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INSIGHT

Potential Disapproval of SEC Staff Accounting Bulletin No. 121 Under the Congressional Review Act

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A growing number of firms are providing platforms for crypto transactions, which has prompted the Securities and Exchange Commission (SEC) to consider how crypto exposures should be treated. Many of these firms safeguard the platform users' crypto assets and maintain crypto keys and other information necessary to access crypto assets. This safeguarding service creates an obligation for the firm, and the SEC's Staff Accounting Bulletin No. 121 (SAB-121) seeks to provide clarity on how such a business should account for that obligation.

SAB-121 went into effect in 2022 and states that, "as long as [the firm] is responsible for safeguarding the crypto-assets held for its platform users, including maintaining the cryptographic key information necessary to access the crypto-assets, the staff believes that [the firm] should present a liability on its balance sheet to reflect its obligation to safeguard the crypto-assets held for its platform users" and that "it would be appropriate for [the firm] to recognize an asset at the same time that it recognizes the safeguarding liability, measured at initial recognition and each reporting date at the fair value of the crypto-assets held for its platform users."

SAB-121 has created concern over the scope and application of the SEC's actions, and some Members of Congress have expressed interest in disapproving it using the Congressional Review Act (CRA). This Insight covers the actions Congress is considering under the CRA regarding SAB-121.

The Congressional Review Act (CRA) and SAB-121

The CRA provides Congress with a mechanism to review federal agency actions that meet the CRA's definition of *rule*. The CRA requires agencies to report the issuance of rules to Congress and provides Congress with special fast-track procedures under which to consider legislation that overturns a rule. Like regular legislation, a CRA joint resolution of disapproval becomes effective once both houses of Congress pass the joint resolution and it is signed by the President or Congress overrides the President's veto.

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The category of rules the CRA covers is broader than the category of rules that are subject to the Administrative Procedure Act's notice-and-comment requirements for federal rulemaking. As such, some agency actions, such as guidance documents, that may not be subject to notice-and-comment rulemaking procedures could still be considered rules under the CRA.

The SEC did not submit SAB-121 as a rule under the CRA, as it did not appear to believe it was covered. However, pursuant to a practice that has developed in recent years, the Government Accountability Office (GAO) was asked for its opinion on whether the bulletin should have been submitted. In its opinion, GAO stated that the bulletin did meet the CRA's definition of *rule* and should have been submitted.

That opinion allowed Congress to consider a joint resolution of disapproval using the CRA's fast-track procedures. Subsequently, Members of the House and Senate introduced H.J.Res. 109 and S.J.Res. 59, respectively, in February 2024. The House passed H.J.Res. 109 on May 9 by a vote of 228-182. One media outlet reported that the Senate may consider a CRA joint resolution of disapproval imminently. President Biden has said he would veto the resolution.

Effects of Disapproval of Rules Under the CRA

Disapproval of a rule under the CRA has the immediate effect of overturning the rule in question, and it also has a more long-term effect on the agency's ability to issue similar rules. If a joint resolution of disapproval is enacted, the CRA states that the "rule shall not take effect (or continue)." If the rule had already gone into effect, like SAB-121, it must be treated as though it "had never taken effect."

In addition, the CRA provides that if a joint resolution of disapproval is enacted, an agency may not issue the rule in "substantially the same form" unless authorized in a subsequent law. The CRA does not define the phrase *substantially the same*. Section 805 of the CRA also has a general prohibition on judicial review, and no courts have weighed in on the meaning of this phrase.

To date, two rules have been reissued after having been struck down under the CRA. In both instances, the agency looked primarily to the legislative history of the congressional disapproval itself to guide what a reissued rule would look like. If S.J.Res. 59 or H.J.Res. 109 were to be enacted, the SEC may choose to consider the legislative history of the disapproval in determining next steps, or it may also wish to consider other factors. Notably, both of the reissued rules were required under statutory mandates.

The CRA is also silent on the question of who would make the determination as to whether a reissued bulletin would be "substantially the same" as SAB-121. Due to the aforementioned prohibition on judicial review, Congress and the agencies themselves, rather than a court, might be ultimately responsible for making that determination. If the SEC were to reissue the bulletin, provided that it met the CRA's definition of *rule*, Congress could again use the CRA to overturn the bulletin on the basis that it was too similar to the disapproved SAB-121 (or for any other reason). Congress could also use its legislative powers in other ways, not just through the CRA, to respond to any subsequent SEC bulletin or other action.

If SAB-121 is not overturned, the SEC will presumably continue to keep it in effect. Subsequently, institutions providing custodial services for crypto asses on their platforms will be required to hold crypto assets on their balance sheets. This, according to industry and regulators, represents a shift from traditional custodial practices, could limit involvement of certain institutions, and may introduce new costs or risks.

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