



## Decision

**Matter of:** Securities and Exchange Commission—Applicability of the Congressional Review Act to Staff Accounting Bulletin No. 121

**File:** B-334540

**Date:** October 31, 2023

---

### DIGEST

On March 31, 2022, the United States Securities and Exchange Commission (SEC) issued *Staff Accounting Bulletin No. 121* (Bulletin). The Bulletin provides interpretive guidance regarding how covered entities should account for and disclose their custodial obligations to safeguard crypto-assets held for their platform users. SEC did not submit a report pursuant to the Congressional Review Act (CRA) to Congress or the Comptroller General on the Bulletin.

CRA requires that before a rule can take effect, an agency must submit a report on the rule to both the House of Representatives and the Senate as well as the Comptroller General, and provides procedures for congressional review where Congress may disapprove of rules. CRA adopts the definition of rule under the Administrative Procedure Act (APA) but excludes certain categories of rules from coverage. We conclude the Bulletin is a rule for purposes of CRA because it meets the APA definition of a rule, and no exceptions apply. Therefore, the Bulletin is subject to the requirement that it be submitted to Congress.

---

### DECISION

On March 31, 2022, the United States Securities and Exchange Commission (SEC or the Commission) issued *Staff Accounting Bulletin No. 121* (Bulletin) and published it on the Commission's website. SEC, *Staff Accounting Bulletin No. 121*, available at <https://www.sec.gov/oca/staff-accounting-bulletin-121> (last visited Oct. 25, 2023). The Bulletin became effective on April 11, 2022, and was published in the *Federal Register* on that same date. 87 Fed. Reg. 21015. We received a congressional request for a decision regarding whether the Bulletin is subject to the Congressional Review Act (CRA). Letter from Senator Cynthia M. Lummis to Comptroller General

(Aug. 2, 2022). For the reasons described below, we conclude that the Bulletin is a rule under CRA and thus subject to CRA's submission requirement.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/gao-06-1064sp>. Accordingly, we reached out to SEC to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, SEC (Oct. 24, 2022). We received SEC's response on November 21, 2022. Letter from General Counsel, SEC, to Assistant General Counsel, GAO (Response Letter).

## BACKGROUND

### SEC's Staff Accounting Bulletin No. 121

SEC was established in the Securities Exchange Act of 1934 (the Exchange Act). 15 U.S.C. §§ 78a-78rr. The Commission is composed of five commissioners who are appointed by the President by and with the advice and consent of the Senate. *Id.* The Exchange Act grants SEC broad authority over the securities industry. *Id.* The Act delegates to SEC the power to oversee certain organizations dealing with securities, to exercise disciplinary authority over covered parties that participate in prohibited conduct, and to require the periodic reporting of information by companies with publicly traded securities. *Id.* In exercising these powers, SEC publishes some its interpretations relating to financial reporting matters in the Code of Federal Regulations. See 17 C.F.R. Part 211. These interpretations include Financial Reporting Releases (Subpart A), Staff Accounting Bulletins (SABs) (Subpart B), and Accounting and Audit Enforcement Releases (Subpart C). *Id.* SEC also publishes these interpretations on its official website in order to "provide guidance to those who must comply with the federal securities laws." SEC, *Staff Interpretations*, available at <https://www.sec.gov/regulation/staff-interpretations> (last visited Oct. 25, 2023).

SABs in particular are used by SEC to publicize its staff's "views regarding accounting-related disclosure practices" under federal securities laws. SEC, *Selected Staff Accounting Bulletins*, available at <https://www.sec.gov/regulation/staff-interpretations/accounting-bulletins> (last visited Oct. 25, 2023). According to SEC, SABs specifically represent the interpretations and policies followed by the Commission's Division of Corporation Finance (Division) and Office of the Chief Accountant (OCA), two internal organizational units of SEC. *Id.* The Division is tasked with ensuring that investors are provided with material information to make informed investment decisions. SEC, *About the Division of Corporation Finance*, available at <https://www.sec.gov/divisions/corpin/cfabout> (last visited Oct. 25, 2023). In furtherance of this goal, the Division selectively reviews filings made under the Exchange Act in order to both monitor and enhance compliance with disclosure and accounting requirements. *Id.* Division staff "may issue comments to a company to elicit better compliance with applicable disclosure requirements," and, in

response, a company has the opportunity to amend its disclosure or revise its financial statements and other disclosures. *Id.* Additionally, the Division may “refer[] matters to the Division of Enforcement” when appropriate. *Id.* OCA, headed by the Chief Accountant, provides advice to the Commission on accounting and auditing matters, including accounting policy determinations. SEC, *Office of the Chief Accountant*, available at <https://www.sec.gov/page/oca-landing> (last visited Oct. 25, 2023).

Starting in 1975, the Division and OCA instituted the practice of releasing SABs to more widely publicize staff interpretations regarding the disclosure requirements of federal securities laws. 40 Fed. Reg. 53557 (Nov. 19, 1975). SABs were created to level the competition among accounting firms; the Commission noted that large accounting firms generally had multiple opportunities to exchange information and views with SEC staff, but that small accounting firms might have been disadvantaged by a lack of similar opportunities. 40 Fed. Reg. 53557. To rectify this imbalance, the SAB was thus instituted as a tool for the Division and OCA to use to “quickly and easily communicate[]” their staff’s new and revised practices and interpretations to the public. 40 Fed. Reg. 53557.

On March 31, 2022, SEC published the Bulletin to express its staff’s views regarding the accounting obligations for covered entities that provide custodial services of crypto-assets. SEC, Bulletin, available at <https://www.sec.gov/oaca/staff-accounting-bulletin-121> (last visited Oct. 25, 2023).<sup>1</sup> The Bulletin was issued in response to SEC staff’s observation of an increase in the number of entities providing platform users with the ability to transact in crypto-assets. *Id.* In the Bulletin, SEC staff state their belief “that the recognition, measurement, and disclosure guidance [] will enhance the information received by investors and other users of financial statements . . . thereby assisting them in making investment and other capital allocation decisions.” *Id.* The Bulletin presents a hypothetical situation regarding Entity A, an example entity engaging in crypto-asset services, and then provides interpretive responses to three questions concerning how SEC staff would expect Entity A to account for and disclose its custodial obligations. *Id.* For example, according to the Bulletin, covered entities<sup>2</sup> that are responsible for safeguarding

---

<sup>1</sup> The Bulletin is published on SEC’s official website but indicates that its text will not appear in the Code of Federal Regulations. 87 Fed. Reg. 21015, 21016.

<sup>2</sup> The Bulletin states that it “is applicable to entities that file reports pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 (“Exchange Act”) and entities that have submitted or filed a registration statement under the Securities Act of 1933 (“Securities Act”) or the Exchange Act that is not yet effective. The [Bulletin] is also applicable to entities submitting or filing an offering statement or post-qualification amendment thereto under Regulation A, entities subject to the periodic and the current reporting requirements of Regulation A, and private operating companies whose financial statements are included in filings with the SEC in

platform users' crypto-assets may be required to present a liability on their balance sheets to reflect this obligation. *Id.* Additionally, the Bulletin states staff would expect such entities to include clear disclosures of the nature and amount of crypto-assets they are responsible for holding for their platform users in the notes to their financial statements, with separate disclosure for each significant crypto-asset, and the vulnerabilities they have due to any concentration in such activities. *Id.*

Also on March 31, 2022, one of the commissioners released a public statement questioning SEC's use of a SAB to make and publicize the Bulletin's change in accounting practices. SEC, Statement of Commissioner Hester M. Peirce, *Response to Staff Accounting Bulletin No. 121*, available at <https://www.sec.gov/news/statement/peirce-response-sab-121-033122> (last visited Oct. 25, 2023) (criticizing the use of an SAB to provide the "definitive interpretive guidance" conveyed in the Bulletin).

### The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id.* CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id.* CRA makes clear that its provisions "shall apply notwithstanding any other provision of law." 5 U.S.C. § 806(a).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

SEC did not submit a CRA report to Congress or to the Comptroller General in regard to the Bulletin. In its response to us, SEC maintained that the Bulletin is not subject to CRA because it does not meet the APA definition of a rule as it is not an "agency statement" of "future effect." Response Letter, at 2–4. For the reasons explained below, we disagree. We find that the Bulletin does meet the definition of a

---

connection with a business combination involving a shell company, including a special purpose acquisition company."

rule under APA and that no exception applies. Thus, the Bulletin is subject to CRA's submission requirement.

## DISCUSSION

At issue here is whether the Bulletin is a rule for purposes of CRA. First, we must consider whether it meets the definition of a rule under APA. We conclude it does. We next must examine whether any exception applies. We find that none apply. Therefore, we conclude the Bulletin is a rule for purposes of CRA.

### The Bulletin is a Rule under APA

The Bulletin meets the APA definition of a rule. First, the Bulletin is an agency statement because it was published on SEC's official, public-facing website as a representation of the views held by its own employees. Second, the Bulletin is of future effect because it explicitly states that it applies to certain entities and contains "guidance for [these] entities to consider when they have obligations to safeguard crypto-assets held for their platform users." Bulletin. From this, we ascertain that SEC intended the Bulletin's guidance to apply prospectively to covered entities' future accounting and disclosure practices. Lastly, the Bulletin interprets and prescribes policy because it announces a preference for how covered entities should account for and disclose crypto-asset-related custodial obligations. *Id.*

SEC contends that the Bulletin is not a rule under APA because it is not an agency action. Response Letter, at 2. In its response to us, SEC stated that the Bulletin is not an agency statement because it is not binding on the agency and "at most" indicates "how the Office of the Chief Accountant and the Division of Corporation Finance would recommend that the agency act." Response Letter, at 3. Additionally, SEC asserts that the Bulletin is not an agency statement because the Exchange Act and SEC's organizational rules prohibit the Commission from delegating general rulemaking authority to an individual Commissioner or to staff. Response Letter, at 2-3 (citing 17 C.F.R. § 200.43).

We recognized in an earlier opinion that "in order [for an agency action] to be a rule [under APA], the statement must be made by an agency." B-238859, Oct. 23, 2017. The Bulletin is a statement made by SEC. While it is true that the Bulletin was not held out by SEC as a statement representing the full Commission, a statement issued by a subset of the agency may still constitute an agency statement for CRA purposes.

In particular, our prior opinions have recognized that agency actions published by less than the full agency can still constitute agency statements for the purposes of APA, and thus CRA. In three of our previous opinions, we examined whether various Supervision and Regulation Letters (SR Letters) issued by the Board of Governors of the Federal Reserve System (FRB or Board) were rules for purposes of CRA. B-330843, Oct. 22, 2019 (finding that *SR 12-7* and *SR 14-8* are rules under

CRA, but that *SR 15-7* is not a rule under CRA because it fell within an exception to the Act), B-331324, Oct. 22, 2019 (finding that *SR 11-7* is a rule under CRA), and B-331560, Apr. 16, 2020 (finding that *SR 15-18* is a rule under CRA). In those opinions, we noted that FRB has the authority to inspect the financial condition of financial institutions under its jurisdiction. B-330843, B-331324, and B-331560. We explained that FRB examiners tasked with inspecting and monitoring these institutions can issue SR Letters when they believe guidance on a particular issue is necessary and clarified that such guidance is not binding on any institution. B-330843, B-331324, and B-331560. In all three of our opinions involving FRB SR Letters, we concluded that the SR Letters at issue were agency statements within the APA definition of rule.<sup>3</sup> B-330843, B-331324, and B-331560. We explained that the SR Letters were agency statements “as [they were] issued by FRB.” B-330843, B-331324, and B-331560. The fact that such SR Letters were issued by examiner employees of FRB rather than the Board as a whole did not diminish the fact that the SR letters constituted the FRB speaking as an agency.

While we recognize that the Exchange Act and SEC’s organizational rules limit the Commission’s authority to delegate its general rulemaking function to its staff, these sources speak only to how the Bulletin does not stem from the Commission’s general rulemaking authority. On this point, we find it helpful to draw a parallel between the organizational structure and practices of both the SEC and FRB. Both are multi-member, independent government agencies that are statutorily restricted from delegating rulemaking authority. The Federal Reserve Act expressly does not authorize FRB to delegate its rulemaking function “to . . . members or employees of the Board.”<sup>4</sup> 12 U.S.C. § 248(k). FRB adopted this language from the Federal Reserve Act as an organizational rule.<sup>5</sup> Similar to how SEC’s Division and OCA publish SABs to announce how staff intends to administer certain accounting-related disclosure practices, FRB’s Division of Supervision and Regulation publish SR Letters to “address significant policy and procedural matters related to [FRB’s] supervisory responsibilities.”<sup>6</sup> As these SR Letters are published by a division of

---

<sup>3</sup> In B-330843, Oct. 22, 2019, we determined that *SR 15-7* was an agency statement and met the APA definition of rule, but was ultimately not a rule under CRA because it qualified for a CRA exception.

<sup>4</sup> “The Board of Governors of the Federal Reserve System shall be authorized and empowered . . . [t]o delegate . . . any of its functions, *other than those relating to rulemaking* or pertaining principally to monetary and credit policies, to one or more administrative law judges, members or employees of the Board, or Federal Reserve banks.” 12 U.S.C. § 248(k) (emphasis added).

<sup>5</sup> 12 C.F.R. § 265.1(a).

<sup>6</sup> FRB, *Supervision and Regulation Letters*, available at <https://www.federalreserve.gov/supervisionreg/srletters/srletters.htm> (last visited Oct. 25, 2023).

FRB, we can presume that the letters are published outside of FRB's rulemaking authority since FRB is not authorized to delegate its rulemaking function to its employees. Our determination that the Bulletin is an agency statement is consistent with our previous recognition of FRB's SR Letters as agency statements in B-330843, B-331324, and B-331560.

Additionally, we have consistently concluded that CRA also covers agency actions outside the APA rulemaking process. For example, in B-331171, Dec. 17, 2020, we recognized that "[t]he sponsors of CRA intended the definition of rule to be as broad as possible to ensure congressional review of agency action." In B-331324, Oct. 22, 2019, we cited to a CRA sponsor's statement that "[a]lthough agency interpretive rules, general statements of policy, guideline documents, and agency policy and procedure manuals may not be subject to the notice and comment provisions of [APA], these types of documents are covered under the congressional review provisions of [CRA]." *Id.* (quoting 142 Cong. Rec. H3005 (daily ed. Mar. 28, 1996)).<sup>7</sup> Moreover, SEC acknowledged that "CRA can apply to agency actions that do not require notice and the opportunity for public comment [under APA]."<sup>8</sup>

---

<sup>7</sup> See also B-331171, Dec. 17, 2020 (finding that the Department of Housing and Urban Development's Reasonable Accommodation Guidance explaining housing provider obligations to individuals with disabilities requesting assistance animals was a CRA rule); B-331560, Apr. 16, 2020 (finding that the Board's *SR 15-18* was a CRA rule); and B-287557, May 14, 2001 (finding that the Department of Interior's Record of Decision regarding the issues of water flow in both the Trinity and Sacramento River mainstems was a CRA rule).

<sup>8</sup> SEC also asserts that "[c]ourts have acknowledged that not every statement by agency staff constitutes a 'rule' under . . . APA." Response Letter, at 3. In support of this statement, SEC cites to three D.C. Circuit cases: *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1255, 1257 (D.C. Cir. 1996); *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005); and *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1039, 1040 (D.C. Cir. 2008). In both *Babbitt* and *Amoco Prod. Co.*, the court determined that the agency documents at issue were not rules subject to APA notice and comment requirements because the documents' authors lacked the authority to bind the agency. *Babbitt* at 1256-1257; *Amoco Prod. Co.* at 732. In *Devon Energy Corp.*, the court found that the documents at issue did not amount to a "binding interpretation," and therefore the agency was not required to provide an opportunity for notice and comment before adopting the documents' interpretation. *Id.* at 1041. We note that the key issue these cases discuss is whether the agency actions at issue require notice and comment under APA. Here, in regard to the Bulletin, we are not opining on whether the Bulletin is subject to APA's notice and comment provisions. Rather, we are opining on a different issue: whether the Bulletin is a rule under CRA. CRA does incorporate APA's definition of rule but does not incorporate APA's notice and comment provisions. Furthermore, our earlier opinions recognize that agency actions not subject to APA's notice and

Response Letter, at 4. Although the Bulletin was published by staff who lack the Commission's general rulemaking authority, our prior precedent and CRA's legislative history demonstrate that the Bulletin is still covered by CRA.

The Bulletin was issued by SEC staff as a representation of how the Division and OCA interpret accounting-related disclosure requirements. Since one of the Division's roles is to monitor companies' compliance with accounting and disclosure requirements, and, since the Division's practice is to refer noncompliant companies to SEC's Division of Enforcement when appropriate, it is reasonable to believe that companies may change their behavior to comply with the staff interpretations found in the Bulletin. SEC published the Bulletin on its public-facing website to "add[] interpretive guidance for entities to consider when they have obligations to safeguard crypto-assets held for their platform users." Bulletin. Like the SR Letters issued by FRB's examiners, the Bulletin was issued by agency employees to provide non-binding guidance that covered entities were nevertheless expected to follow. We therefore find that the Bulletin is an agency statement within the meaning of APA.

As stated previously, the Bulletin is also of future effect and was designed to interpret and prescribe policy. Accordingly, we conclude that the Bulletin meets the definition of rule under APA.

#### No CRA Exceptions Apply to the Bulletin

Having concluded that the Bulletin meets the APA definition of a rule, we next consider whether any of the three CRA exceptions apply. We conclude that none apply. First, the Bulletin is a rule of general applicability because it neither identifies specific entities by name nor does it address specific actions for a named entity to take.<sup>9</sup> Second, the Bulletin concerns actions that covered entities should take, rather than actions that SEC management or personnel should take, and is, therefore, not a rule of agency management or personnel.<sup>10</sup> This leaves the third exception, the exception for rules of "agency organization, procedure, or practice that do[] not substantially affect the rights or obligations of non-agency parties." 5

---

comment provisions may still be covered under CRA. See note 6, *supra*, for additional information.

<sup>9</sup> We have previously observed that "[t]he legislative history of CRA and relevant case law indicate rules of particular applicability are the rules that not only are addressed to an identified entity [] but also address actions that entity may or may not take, taking into account facts and circumstances specific to that the entity." B-330843, Oct. 22, 2019.

<sup>10</sup> In B-334237, Apr. 6, 2023, we explained that a rule falls within the CRA's exception for rules relating to agency management or personnel if the rule "relates to purely internal agency matters, with no effect on non-agency parties."

U.S.C. § 804(3)(C). The Bulletin does not qualify for this last exception because it has a substantial impact on its regulated community.

In analyzing the third CRA exception, we have previously held that agency rules that encourage the regulated community to change internal operations or policies have a substantial impact on non-agency parties and thus do not qualify for the exception. B-334032, Dec. 15, 2022. See B-330843, B-331324, and B-331560. Additionally, we more specifically determined that agency rules that recommend specific actions, such as best practices the regulated community should take, do not qualify for the exception. B-334032.

We examined a similar issue in B-330843, Oct. 22, 2019, where we found that FRB's *SR 12-17* did not meet the third CRA exception because it had a substantial impact on the regulated community. *SR 12-17* put forth actions institutions should take to ensure their resiliency if they enter a period of financial distress and to prevent harm to the financial system in case of the institution's failure. *Id.* We noted that the actions from *SR 12-17* could change covered entities' expectations of FRB and could lead to and encourage changes in the covered entities' internal operations and policies. *Id.* For those reasons, we determined that *SR 12-17* had a substantial impact on the regulated community and thus did not qualify for the third CRA exception. *Id.*

Here, the Bulletin recommends best practices for how covered entities should account for their obligations to safeguard the crypto-assets they hold for their platform users. Bulletin. Similar to the FRB guidance in B-330843, the Bulletin advises these covered entities on how they can fulfill certain financial disclosure obligations to ensure compliance with SEC staff's interpretations of these obligations.<sup>11</sup> By advising the covered entities in this manner, the Bulletin is encouraging the regulated community to change its internal operations or policies to comply with the Bulletin's guidance.

Additionally, since the Bulletin was published on SEC's official website, it is reasonable for covered entities to believe they are expected to, at minimum, consider the Bulletin's guidance when preparing their own financial disclosures to the agency. SEC states that the Bulletin reflects policies followed by the Division and OCA. Response Letter, at 3. According to SEC, the Division uses its filing review process to monitor and to enhance compliance with disclosure and

---

<sup>11</sup> For example, the Bulletin makes clear that SEC staff believes that a hypothetical Entity A "should present a liability on its balance sheet to reflect its obligation to safeguard the crypto-assets held for its platform users" and that Entity A's notes to its financial statements "should include clear disclosure of the nature and amount of crypto-assets that Entity A is responsible for holding for its platform users, with separate disclosure for each significant crypto-asset, and the vulnerabilities Entity A has due to any concentration in such activities." Bulletin.

accounting requirements.<sup>12</sup> Since SEC monitors the covered entities' compliance with certain financial disclosure requirements, it is reasonable to believe that these entities might change their internal operations and policies to align with the accounting practices suggested by the Bulletin.

Furthermore, in a public statement about the Bulletin, an SEC Commissioner recognized that the Bulletin "provides definitive interpretive guidance" for public companies and contains a "detailed description of disclosure the staff expects to see, including a full paragraph describing relevant disclosures that 'may also be required outside the financial statements under existing Commission rules.'"<sup>13</sup> We agree with this characterization. Because the Bulletin changes covered entities' expectations of how SEC will evaluate their compliance, and because it encourages these entities to change their internal operations and policies, we conclude that the Bulletin has a substantial effect on the financial disclosure obligations of non-agency parties. Thus, the Bulletin does not fall within CRA's exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

## CONCLUSION

The Bulletin is a rule for purposes of CRA because it meets the APA definition of a rule and none of the three CRA exceptions apply. Accordingly, the Bulletin is subject to the CRA's submission requirement.



Edda Emmanuelli Perez  
General Counsel

---

<sup>12</sup> SEC, *About the Division of Corporation Finance*, available at <https://www.sec.gov/divisions/corpfin/cfabout> (last visited Oct. 25, 2023).

<sup>13</sup> SEC, Commissioner Hester M. Peirce, *Response to Staff Accounting Bulletin No. 121*, available at <https://www.sec.gov/news/statement/peirce-response-sab-121-033122> (last visited Oct. 25, 2023).