

Clients & Friends Memo

The Trump Administration: Potential Levers of Regulatory Change Affecting the Commodities Markets

December 21, 2016

Much has happened since the election of Donald J. Trump as the 45th President of the United States and the return of both houses of Congress to Republican control. The Trump transition team has repeatedly declared its intention to “dismantle” the Dodd-Frank Act (“Dodd-Frank” or “Act”), in the interim calling for an immediate moratorium on new rulemaking not required for emergencies to allow for a systematic review before further action is taken. Congress has been similarly vocal in its call for repeal of Dodd-Frank. During this transition period, Republican leaders of the House introduced the Midnight Rules Relief Act of 2016, seeking to enhance Congressional authority to block final agency rules under the Congressional Review Act. The Chairman of the House Committee on Agriculture urged the Chairman of the U.S. Commodity Futures Trading Commission (“CFTC”) to “refrain from pushing through controversial regulations at the end of your tenure. . . .”¹

Adherence to the professed will of the President-elect and Congress by the CFTC has been mixed: on the one hand, the CFTC has pressed forward with finalizing its new position aggregation rule and re-proposed rules addressing the imposition of capital requirements for non-prudentially regulated swap dealers and the regulation of automated trading in the commodities markets. On the other hand, the CFTC ostensibly backed down from issuing final rules requiring the imposition of federal position limits for a list of “core” futures contracts and economically equivalent swaps; instead electing to re-propose the position limits rules for further public comment.

Against this backdrop, Cadwalader attorneys begin a discussion about the potential levers available to the Trump Administration and the Republican Congress, short of a repeal of the Act, to reduce the regulatory burden on the commodities markets.

¹ Letter from K. Michael Conaway to the Honorable Timothy G. Massad, Commodity Futures Trading Commission, dated November 18, 2016.

Congressional Review Act

The Congressional Review Act (“CRA”) provides a mechanism for Congress to review and effectively overturn newly promulgated agency rules before they become effective.² The CRA applies to “major” rules and provides Congress with a time-limited window to reject agency action. Although Congress has utilized the CRA to overturn an agency rulemaking only one time, the one instance was in 2001 for regulations promulgated in advance of the transition from then-President Clinton (Democrat) to newly elected President George W. Bush (Republican).³ The transition from President Obama (Democrat) to President-elect Trump (Republican) may provide a similar environment for Congress to utilize the CRA if agencies under the Obama Administration promulgate major rules in advance of the transition to the Trump Administration. Indeed, Congress has featured the CRA in many of its public demands for a rulemaking standstill. Below is a short summary of the process implemented by the CRA.

- Before an agency rule can take effect, the agency must submit the rule to each House of Congress and the Comptroller General. In addition to the rule, the agency submits a form identifying whether the rule is a “major” rule.
- A “major” rule includes any rule that is likely to result in one of the following: (1) an annual effect on the economy of one hundred million dollars or more (\$100,000,000); (2) a major increase in the cost of prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.
- If a rule is a major rule, the Comptroller must send a report about the rule within 15 days to the Congressional committees of jurisdiction.⁴ The CRA automatically delays the effectiveness of any major rule until 60 days from the later of (1) the date the rule is published in the federal register; or (2) the date the agency’s report is submitted to Congress.
- The CRA allows any member of Congress to introduce a resolution of disapproval. To pass the disapproval measure, both Houses of Congress must agree and, thereafter, the resolution must be presented to the President. If the disapproval measure passes and is signed, the law overturns the rule and it is **as if the final rule never existed**.
- The opportunity for a member of Congress to introduce a resolution to disapprove a rule is time-limited. Specifically, a member of Congress must introduce a resolution within 60 days (session days for the Senate; legislative days for the House) of the later of the rule being published in the federal register or submission of the report to Congress.⁵ However, once a member of

² 5 U.S.C. §§ 801-808 (2000).

³ Specifically, Congress overturned the Occupational Safety and Health Administration’s ergonomic regulations. See *Ergonomics Program*, 65 Fed. Reg. 68262 (Nov. 14, 2000).

⁴ For example, the CFTC’s committee of jurisdiction is the House and Senate Agriculture Committees.

⁵ Where less than 60 days remain before the date the Congress adjourns the session of Congress, the 60-day clock resets in the next session of Congress.

Congress introduces a resolution, there is no time limit for Congress to vote on the resolution during that Congress.

- The CRA includes provisions designed to prevent a Senate filibuster if 30 members so petition.

Agency Amendment or Withdrawal of Existing Rules

Separately, the various agencies under the new Trump Administration could decide to amend or withdraw proposed or existing agency rules. The Administrative Procedure Act (“APA”) generally governs the procedural requirements for agency rulemakings.⁶ For the most part, the process to amend or withdraw a final agency rule requires notice and comment rulemaking under the APA.⁷ Furthermore, if an agency under the Obama Administration finalizes a rule, but the rule does not take effect until the Trump Administration, the agency under the Trump Administration likely will need to engage in the notice and comment process if the agency intends to withdraw the final rule.⁸

The APA provides a “good cause” exception for an agency to forego the notice and comment process to promulgate, amend, or withdraw an agency rule if the agency “for good cause finds [...] that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁹ However, the courts have “narrowly construed” whether the good cause exception is available to a particular agency.¹⁰ Cases that found an agency had good cause to bypass the notice and comment requirement can be categorized into: (1) situations involving emergencies, (2) situations where prior notice would subvert the underlying statutory scheme; or (3) situations where Congress intended to waive the notice and comment requirements.¹¹

Of particular relevance here, certain provisions of the Dodd-Frank Act applicable to the commodities markets (and financial markets generally) expressly required multiple regulators, including the CFTC, to implement rules governing the same statutory provision. The much debated “Volcker Rule”, for example, required the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the

⁶ See 5 U.S.C. §§ 551-559.

⁷ See, e.g., *Citibank, Fed. Sav. Bank v. FDIC*, 836 F. Supp. 3, 7 (D.D.C. 1993) (“The notice and comment procedures which apply to the creation of new regulations are equally applicable to the repeal of existing regulations.”); and *Consumer Energy Council v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982) (“[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule. . . . The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of appeal.”).

⁸ See *Natural Resources Defense Council, Inc. v. U. S. EPA*, 683 F.2d 752, n. 23 (3rd Cir. 1982) (indefinite suspension of a final rule may be interpreted as “tantamount to a revocation” and in violation of the notice and comment requirement).

⁹ 5 U.S.C. § 553(b)(3)(B).

¹⁰ *NRDC v. EPA* at 764.

¹¹ Jared P. Cole, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, Congressional Research Service, at pp. 4-5 (2016).

Securities and Exchange Commission and the CFTC to implement regulations under Section 619 of the Act.¹² Congress further directed the relevant agencies to “consult and coordinate with each other, as appropriate, for the purposes of assuring, to the extent possible, that such regulations are comparable and provide for consistent application and implementation of the applicable provisions . . .”¹³ Reflecting the significant burden of this undertaking, it took almost two years from the publication of the CFTC’s proposed rule for the agency to finalize its implementing regulation. It would not be unreasonable to predict that efforts to amend or withdraw the CFTC rule would meet with similar delay.

Agency Amendment or Withdrawal of Guidance

To the extent that an agency under the Obama Administration adopted a statement of policy or other “guidance,” the same agency under the new Trump Administration has the discretion to retain, amend, replace, and/or withdraw the policy or guidance. The APA does not obligate an agency to engage in notice and comment rulemaking to amend, replace, and/or withdraw policy statements or guidance because they do not constitute rules under the APA.

As described in *Pacific Gas & Electric Co. v. Federal Power Commission*, “[a] general statement of policy [...] does not establish a ‘binding norm.’ It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as a policy.”¹⁴ The CFTC’s policy for the application of CFTC rules to cross-border swaps activity is an example of an agency statement of policy issued as part of the implementation of the Dodd-Frank Act.¹⁵ In a September 2014 decision, the D.C. District Court confirmed that the CFTC’s statement of policy for cross-border regulation is, in fact, a statement of policy for APA purposes.¹⁶ As a result, the CFTC under the new Trump Administration could decide to forgo notice and comment rulemaking to amend, replace, and/or withdraw the policy.

¹² Under Section 13 of the Bank Holding Company Act, the CFTC’s final rule will be applicable to a banking entity for which the CFTC is a “primary financial regulatory agency” for the banking entity. Thus, the final rule may apply to banking entities that are, for example, registered swap dealers, futures commission merchants, commodity trading advisors and commodity pool operators.

¹³ 12 U.S.C. § 1851(b)(2)(B)(ii).

¹⁴ *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974).

¹⁵ See *Interpretative Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45292 (Jul. 26, 2013).

¹⁶ *Securities Industry and Financial Markets Association v. United States Commodity Futures Trading Commission*, 67 F. Supp 3d 373 (D.D.C 2014)

Conclusion

For most rule changes, an agency will need to engage in notice and comment; but an agency can change a statement of policy without notice and comment. In addition to agency action, Congress has the opportunity to review and overturn major agency rules recently adopted in advance of the Trump Administration. Once Trump Administration - appointed Chairpersons and Commissioners have been confirmed by Congress, they will prioritize key regulatory issues including rules or guidance to amend, promulgate, or withdraw.¹⁷

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¹⁷ Here is a prior Cadwalader summary of expected key topics for financial regulatory agencies:
<http://www.cadwalader.com/resources/clients-friends-memos/the-trump-administration-change-by-appointment>.