AND AT THE END OF PRESIDENTS’ TERMS 1 (2018) defines “midnight” as the last 120 days, and it provides data about midnight rulemaking from the Clinton, Bush, and Obama administrations.

¹² CHRISTOPHER M. DAVIS & RICHARD S. BETH, CONG. RESEARCH SERV., IN10437, AGENCY FINAL RULES SUBMITTED ON OR AFTER JUNE 13, 2016, MAY BE SUBJECT TO DISAPPROVAL BY THE 115TH CONGRESS 1 (2016).

Before 2017, only one CRA resolution became law: disapproval of a Labor Department rule on ergonomics.¹³ Accordingly, there has been no case in which an agency adopted a rule that was arguably “substantially the same” as a previously disapproved rule. There has also been no case elaborating what it means for a rule to have “no force and effect”—a phrase, we will argue below, that is narrower than it at first appears. The real effect of CRA resolutions remains to be seen.

II. THE NEW INITIATIVE: CRA DISAPPROVAL OF GUIDANCE DOCUMENTS

In the Trump Presidency, CRA resolutions have become almost routine. Fifteen of them have passed as of April 2019, disapproving rules ranging from an amendment to federal procurement rules to a consumer-protection rule restricting the use of arbitration clauses.¹⁴

Nearly all of those rules were “legislative” rules—creating rights and obligations, and adopted through notice and comment, published in the Federal Register, and accompanied with the full panoply of rulemaking such as Regulatory Flexibility Act compliance.¹⁵ The latest initiative has been to use the CRA to overturn agency guidance documents. The Government Accountability Office (“GAO”) concluded, in response to an inquiry from Senator Pat Toomey, that a particular guidance document that federal banking regulators issued regarding leveraged lending was a rule for purposes of the CRA.¹⁶ The guidance in question informed depository institutions about the regulators’ expectations of how institutions will manage the risk of leveraged lending, and identified conduct that would likely lead regulators to take supervisory action. The GAO acknowledged that the document was only a general statement of enforcement policy and did not establish any binding norms. Yet, the GAO noted, general statements of policy are “rules” under the

¹³ Pub. L. No. 107-5, 115 Stat. 7 (2001). President Obama vetoed five CRA resolutions during his tenure. See DAVIS & BETH, *supra* note 12, at 1.

¹⁴ GAO has a list on its website. U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/legal/congressional-review-act/faq> [<https://perma.cc/9GYZ-VCDA>] (last visited Mar. 16, 2019).

¹⁵ See *Truckers United for Safety v. Fed. Highway Admin.*, 139 F.3d 934, 938-39 (D.C. Cir. 1998) (describing hallmarks of a legislative rule); *Cent. Tex. Tel. Coop., Inc. v. Fed. Comm. Commission*, 402 F.3d 205, 214 (D.C. Cir. 2005) (noting that the requirement to issue an impact statement “under § 604 of the Regulatory Flexibility Act . . . applies only to legislative rules”).

¹⁶ Letter from Susan A. Poling, General Counsel, U.S. Gov’t Accountability Off., to Senator Pat Toomey, U.S. Senate (Oct. 19, 2017) (on file with U.S. Gov’t Accountability Off., <https://www.gao.gov/assets/690/687879.pdf>).

Administrative Procedure Act (“APA”) definition, and the CRA incorporates the APA definition. So it follows that a general statement of policy “is a rule subject to the requirements of CRA.”¹⁷

There has been no attempt to invalidate the leveraged lending guidance. But shortly after that opinion, the GAO reached a similar conclusion about a guidance document that has many more enemies: the Consumer Financial Protection Bureau’s statement about discrimination risks in indirect auto lending.¹⁸ The auto lending guidance, issued in 2013, expressed the Bureau’s view that certain indirect auto lenders have obligations under the Equal Credit Opportunity Act (“ECOA”); it points out that these lenders may be liable under ECOA if their own conduct is discriminatory; and it points out ways a lender can mitigate its risk of ECOA liability.¹⁹ Many politicians, as well as many auto lenders, have sharply criticized the auto lending guidance since it first came out.²⁰ On May 21, 2018, the guidance became the first guidance document to be the subject of a successful CRA resolution.²¹

The auto lending guidance may turn out to be an anomaly. It had inspired an unusually high degree of anger, a greater amount than most rules of any kind. But the GAO’s interpretation of guidance documents as rules opens up a wide range of past policymaking for potential CRA action because the statutory timeline is tolled until a document is sent to Congress. Until the GAO’s recent decisions, it is likely agencies usually did not transmit guidance documents to Congress for CRA review.²² The normal course was to submit

¹⁷ *Id.*

¹⁸ Letter from Thomas H. Armstrong, General Counsel, U.S. Gov’t Accountability Off., to Senator Pat Toomey, U.S. Senate (Dec. 5, 2017) (on file with U.S. Gov’t Accountability Off., <https://www.gao.gov/assets/690/688763.pdf>).

¹⁹ *Bulletin re: indirect auto lending and compliance with the Equal Credit Opportunity Act*, CONSUMER FIN. PROT. BUREAU (Mar. 21, 2013), <https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-guidance/bulletin-indirect-auto-lending-compliance/> [<https://perma.cc/KS2Q-T3A8>] [hereinafter “*Bulletin*”].

²⁰ See, e.g., Nat’l. Auto. Dealers Ass’n. and Nat’l. Auto. of Minority Auto. Dealers, *NADA and NAMAD Question CFPB’s Approach in Its Guidance on Auto Lending*, (Mar. 21, 2013), <https://www.prnewswire.com/news-releases/nada-and-namad-question-cfpbs-approach-in-its-guidance-on-auto-lending-199444951.html> [<https://perma.cc/9LVD-TX5G>] (discussing auto dealer associations describing the guidance as an “anti-competitive approach” that will “only weaken the consumer’s ability to secure financing at the lowest possible cost”); Kim B. Perez, *The CFPB Indirectly Regulated Lending Through Auto Dealers*, 18 N.C. BANKING INST. 399, 400 n.7 (2013) <http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1375&context=ncbi> [<https://perma.cc/A2QB-9ABW>] (collecting letters from senators and congressmen).

²¹ Pub. L. No. 115-172, 132 Stat. 1290 (2018).

²² Arguably, agencies had some warning about the position the GAO might take. In 1997, the GAO opined on whether a National Forest Land and Resource Management Plan was a rule for CRA purposes; that opinion used reasoning fairly similar to the recent opinions.

only documents published in the Federal Register, and not even all of those.²³ Because the deadline for introducing a CRA resolution is 60 session days after the agency sends the rule to Congress, the CRA window is open for countless past agency guidance documents.

Some commenters have taken the position that the GAO is simply mistaken. For example, Professor David Zaring argues that a “rule” is something that “prescribe[s] law or policy,” and general guidance documents do not.²⁴ But a statement that is “designed to implement . . . policy” is also a rule, and that description seems broad enough to cover most guidance documents. In any case, this argument is unlikely to dissuade both legislators from introducing CRA resolutions attacking guidance documents and Congress from passing those resolutions.

We argue in this essay that, in fact, CRA resolutions to nullify these guidance documents will be ineffectual. The CRA is truly a tool meant for defeating legislative rules. That power is important, no doubt. But CRA resolutions to nullify past policies that an agency might not have submitted for congressional review will, we argue, have no effect on the agency’s actual policy and activities. Further, understanding why the CRA’s effect is limited will illustrate certain limits on the meaning of the “no reissuance” rule.

III. DISAPPROVAL OF POLICY STATEMENTS

A. Character of Policy Statements and Guidance Documents

We begin with the practical realities of guidance documents and policy statements. It is fairly well understood what these documents do, and what they do not do. Pure guidance documents might inform the public about the agency’s policy priorities, its plans for enforcement, its forecasts about the direction of regulatory policy, its expectations for the conduct of regulated

Letter from Robert P. Murphy, General Counsel, U.S. Gov’t Accountability Off., to Senators Ted Stevens, Frank H. Murkowski, and Don Young, U.S. Senate (Jul. 3, 1997), (on file with U.S. Gov’t Accountability Off., <https://www.gao.gov/decisions/cra/tongass.pdf>). That the respective agencies had not sent the leveraged lending guidance or the auto lending bulletin for review suggests agencies have not been observant on this point.

²³ See KRIS NGUYEN, U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-436T, OPPORTUNITIES TO IMPROVE THE EFFECTIVENESS AND TRANSPARENCY OF REGULATORY AND GUIDANCE PRACTICES 13 (2018), where the GAO reviewed CRA compliance for significant rules and found it was at around 75%. Presumably compliance rates were worse for less significant rules.

²⁴ David Zaring, *Guidance and the Congressional Review Act*, THE REG. REV. (Feb. 15, 2018), <https://www.theregreview.org/2018/02/15/zaring-guidance-congressional-review-act/> [<https://perma.cc/FL33-NUDH>].

entities, its understanding about prevailing economic conditions or technological capabilities, and more. It does not, however, establish rights or obligations that are binding on the public or on the agency. Of course, disputes frequently arise about whether an agency statement is truly just a policy statement, or if it is actually a legislative rule, especially as agencies sometimes mischaracterize their documents.²⁵ But, assuming a document is a policy statement, it does not grant an agency authority to act in accordance with such policy: when the agency wants to take regulatory action consistent with a policy statement, say by enforcing a regulation, the policy statement is neither a prerequisite for the action, nor sufficient authority for the action. Fundamentally, the agency's authority for the action depends on the underlying statute or regulation, regardless of what the policy statement says.²⁶ "When the agency applies [a general statement of] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."²⁷

Thus, agencies' inattentiveness in failing to submit policy statements to Congress is understandable. Outside the CRA, any possible status of these documents as "rules" has had little legal significance. These general statements of policy are exempt from notice and comment rulemaking procedures under the APA.²⁸ They are not binding on the agencies or on regulated parties.²⁹ Finally, under the APA, agencies are supposed to publish these policy statements in the Federal Register, but incomplete compliance does not typically result in serious consequences.³⁰

²⁵ See, e.g., *Chamber of Commerce v. Dept. of Labor*, 174 F.3d 206, 212-213 (D.C. Cir. 1999); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986).

²⁶ A policy can change the landscape for enforcement, by providing notice to regulated parties that particular types of conduct may incur penalties. But the policy would still not be the legal justification for imposing a penalty; and conversely many forms of relief (injunctive orders, restitution, compensatory damages) and often even penalties are available without an agency's having previously given warning through a policy statement.

²⁷ *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014); *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974).

²⁸ 5 U.S.C. § 553(b)(A).

²⁹ See *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017) ("[T]he Manual instructions constitute a policy statement . . . [because] they have no binding legal effect."); *Holistic Candles & Consumers Ass'n v. Food and Drug Admin.*, 664 F.3d 940, 944 (D.C. Cir. 2012) ("[A]n FDA warning letter compels action by neither the recipient nor the agency.").

³⁰ 5 U.S.C. § 552(a). We do not mean to condone agencies' failing to follow rigorously the statutory requirement to publish their statements of policy. However, the most significant legal consequence of a failure to publish a document is that the document cannot be the basis for imposing adverse consequences on the public. A guidance document cannot be the grounds for adverse consequences anyway. *Nat'l Mining Ass'n*, 758 F.3d at 252.

The auto lending guidance targeted by the CRA resolution illustrates the character of policy statements. For purposes of this argument, we distinguish between two aspects of the bulletin: an interpretation of ECOA and a public notice about the Bureau's views and enforcement plans. With respect to the public notice (we address the interpretation below in Section IV), the bulletin simply provides information about the Bureau's views regarding the risks associated with a certain mode of lending called dealer markup, and the ways that indirect lenders can mitigate these risks.³¹ The bulletin points out that dealer markup may result in disparate impact in loan pricing and it warns indirect auto lenders that they "may be liable" if they allow dealer markup and the markup results in prohibited disparities.³² The bulletin also urges lenders to "take steps to ensure that they are operating in compliance," and it identifies some steps that would help with respect to dealer markup.³³

Given the warning, it would be unsurprising if the Bureau initiated an enforcement action alleging that an indirect lender allowed dealer markups that resulted in discrimination. Indeed, we could infer that dealer markup was an enforcement priority. But to win such a case, the Bureau would have to persuade a court that, given the facts, the lender's activities violated ECOA; the existence of the auto lending bulletin would not be so much as a thumb on the scale in the court's decision.³⁴ With respect to the risk-mitigation practices that the bulletin suggests, the Bureau clearly favored those actions. The bulletin itself does not, and cannot, obligate a lender to implement those risk-mitigation practices.

Recent events underline the nature of guidance documents and policy statements. Most of the federal agencies regulating the financial industry issued statements affirming that guidance documents are not binding. The joint statement from the prudential regulators (the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration) and the Consumer Financial Protection Bureau asserts that, as we have explained above, "supervisory guidance outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding appropriate practices for a given subject area."³⁵ Furthermore, "any citations

³¹ *Bulletin*, *supra* note 19 at 3-5.

³² *Id.* at 3.

³³ *Id.* at 4.

³⁴ *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980) ("Unlike legislative rules, non-binding agency statements carry no more weight on judicial review than their inherent persuasiveness commands.").

³⁵ *Interagency Statement Clarifying the Role of Supervisory Guidance*, CONSUMER FIN. PROT. BUREAU (Sept. 11, 2018), <https://www.consumerfinance.gov/about-us/newsroom/agencies-iss-ue-statement-reaffirming-role-supervisory-guidance/> [<https://perma.cc/RBX5-Y3EU>].

will be for violations of law,” rather than for “a ‘violation’ of supervisory guidance.”³⁶ The Chair of the Securities and Exchange Commission also issued a statement asserting that the Commission has long said its staff guidance is not binding or legally enforceable.³⁷

B. The Ineffectiveness of the CRA as to Policy Statements

The nature of policy statements makes a CRA resolution rather useless. Let’s suppose, for purposes of argument, that a CRA resolution was successful in blocking the Bureau from maintaining its auto lending policy statement. Then the Bureau could still bring an enforcement case based on dealer markup. Just as the policy statement did not justify or authorize such cases, the absence of the policy statement would not bar them. The facts of a given case would make the conduct a violation, or not, depending on the content of ECOA and Regulation B—even in the absence of the policy statement. Additionally, the Bureau could, in the enforcement action, encourage the sorts of company policy that the policy statement recommended.³⁸ For example, the Bureau could reach a settlement in which the defendant promises to adopt those policies; the Bureau could ask for an injunction requiring those steps; or it could accept a more lenient penalty on the basis of a company’s policies along those lines. An agency does those things on a case-by-case basis, and it could keep doing that without the policy statement.

As a practical matter, for a regulated entity it often may not seem like there is much difference between a regulation and a policy statement. If the Bureau says it wants auto lenders to impose certain controls on dealer markup, a typical lender might not think of that suggestion as optional.³⁹ After all, even

³⁶ *Id.* The tone of the statement suggests that perhaps the prudential regulators have occasionally overplayed the role of their guidance documents, and maybe examiners actually have treated guidance as binding. That behavior would not be surprising, or inconsistent with our arguments. Supervisory agencies frequently issue directives and instructions to regulated institutions that carry special weight because of the supervisory role and authority.

³⁷ Jay Clayton, *Statement Regarding SEC Staff Views*, U.S. SEC. EXCH. COMM’N (Sept. 13, 2018), <https://www.sec.gov/news/public-statement/statement-clayton-091318> [<https://perma.cc/6PCM-XU8E>].

³⁸ Perhaps if a policy statement described a rubric for enforcement prioritization, a CRA resolution could block the agency from prioritizing enforcement cases in that particular way. It would be easy for an agency to sidestep this use of the CRA, so as to render the resolution ineffectual.

³⁹ See *Nat’l Mining Ass’n*, 758 F.3d at 253 (“[W]hile regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall about what will be needed to obtain a permit, there has been no ‘order compelling the regulated entity to do anything.’”).

if in principle a company has the right to argue that its dealer markups are legal, the expense of the fight and the uncertainty of the outcome might make it utterly impractical. An agency's pronouncement that it thinks a certain practice could be a violation will often be enough to end the practice.⁴⁰

Still, there is a key difference between that dynamic and the impact of a genuine legislative regulation. For example, the Bureau adopted a legislative rule prohibiting class-action waivers in arbitration clauses, and a CRA resolution disapproving that rule became law.⁴¹ Absent the arbitration rule, there is no rule generally prohibiting class-arbitration waivers. So a company can confidently include those waivers in its consumer finance contracts, and continue to use them. By contrast, suppose the CRA resolution against the auto lending bulletin passes. We doubt any company will be confident that, because of the CRA resolution, it can use dealer markups freely.⁴²

We are not the first to observe these characteristics of policy statements. However, we believe it is important to recognize the full implications with respect to the CRA. A policy statement might be a rule; the CRA might entitle the majority to pass a resolution disapproving the rule using expedited procedures; and the resolution might then wipe the policy statement out, as though it had never been. Nothing in the real world would change as a result—either for the agency or for regulated entities.

Finally, looking to the text of the CRA, it is consistent with this discussion, and does not suggest that a CRA resolution should have any significance for a policy statement. The language that the CRA mandates for a

⁴⁰ For example, in 2013, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency jointly issued guidance that said deposit advance loans pose risks to bank safety and soundness, and indicated they would scrutinize such products carefully during supervisory examinations. Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70,552 (Nov. 26, 2013). According to the American Bankers Association, banks heeded the warning, and all but one bank stopped offering the product entirely. *Small Dollar Credit*, AM. BANKERS ASS'N 5 (Apr. 2017), <https://www.aba.com/Advocacy/Documents/SmallDollarWhitePaper2017Apr.pdf>.

⁴¹ See Bureau of Consumer Financial Protection Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040); Joint Resolution, Pub. L. No. 115-74, 131 Stat. 1243 (2017) (invalidating the rule).

⁴² Lenders may have more freedom to use dealer markup, because the new leadership at the Bureau may no longer believe dealer markup is illegal and may not want to take enforcement action against markup policies. If so, what matters is that the views of Bureau leadership have changed—not that a CRA resolution affirmed the new views. On the other hand, ECOA violations are, in principle, subject to private rights of action. 15 U.S.C. § 1691(e). Just as the existence of the Bureau's policy statement would have been of only marginal benefit for a plaintiff's proof in a case involving dealer markup, the disappearance of the policy statement does not undermine such a case.

resolution makes such a resolution irrelevant for policy statements because the resolution has to say the subject rule “shall have no force and effect.”⁴³ A policy statement, by its very nature, has no legal force or effect.⁴⁴ Similarly, while “[a]ny rule that takes effect and is later made of no force and effect by enactment of a joint resolution . . . shall be treated as though such rule had never taken effect,” a policy statement is not “made of no force and effect” by a CRA resolution.⁴⁵ A policy statement had no force and effect in the first place. The reference to “tak[ing] effect” seems, superficially, like it could be relevant to policy statements; an agency might speak of a policy’s “effective date,” meaning the point after which the agency would begin acting in accordance with the statement. However, given the repeated usage of “force and effect,” that is evidently not the sort of “effect” that the CRA means.

Nor does the “salting the earth” provision in the CRA have any consequence for a policy statement. The Bureau asserted that, thanks to that provision, the CRA resolution about the auto lending policy statement “prohibits the Bureau from ever reissuing a substantially similar rule.”⁴⁶ However, the “salting the earth” provision only says, “[a] rule that does not take effect (or does not continue)” due to a CRA resolution “may not be reissued in substantially the same form.”⁴⁷ This restriction has no import for a policy statement, because the agency could all along have acted in the same way without issuing the statement. For a legislative rule, issuance is a key step without which the rule has no effect. For a policy statement, issuance is simply a convenient way to provide information.⁴⁸

To be clear, Congress can, of course, restrict how an agency carries out its policy preferences, including how it prioritizes enforcement. One common

⁴³ 5 U.S.C. § 802(a).

⁴⁴ At most, the agency must provide an explanation for declining to follow its policy statement. But the bar for such an explanation is not high. *Consol. Edison Co. of N.Y. v. Fed. Energy Reg. Comm’n*, 315 F.3d 316, 323 (D.C. Cir. 2003) (affirming agency’s decision to rely on old policy statement instead of current one for reasons of “administrative convenience” and finding that “[p]olicy statements’ differ from substantive rules that carry the ‘force of law,’ because they lack ‘present binding effect’ on the agency”)

⁴⁵ § 801(f).

⁴⁶ Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57, CONSUMER FIN. PROT. BUREAU (May 21, 2018), <https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/> [<https://perma.cc/M5CX-3UVP>] (providing statement from Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau).

⁴⁷ § 801(b)(2).

⁴⁸ At most the CRA would prohibit the agency from issuing the policy statement—an outcome that would mean the agency could not tell the public about beliefs, policies, or priorities even though it could implement them.

tool is limiting language in appropriations. For example, appropriations laws have repeatedly prohibited the Department of Justice from spending funds to prosecute certain types of crime involving marijuana.⁴⁹ Another appropriations law restricted the Department of Energy from implementing a statutory provision under which, otherwise, it was supposed to limit sales of incandescent light bulbs.⁵⁰ We are not arguing that limitations like these are beyond Congress's power. Rather, the point is that a CRA resolution does not impose such limitations. CRA resolutions have specific language and a specific purpose, to prevent the subject rules from having "force and effect." That language is about legislative rules, not policy statements.

In sum, a CRA resolution disapproving a policy statement is a fairly hollow exercise from a legal point of view. The resolution may have some value as a rhetorical tool in political debates. To be sure, a very large number of agency documents are purely policy statements and expressing disapproval via a CRA resolution may be a useful way to send a message—to the agency or to voters—about an agency's policy. However, there is nothing that a CRA resolution about a policy statement would prevent an agency from doing, and no protection that it would provide to a regulated party.

IV. DISAPPROVAL OF INTERPRETIVE RULES

An analogous argument can be made about many interpretive rules. Textually, the argument is essentially the same. A CRA resolution prevents a rule from having "force and effect"; and myriad cases have said that interpretive rules have no binding legal force.⁵¹

Of course, a subset of interpretive rules have, according to the Supreme Court, "the force of law." These are interpretations from agencies that have the authority to speak with that force on certain ambiguous statutory provisions, and that the agencies have issued through a "relatively formal administrative procedure" appropriate for interpretations having legal force.⁵² The strength of

⁴⁹ See, e.g., Consolidated Appropriations Act, Pub. L. 115-141, § 538 (2018).

⁵⁰ See, e.g., Consolidated Appropriations Act, Pub. L. 114-113 § 312, 129 Stat. 2419 (2016). There is no principled reason that restrictions like these could not go into other laws; appropriations bills are attractive mainly because they are relatively unlikely to attract a filibuster or veto.

⁵¹ See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) ("Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process.") (internal quotation marks and citation omitted); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979) ("A court is not required to give effect to an interpretative regulation.") (internal quotation marks omitted).

⁵² *U.S. v. Mead Corp.*, 533 U.S. 218, 240 (2001) (internal quotations omitted).

that characterization in *Mead* illustrates the converse as well, that very many interpretive rules do not carry the force of law.⁵³ Just like policy statements, these rules can be regarded as not having “force and effect” under the CRA, so that CRA resolutions do not really affect them.

The CFPB’s auto lending bulletin is a good illustration for this point as well. The bulletin explains what it means to be a “creditor” under ECOA.⁵⁴ Based on this interpretation, the bulletin describes two sets of credit practices that, if an indirect lender used them, would “likely” make the lender a “creditor” under ECOA.⁵⁵ Whether these observations in the bulletin are correct depends on the content of ECOA and Regulation B. We take for granted that the bulletin would not deserve *Chevron* deference. Were the Bureau to take enforcement action asserting a lender was a creditor of the type described in the bulletin, the Bureau would not be able to rely on the bulletin itself as the authority for the proposition. On the other hand, if the bulletin didn’t exist, the Bureau would have the same ability to bring, and perhaps win, an enforcement action using the same interpretation.⁵⁶

Not only does the text of the CRA suggest a similar result for interpretive rules as for policy statements, the functional arguments work the same as well. The key similarity is that, just as with policy statements, interpretations do not need to be rules. As noted above, an agency can prioritize in a given way, or adopt a particular policy in the course of enforcement actions, without having issued a policy statement. An agency can provide a

⁵³ See *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (“Interpretive rules do not carry the force and effect of law.”); see also *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111-12 (D.C. Cir. 1993) (explaining that a “purported interpretive rule” that has “legal effect” is actually “a legislative, not an interpretive rule”). Some circuits accord *Chevron* deference to rules that are more informal than would earn deference in others. See *Doe v. Leavitt*, 552 F.3d 75, 80 (1st Cir. 2009) (comparing examples in First and D.C. Circuits). This fuzziness at the *Mead* boundary does not alter the basic point that many interpretive rules have no legal force. In addition, there might be special cases. For example, an agency might have contracts that bind its contractors to respect its interpretations. The possibility of such cases does not make the general proposition less valid.

⁵⁴ *Bulletin*, *supra* note 19 at 2.

⁵⁵ *Id.*

⁵⁶ Of course, an agency can get *Seminole Rock* deference for an interpretation of its regulations even if it presents the interpretation informally. See generally *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). However, the courts have not spoken of this deference as giving the force of law to such interpretations. See Transcript of Oral Argument at 28:8-12, *Kisor v. Wilkie*, No. 18-15 (S. Ct. Mar. 27, 2019) (Chief Justice Roberts expressing doubt that regulatory interpretations “have the force and effect of law”). Indeed, the way *Seminole Rock* deference works belies the notion that any given articulation of the interpretation has the force of law. The agency could state the interpretation in any format, including in an enforcement action, and deserve the same deference. The deference does not accrue to a particular interpretation arising in a rule having the force of law.

given interpretation, without the force of law, in the course of an enforcement action; in an informal adjudication on a non-enforcement issue; in an amicus brief; etc. If the CRA prevented the agency from “issu[ing] [a] rule” stating that interpretation, that restriction would not stop the agency from having the same view or effectuating it in any of those other ways.

V. DISAPPROVAL OF LEGISLATIVE RULES

In conclusion, a CRA resolution matters only when the rule at issue would have “force and effect” in the absence of the resolution. Legislative rules in general have this character, and for them CRA resolutions are highly consequential. Still, as we noted above, exactly what those consequences are remains to be seen. In general, we can expect it to be some time before this issue plays out. After all, the CRA resolutions passed in this congressional session aligned with the policies of the Trump Administration; and current agency heads are unlikely to test the boundaries of “no force and effect” or “substantially similar.”

Future agency heads, in a new administration, may want to test these boundaries. If so, the discussion here offers one way to think about the issues. Every final rule that is legislative in the main contains some additional material that amounts only to discussion of the agency’s policy views, explanation of enforcement priorities, etc. Our argument leads to the conclusion that had the agency issued those aspects of the rule separately, a CRA resolution would not have affected them—because they would have had no force and effect in any case. They should have no more force and effect when incorporated in a legislative rule.⁵⁷ If that is correct, then eliminating the legal force of the legislative rule ought not to block the agency from implementing the policy features that were not legislative. At a minimum, “substantially similar” should measure only the legislative features of a rule.

⁵⁷ Often, interpretations in a legislative rule will deserve *Chevron* deference. As we made clear above, our arguments that CRA resolutions do not affect interpretive rules focused on interpretations that do not deserve such deference.