



Decision

Matter of: Board of Governors of the Federal Reserve System—Applicability of the Congressional Review Act to Supervision and Regulation Letter 15-18

File: B-331560

Date: April 16, 2020

DIGEST

In 2015, the Board of Governors of the Federal Reserve System (FRB) issued Supervision and Regulation Letter 15-18 (*SR 15-18*). *SR 15-18* outlines capital planning expectations for specified entities subject to FRB’s jurisdiction. FRB did not submit a Congressional Review Act (CRA) report for *SR 15-18* to Congress or the Comptroller General.

SR 15-18 meets the CRA definition of a rule and no exception applies. Therefore, we conclude *SR 15-18* is subject to the requirement that it be submitted to both Houses of Congress and the Comptroller General for review before it can take effect.

DECISION

FRB issued *SR 15-18*, “Federal Reserve Supervisory Assessment of Capital Planning and Positions for LISC Firms and Large and Complex Firms” on December 18, 2015. This is our decision as to whether *SR 15-18* is a rule under the CRA.¹ As explained below, we conclude that *SR 15-18* is a rule under CRA, which requires that it be submitted to Congress for review before it can take effect.

Our practice when rendering opinions is to contact the relevant agencies and 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 www.gao.gov/products/GAO-06-1064SP. We contacted FRB to obtain

¹ On October 24, 2019, Senator Thom Tillis requested our opinion on this matter. Letter from Senator Thom Tillis to the Comptroller General (Oct. 24, 2019).

the agency's views. Letter from Managing Associate General Counsel, GAO, to General Counsel, FRB (Nov. 5, 2019). We received FRB's response on January 16, 2020. Letter from General Counsel, FRB, to Managing Associate General Counsel, GAO (Jan. 16, 2020) (Response Letter).

BACKGROUND

FRB's authority and responsibilities

FRB has regulatory and supervisory jurisdiction over several types of financial institutions, including state-chartered banks that are members of the Federal Reserve System, bank holding companies, and foreign bank holding companies operating in the United States. See, e.g., 12 U.S.C. §§ 325, 1844(b).² When FRB inspects the financial condition of an institution, it inspects the institution's safety and soundness. FRB, *The Federal Reserve System Purposes and Functions*, 74 (10th ed. 2016). FRB performs safety and soundness reviews through risk-based examinations. *Id.* at 83. These examinations are conducted through on-site examinations and inspections as well as off-site scrutiny and monitoring. *Id.* at 83. For the largest institutions, FRB maintains a continuous supervisory presence and full-time examiners. *Id.*

According to FRB, when examiners believe that guidance on safety and soundness issues are necessary, FRB issues supervisory statements. Response Letter, at 1. These supervisory statements are called Supervision and Regulation Letters (SR Letters). SR Letters are intended by FRB to address significant policy and procedural matters related to FRB's supervisory responsibilities.³ The letters provide transparency to the industry and FRB staff concerning supervisory insights, practices, and approaches. Response Letter, at 1. According to FRB, SR Letters are not binding on any institution. *Id.*; see also FRB, *Interagency Statement Clarifying the Role of Supervisory Guidance: SR 18-5*, (Sept. 18, 2018). Active SR Letters are publicly available on the FRB website.

SR 15-18

SR 15-18 provides an explanation of FRB's supervisory expectations for capital planning at firms subject to the Large Institution Supervision Coordinating Committee (LISCC) framework and other specified large and complex firms.⁴

² Some non-financial institutions are also subject to FRB's jurisdiction. See 12 U.S.C. § 5323.

³ FRB, *Supervision and Regulation Letters*, available at <https://www.federalreserve.gov/supervisionreg/srletters/srletters.htm> (last visited Feb. 27, 2020).

⁴ As part of an effort to strengthen its supervision of the largest and most complex institutions, FRB created an internal component called the Large Institution

SR 15-18 at 1. The guidance outlines capital planning expectations for governance, risk management, internal controls, capital policy, scenario design, and projection methodologies.⁵ *Id.* at 2. *SR 15-18* applies to all U.S. bank holding companies and intermediate holding companies of foreign banking organizations that are either subject to FRB's LISCC framework, have total consolidated assets of \$250 billion or more, or consolidated total on-balance sheet foreign exposure of \$10 billion or more. *Id.*

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory 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. 5 U.S.C. § 801(a)(1)(A). In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. 5 U.S.C. § 801(a)(1)(B).

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. 5 U.S.C. § 804(3).

FRB did not submit a CRA report for *SR 15-18* to Congress or the Comptroller General. In its letter to our office, FRB did not provide its views regarding whether *SR 15-18* is a rule under CRA or whether any exceptions apply. FRB stated, however, that the Board continues to assess in consultation with the other federal banking agencies, the scope of documents it sends to Congress under the CRA. Response Letter at 2.

Supervision Coordinating Committee. For additional discussion of this entity's responsibilities, see B-330843, Oct. 22, 2019, at 2.

⁵ The guidance states, "This capital planning and positions guidance provides additional details around the Federal Reserve's core capital planning expectations for LISCC Firms and Large and Complex Firms, building on the capital planning requirements included in the capital plan rule and the Board's stress test rules." *SR 15-18*, Attachment at 3.

DISCUSSION

Applying the statutory framework under CRA, we first address whether *SR 15-18* meets the APA definition of a rule. As explained below, we conclude that it does. The next step then is to determine whether any of the CRA exceptions apply. We conclude they do not. Therefore, we conclude that *SR 15-18* is a rule under CRA.⁶

SR 15-18 meets the APA definition of rule upon which CRA relies. First, it is an agency statement as it was issued by FRB. Second, it is of future effect because it outlines prospective supervisory expectations and when those expectations will take effect. *SR 15-18* at 3 (“The guidance is effective immediately for [certain] bank holding companies The guidance will become effective for intermediate holding companies beginning on January 1, 2017”). Finally, *SR 15-18* implements, interprets, or prescribes law or policy as it outlines supervisory expectations for capital planning in several areas for applicable firms. See *id.* at 1–2; see also B-330843, Oct. 22, 2019 (finding that “[the SR letter at issue] is similar in language and intent to other FRB guidance documents that we have previously determined to be rules under CRA”).

In its Response Letter, FRB stated *SR 15-18*, as with other supervisory statements, is non-binding. Response Letter at 2. We have previously found, however, that this does not change our analysis. B-330843, Oct. 22, 2019 at 5–6 (“[E]ven though [the SR letter at issue] is a non-binding guidance document...it still meets the APA definition of a rule.”).

For similar reasons as those outlined in our previous opinions, we find that *SR 15-18* does not fall within any of the three exceptions under CRA. First, *SR 15-18* applies to all bank holding companies and intermediate holding companies of foreign banking organizations that are either subject to the LISCC framework or have total consolidated assets of at least \$250 billion or consolidated total on-balance sheet foreign exposure of at least \$10 billion. Therefore, it is a rule of general and not particular applicability. Second, it addresses actions banks should take and not FRB management or personnel. Therefore, it is not a rule relating to agency management or personnel. Finally, the guidance sets forth the supervisory expectations for specified bank holding companies and intermediate holding companies for capital planning, building upon existing capital planning requirements. We have said that agency actions substantially affect the rights and obligations of non-agencies if they could cause changes to regulated entities’ internal operations

⁶ We previously determined whether certain SR Letters were rules for purposes of CRA. In B-330843, we determined that SR Letters *12-17* and *14-8* met the definition of a rule under CRA and did not fall within an exception. B-330843, Oct. 22, 2019. Additionally, we found that while *SR 15-7* met the definition of a rule, it fell within an exception. *Id.* In B-331324, we determined that *SR 11-7* was a rule under CRA. B-331324, Oct. 22, 2019.

and policies. B-330843, Oct. 22, 2019; B-331324, Oct. 24, 2019 Because the actions listed in *SR 15-18* could lead to and encourage change to an applicable bank holding company's internal operations, *SR 15-18* has a substantial impact on the regulated community. Therefore, the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties does not apply.

CONCLUSION

SR 15-18 meets the APA definition of a rule and no exception applies. Accordingly, given our conclusions above, and in accordance with the provisions of 5 U.S.C. § 801(a)(1), *SR 15-18* is subject to the requirement that it be submitted to both Houses of Congress and the Comptroller General for review before it can take effect.

A handwritten signature in cursive script that reads "Thomas H. Armstrong". The signature is written in black ink and is positioned above the typed name.

Thomas H. Armstrong
General Counsel