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Abstract

Congress routinely enacts statutes mandating that federal agencies adopt specific regulations. For example, when Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, it required the Securities and Exchange Commission (SEC) to adopt a regulation compelling energy companies to disclose payments they make to governmental entities. Although this disclosure regulation is specifically required by the Dodd-Frank Act, it is also a regulation subject to disapproval by Congress under a process outlined in a separate statute known as the Congressional Review Act (CRA).

In 2017, Congress passed a joint resolution disapproving the SEC's disclosure rule under the process authorized in the CRA. That resolution nullified the SEC's rule, but it did not amend the Dodd-Frank Act. It did, though, make relevant a provision in the CRA that prohibits an agency from adopting any regulation that is "substantially the same" as one that Congress has disapproved. As a result, the SEC still must issue a disclosure regulation, but it cannot issue one that is substantially the same as the old one. Although normally this might not pose a major problem to an agency, the Dodd-Frank Act not only requires a disclosure regulation, it also provides considerable detail about what must be included in that regulation.

The SEC faces what appears to be a conundrum. On the one hand, it must adopt a regulation that comports with the detailed provisions of the Dodd-Frank Act. But on the other hand, it is prohibited under the CRA from adopting a regulation that is "substantially the same" as the old regulation. What is the agency to do? Earlier this year, the SEC announced a proposal for a new disclosure regulation that differs in several ways from the old one—but the proposed regulation would also appear in some respects to violate the Dodd-Frank Act's requirements for how the disclosure rule should be designed.

In this paper— originally submitted as a public comment on the SEC's proposed rule—I explain that the SEC need not violate the Dodd-Frank Act to comply with the CRA. The CRA conundrum can be readily solved. The CRA's choice of the imprecise word "substantially" invites the SEC to reconcile both statutes. The agency can do so by ensuring that those features of a new regulation that remain in the SEC's discretion are not substantially the same as in the old rule. After all, a statute such as the CRA can only impose an obligation on an agency over matters over which it has a choice. The SEC just needs to make sure that any re-issued rule is no longer substantially the same in terms of portions of the rule over which the agency can exercise its discretion.

Even with detailed statutory provisions, such as the one in the Dodd-Frank Act, an agency nevertheless will still have some discretion available to it. It can exercise that discretion in a substantially different way even if by making available opportunities for waivers or by extending deadlines for compliance. The disapproval of a rule under the CRA simply does not relieve an agency from its obligation to produce a regulation that complies with other statutory obligations.

Solving the Congressional Review Act's Conundrum*

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I am submitting this comment on the U.S. Securities and Exchange Commission's (SEC) proposed new Rule 13q-1[1] which has followed from the 2017 disapproval of an earlier version of Rule 13q-1 under the Congressional Review Act (CRA).[2] This comment takes no substantive position on the proposed Rule 13q-1. I write on my own behalf, as a scholar who has taught and written on statutory interpretation and administrative law issues for over twenty-five years, seeking to offer the Commission the benefit of my analysis of the legal issues created by an apparent tension between the CRA and the Dodd-Frank Wall Street Reform and Consumer Protection Act. Specifically, I address the proper construction of the CRA's prohibition on an agency adopting a rule that is "substantially the same" as a disapproved rule when a substantive statute—in this instance, the Dodd-Frank Act—has clearly mandated that an agency adopt a rule along the lines of the disapproved rule.

In other words, the question addressed here is: How should an agency resolve the apparent contradiction created by (a) the CRA's "substantially the same" prohibition and (b) a substantive statute's mandate for a rule that takes a particular form? The answer, in brief, is that any assessment of whether a subsequent rule is "substantially the same" as an earlier disapproved rule must be made with reference to the discretion the substantive statute affords the agency in designing the rule. A congressional disapproval resolution under the CRA does not amend the substantive statute to eliminate its requirement that the agency adopt a rule that meets certain criteria or contains specified elements. What counts as a substantial similarity or difference thus cannot be made simply by comparing the two rules on their face, completely divorced from the substantive statute's mandate. When Congress has required an agency to adopt a rule that Congress later disapproves, the approach that best respects both the statutory prohibition in the CRA and statutory requirement in the substantive law is to look to see whether the agency has exercised its discretion in substantially the same manner.

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* This paper was submitted on March 16, 2020, as a comment to the Securities and Exchange Commission on its proposed rule on disclosure of payments by resource extraction issuers, 85 Fed. Reg. 2522-2571 (Jan. 15, 2020), File Number S7–24–19.

[1] 85 Fed. Reg. 2522 (Jan. 15, 2020).

[2] 5 U.S.C. § 801 et seq.

The Dodd-Frank Act, Rule 13q-1, and the CRA

In 2010, Congress enacted Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] instructing the SEC to adopt an administrative rule requiring detailed reporting of payments made by natural resource extraction issuers to governmental entities, as a way of addressing concerns about corruption in countries that are rich in natural resources, such as oil.

Section 1504 is detailed and specific. In its approximately 800 words, this section directs the SEC, among other things, to issue its disclosure rule on resource extraction within nine months after the Dodd-Frank Act's enactment. The section also provides statutory definitions for integral terms, such as "payments" and "resource extraction issuers."

In response to the statutory mandate in Section 1504, the SEC initially adopted a final rule[4] which was subsequently vacated in 2013 by the U.S. District Court for the District of Columbia as arbitrary and capricious.[5] On remand from the court, the SEC issued a new rule in 2016[6] which was then disapproved by a 2017 joint resolution passed by Congress and signed by the President[7] in accordance with the procedures outlined in the CRA.[8]

Under the CRA, a rule that is disapproved no longer has any legal force or effect.[9] Furthermore, under the CRA, the agency that adopted the disapproved rule is precluded from issuing the same rule in the future.[10] The relevant provision of the CRA—Section 801(b)(2)—reads as follows:

> A rule [disapproved under the CRA] 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, unless the reissued or new rule is specifically authorized by a

[3] 15 U.S.C. § 78m(q).
[4] 77 Fed. Reg. 56365 (Sept. 12, 2012).
[5] Amer. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. July 2, 2013).
[6] 81 Fed. Reg. 49359 (Jul. 27, 2016).
[7] Pub. L. No. 115-4 (2017), https://www.congress.gov/115/plaws/publ4/PLAW-115publ4.pdf.
[8] 5 U.S.C. § 801 et seq.
[9] The entirety of the joint resolution of disapproval of the SEC resource extraction payment disclosure rule reads as follows: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Securities and Exchange Commission relating to ''Disclosure of Payments by Resource Extraction Issuers'' (published at 81 Fed. Reg. 49359 (July 27, 2016)), and such rule shall have no force or effect." This language follows the required template for such a disapproval resolution in the CRA, 5 U.S.C. § 802(a).
[10] Unlike with the nullification of the SEC's 2016 rule, this preclusion stems from the CRA, not any language within the 2017 joint resolution of disapproval. Except for the most general heading that references "chapter 8 of title 5" of the U.S. Code, a heading that is not itself part of the enacted law, the joint resolution contains no language whatsoever about any limitations on the SEC's ability to adopt a subsequent administrative rule on the disclosure of payments by resource extraction issuers.

law enacted after the date of the joint resolution disapproving the original rule.[11]

As the Commission notes in the preamble to its proposed rule, the CRA does not explicitly define what is meant by "substantially the same."[12] Moreover, no court has yet been presented with the occasion to construe these words in the CRA.[13]

Discerning the meaning of "substantially the same" is pivotal in the context of the SEC's recently proposed new Rule 13q-1. As the Commission correctly acknowledges, the agency remains under a statutory obligation to adopt a rule that implements Section 1504 and its detailed provisions.[14] But with its recently proposed rule, the Commission also appears to be proposing or considering modifications of its 2016 rule that may be inconsistent with the Dodd-Frank Act, even though it is clear that neither the CRA nor the 2017 joint resolution of disapproval effectuated any amendment of the Dodd-Frank Act.[15]

"Substantially the Same" and the CRA Conundrum

In the abstract, the CRA's "substantially the same" provision might seem unremarkable. For purposes of illustration, consider a hypothetical agency that issues a hypothetical rule that consists of, say, 100 words. If that rule were disapproved under the CRA and the agency subsequently issued a new rule that contained the same 100 words in identical order, the new rule would not only be substantially the same—it would be exactly the same. But what if the new rule eliminated one word? It would seem rather obviously to be "substantially the same" as the original 100-word rule that had been disapproved.

Yet exactly how many words would need to be eliminated or changed before the new rule would no longer be "substantially the same" as the rule that had been disapproved? 10? 20? 60? 70? The CRA provides no bright line. The statute leaves other questions unanswered too. Even if an agency changed all 100 words but the new rule retained the same meaning—that is, it still obligated the same individuals or entities to undertake or avoid the same actions—would this be

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[11] 5 U.S.C. § 801(b)(2).

[12] 85 Fed. Reg. at 2526 ("The CRA does not define the phrase 'substantially the same'"…).

[13] It may not be immediately clear whether a court could ever be confronted with this question, as a precedent question is whether any suit for noncompliance with the CRA would be barred by Section 805 of the CRA, which states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. Presumably, this limitation on judicial review would not bar a court from enforcing the CRA's prohibition on the issuance of a subsequent rule that was "substantially the same" because judicial review in such a case would be of an action based on the substantive statute, not one arising "under" the CRA.

[14] The Commission states: "Although the joint resolution vacated the 2016 Rules, the statutory mandate under Section 13(q) of the Exchange Act remains in effect. As a result, the Commission is statutorily obligated to issue a new rule." 85 Fed. Reg. at 2526.

[15] Among other issues, for example, it seems arguable whether the Commission's proposed approach to the aggregation of payments in submissions would be consistent with the Dodd-Frank Act, which calls for disclosure of "any payment," not an aggregated amount of payments. 15 U.S.C. § 78m(q)(2)(A).

"substantially the same"? What if the new rule imposed different obligations on different individuals or entities but still achieved the same overall benefits and imposed the same overall costs?

The text of the CRA does not provide ready answers to these questions. It most emphatically does not speak at all to what might be called the "CRA's conundrum"—a puzzle that arises when an agency faces another, substantive statute that requires it to adopt a rule, as often is the case. The Dodd-Frank Act, for example, contained explicit provisions requiring agencies to adopt nearly 250 specific rules.[16] The CRA conundrum arises because of the possibility of a conflict between a substantive statute, such as the Dodd-Frank Act, and the CRA. When an agency is obligated to create a particular rule by another statute, and yet Congress disapproves such a rule under the CRA, what is the agency now obligated and allowed to do?[17]

Solving the CRA's Conundrum

The imprecision of the CRA's text—through its use of the word "substantially"—implies that the CRA is not intended to impose a rigid restriction on an agency. It is also clear that a CRA disapproval resolution does not lift an agency obligation to comply with another legal requirement that calls for a rule similar to the one disapproved.

Indeed, the drafters of the CRA expressly contemplated that other statutes impose rulemaking requirements on agencies. The text of the CRA makes clear that a resolution of disapproval does not repeal those requirements. Section 803 of the Act provides a "special rule" on statutory deadlines, expressly extending by a year after enactment of a joint resolution of disapproval any deadline in a substantive statute that imposes an obligation to issue a rule by a date certain.[18] Section 803 would not have been needed if a resolution of disapproval were to be construed as a repeal of a substantive statute's requirement to promulgate a rule.

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[16] Davis Polk, Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), https://www.davispolk.com/files/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf ("By our count, the Act requires 243 rulemakings…").

[17] An agency might, of course, permissibly modify an earlier construction of ambiguous aspects of the substantive statute. A new agency interpretation of any such ambiguous provisions in the substantive statute might well prove reasonable and entitled to deference, even when its earlier interpretation was also reasonable and entitled to deference. Chevron v. NRDC, 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone."). By revising its interpretation of such ambiguous provisions, the agency may be able to make its post-disapproval rule substantially different than its pre-disapproval rule. This would be another way of giving effect to both statutes, but this possibility amounts to a retreat from the assumption underlying the analysis in this comment: namely, that the CRA and the substantive statute are truly in tension. To the extent that the substantive statute can be reinterpreted to eliminate that tension and allow the agency room to make what would colloquially be deemed a substantially different rule, then there really would be no CRA conundrum presented.

[18] 5 U.S.C. § 803.

Of course, it is also a longstanding, firmly entrenched principle of statutory interpretation that repeals of statutes should be stated expressly—and nothing express to this effect can be found in a CRA resolution of disapproval. As early as 1814, the Supreme Court has made it clear that repeals by implication are disfavored.[19] The Court has described the general presumption against implied repeals as a "cardinal rule," stating that "[w]here there are two acts upon the same subject, effect should be given to both if possible."[20] It has explained that, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."[21]

But if we assume an irreconcilable difference between the CRA and the Dodd-Frank Act, this would hardly imply that the CRA had repealed Section 1504 of the Dodd-Frank Act. Quite the contrary, if Section 1504 and the CRA Section 801(b)(2) were hopelessly irreconcilable, Section 1504 would impliedly repeal the application of Section 801(b)(2) with respect to rules issued under Section 1504. This conclusion follows directly from two other longstanding, well-accepted principles of statutory construction: namely, (1) that specific statutes (such as the Dodd-Frank Act) take priority over general statutes (such as the CRA), and (2) that later statutes prevail over earlier ones. The Dodd-Frank Act was enacted in 2010, while the CRA was adopted in 1996—meaning that, if the provisions are assumed irreconcilable, then the Dodd-Frank Act's provisions prevail. (Admittedly, the resolution of disapproval comes last of all, after the enactment of the Dodd-Frank Act. But the disapproval resolution does not contain any prohibition on the adoption of a substantially similar rule; only the 1996 CRA does.[22] If an irreconcilable conflict were to arise, it would be because of Section 801(b)(2) in the CRA, not any provision in the disapproval resolution.)

All this said, there in fact exists no reason to assume an irreconcilable conflict between the Dodd-Frank Act and the CRA. This is because "substantially the same" is flexible and can and should be construed in a way that gives effect to both the CRA and the Dodd-Frank Act. The way to reconcile the two statutes is to recognize that what constitutes substantial similarity under the CRA depends on the degree of discretion afforded to the agency under the substantive statute (such as the Dodd-Frank Act). To see how this is so, let us return to the hypothetical example of a 100-word rule that has been disapproved by Congress under the CRA. Let us further assume, simply for the sake of analysis, that 70 of those words had been expressly dictated by a substantive statute obligating an agency to issue the rule. How should a new rule be judged if it contains those same 70 words but makes meaningful changes to the 30 words that were not required by the substantive statute? Taking the overall 100 words into account, perhaps it might

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19 Hartford v. United States, 12 U.S. 109, 109 (1814) ("[A] repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable.").
20 Posadas v. National City Bank, 296 U.S. 497, 503 (1936).
21 Morton v. Mancari, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). *See, e.g.,* Branch v. Smith, 538 U.S. 254, 273 (2003) (plurality opinion). ("We have repeatedly stated . . . that absent a clearly expressed congressional intention, repeals by implication are not favored" (citations and internal quotation marks omitted)).
22 *See supra* note 9.

seem as if the new rule is still substantially similar to the old rule, as 70 percent of the words are the same. But that cannot be the correct result, as it would imply that the CRA has repealed the substantive statute that requires those 70 words—a result which, as I explained above, cannot be the correct conclusion under well-accepted statutory interpretation principles. The better conclusion is that the agency, having genuinely changed its approach in the portion of the rule over which it had discretion, has acted faithfully both to Section 801(b)(2) of the CRA and to the commands of its underlying substantive statute. In fact, this is not only the better conclusion about how to construe "substantially the same," it is the only possible way to understand it in the context of constraining substantive commands imposed by other statutes on the agency.

Given the specificity and detail in Section 1504 of the Dodd-Frank Act, the SEC finds itself in a position not at all unlike the hypothetical statute that compels 70 percent of the words in a rulemaking. I make no claim to quantify the level of discretion left to the SEC in developing its Rule 13q-1, but it is clear that the Commission has much less discretion over its resource extraction payments rule than a rule adopted under a more general authorization to create rules as "may be necessary or appropriate,"[23] as statutory authorizations of rulemaking not infrequently provide.[24] Every rule, though, will have multiple issues that need to be addressed, or different dimensions to be covered—the who, what, when, and how of rulemaking.[25] In some cases, as with Section 1504, the substantive statute will dictate how some of these issues or dimensions are to be addressed. (And in the case of Rule 13q-1 in particular, some of these issues or dimensions may also have been effectively foreclosed by the district court's decision applying the Administrative Procedure Act's arbitrary and capricious test to an earlier version of the rule.)

When it comes to compliance with the CRA's provision on substantial similarity, the reconciling approach is to consider fixed, and unaffected by a disapproval resolution, those parts of the rule that Congress has effectively written for the agency by requiring that the agency include in its rule certain features, definitions, or provisions. The task is simply to see how similar the rule is in those aspects over which the agency has discretion. The basic idea, in other words, is to think spatially about agency discretion. Consider how much of the regulatory "space" the substantive statute allowed the agency to fill, and then make sure that any new rule that follows a disapproved rule is not substantially the same within that remaining space that the substantive statute gave the agency power to fill.

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23 15 U.S.C. § 78u-6(j).

24 For additional examples, see Cary Coglianese, Chevron*'s Interstitial Steps*, 85 Geo. Wash. L. Rev. 1339, 1350-1351 (2017).

25 The Commission's preamble to its proposed rule seems to recognize as much, when it refers to the "the amount, granularity, timing, scope of, and liability for, the required disclosures. 85 Fed. Reg. at 2527. For related but general discussions, see Cary Coglianese, *Regulation's Four Components*, Reg. Rev. (Sept. 17, 2012), https://www.theregreview.org/2012/09/17/regulations-four-core-components/; Cary Coglianese, *Dimensions of Delegation*, 167 U. Pa. L. Rev. 1849, 1863-1870 (2019).

On the Applicability of *Chevron* and Legislative History

This spatial understanding is a reasonable way to accommodate both the CRA and the Dodd-Frank Act. That reasonableness might lead some observers to think that the SEC should receive deference under *Chevron v. NRDC* [26] if the agency were to adopt this approach—especially considering that the word "substantially" is ambiguous, for reasons discussed above. But a court would not be justified in giving the SEC *Chevron* deference if it adopted this approach. *Chevron* deference is grounded on an implied delegation to an agency[27]—and, while Congress has authorized the SEC to implement aspects of the Dodd-Frank Act, it has not delegated to the SEC or any other agency the authority to construe ambiguous terms in the CRA. *Chevron* deference is not available to agencies for their interpretations of general statutes, no matter how reasonable those interpretations may be.[28]

The issue of *Chevron* deference is thus largely a distraction, as the spatial understanding of "substantially the same" in the CRA is not merely a *reasonable* interpretation of the CRA in a setting where a statute has compelled an agency to adopt a specific rule; it is also the *only* plausible interpretation that reconciles both the CRA and the substantive statute. A court would need to adopt this as it is the only way to fulfill the principle that "effect should be given to both [statutes] if possible."[29]

Still, it is worth mentioning *Chevron* for another reason: to make clear that such deference cannot sustain an agency position to construe the CRA's "substantially the same" provision in a manner that effectively amends a substantive statute, such as by claiming that the resolution of disapproval now releases the agency from its responsibility to comply with the substantive statute. An agency would hardly be entitled to deference for such a claim that a resolution of disapproval under the CRA amended or repealed a substantive statute. The text of such a resolution of disapproval, after all, is stipulated by the CRA itself to read quite sparsely as follows:

> "That Congress disapproves the rule submitted by the ___ relating to ___, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).[30]

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[26] 467 U.S. 837.
[27] *See* Coglianese, *supra* note 24, at 1347-1350.
[28] Arianna Skibell & Geof Koss, *SEC Rule Repeal Sets Stage for Unprecedented Legal Fight*, E&E Daily (Feb. 10, 2017) (attributing to the author of this comment the conclusion that the SEC cannot win *Chevron* deference for an interpretation of a general statute such as the CRA); Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially The Same," and Decline to Defer to Agencies Under* Chevron, 70 Admin. L. Rev. 53, 94-101 (2018) (arguing much the same).
[29] Posadas, 296 U.S. at 503.
[30] 5 U.S.C. § 802(a).

Nothing in a resolution worded like this—as a resolution is supposed to be worded under the CRA—appears in any relevant way to be ambiguous. Nor is it possible to see how any interpretation of this text could ever sustain a reasonable interpretation that yet another statute had been effectively amended or repealed by such a resolution.

In addition, it would be extremely problematic for an agency to rely on any legislative history standing behind such a resolution of disapproval to imply an amendment or repeal of another statute. Legislative history can be an aid in understanding a statute and giving it meaning, but it is not the law adopted by Congress. None of the words contained in a joint resolution of disapproval signed by the president speak in any way to amending or repealing any statute. Legislative history needs to be at least connected to and in service of the meaning of a statute. When the relevant statute is a CRA resolution of disapproval, any such history that may pertain to how any entirely separate statute ought to be construed would be devoid of any connection with the disapproval resolution. All the resolution does is remove the force and effect of the rule; it does not speak to the statute underlying the disapproved rule.

In the preamble to its recent proposed rule, the SEC looks to the legislative history of the joint resolution of disapproval for guidance as to what its options may be for a subsequent rulemaking. Some of the Commission's invocation of legislative history is innocuous. For example, the Commission quite appropriately acknowledges that even some members of Congress who voted for the disapproval resolution did so while recognizing that the agency still must go back and follow the dictates of the Dodd-Frank Act in issuing a new rule.[31]

More concerningly, the Commission elsewhere in its preamble cites a problematic passage in the legislative history of the CRA itself, quoting part of a flawed claim made by Senate sponsors of the bill that became the CRA.[32] Their claim suggested that the legislative history of a resolution of disapproval could be used to support an agency taking a position on a new rule that would effectively modify or even repeal the relevant substantive statute:

> The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the

[31] 85 Fed. Reg. at 2526, n. 60 ("A number of members who supported the joint resolution noted that the Commission would be obligated to issue a new rule fulfilling the statutory mandate.").

[32] The legislative history consists mainly of a joint statement of Senate sponsors introduced in the Senate only *after* the House had already passed the bill and only "immediately" before passage in the Senate under a motion for unanimous consent. 142 Cong. Rec. S3683 (April 18, 1996) (statement of Sen. Nickles). Only later, after the President signed the CRA, did relevant committee chairs in the House submit into the record the statement of the Senate sponsors. *Id.*

> original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.[33]

The full passage from which this quotation has been taken also states that "if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule."[34] The Commission is to be applauded for not quoting or endorsing this additional sentence in its preamble as it does not reflect a proper reading of the authority of either members of Congress or an administrative agency.

As already indicated, regardless of what might have transpired in the legislative deliberations leading up to a resolution of disapproval, nothing in such a resolution would make any of the legislators' views about the continued wisdom of a prior, duly enacted law germane to an understanding of the actual resolution adopted. Contrary to what the Senate sponsors of the CRA claimed in their joint statement, Congress cannot through statements in the legislative history of a CRA disapproval resolution bypass the normal bicameral and presentment requirements to amend a statute that requires an agency to promulgate a specific rule.[35] If Congress wants to repeal or change the parameters of a substantive statute's obligation on an agency, it cannot do so via legislative history to a process directed at administrative rules.

Conclusion

Until Congress repeals or amends a substantive statute imposing specific rulemaking requirements on an agency, the agency is bound to respect its statutory requirements. A court can be expected to hold the agency to those obligations. In the case of an agency such as the SEC, which faces both a substantive statute's obligations and a resolution of disapproval of an earlier version of a rule established to fulfill the agency's substantive obligations, the resolution of disapproval does not, as the SEC recognizes, alleviate the agency's underlying substantive statutory obligations. When a statute mandates a rule such as Rule 13q-1, the question is not whether to assess "substantially the same" in the abstract. Rather, those terms in the CRA must be understood by reference to the degree of agency discretion that is afforded in the original statute.

Agencies cannot use the CRA to expand their discretion by revising aspects of a previous rule that were required to fulfill the agency's obligations under a substantive statute. The SEC could not weaken a disclosure regime in contravention of requirements in the Dodd-Frank Act, for example, even if in the name of satisfying the CRA. In circumstances where a substantive statute spells out in exacting detail what a rule must entail, an agency may still have some degree of discretion, if only to offer the possibility of waivers or perhaps to phase in or otherwise delay the date for compliance with its new rule. In such situations where agencies have been given no

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[33] 85 Fed. Reg. at 2526, n. 63.
[34] 142 Cong. Rec. S3686 (April 18, 1996).
[35] INS v. Chadha, 462 U.S. 919 (1983).

other discretion under a substantive statute as to the form and content of a rule, the inclusion of a limited exemption or waiver option, or a delayed compliance date, could suffice to satisfy the CRA by making the subsequent rule substantially different in the relevant space of available agency discretion.[36] A spatial understanding of what it means to be substantially the same holds the key to reconciling the apparent conundrum created when a procedural statute, such as the CRA, comes into tension with the requirements of a later-enacted substantive statute, such as the Dodd-Frank Act. Only under such an approach can an agency give due effect to both statutes.

[36] Skibell & Koss, *supra* note 28 (attributing to the author of this comment the view that "delaying the compliance period or providing more opportunities for waivers" could suffice to make a new rule substantially different from an old one).