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Solving the Congressional Review Act's Conundrum

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SOLVING THE CONGRESSIONAL REVIEW ACT'S CONUNDRUM

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Congress routinely enacts substantive statutes that require federal agencies to adopt regulations. When agencies issue regulations under these statutes, their rules are then subject to potential disapproval by Congress under a process outlined in a separate procedural statute known as the Congressional Review Act (CRA). If Congress passes a CRA disapproval resolution, this voids the disapproved regulation and triggers a provision in the CRA that prohibits the agency from adopting any subsequent regulation that is "substantially the same" as the disapproved one. But a CRA disapproval resolution does nothing to eliminate the agency's obligation under the substantive statute to put a regulation in place. And many times, the substantive statute does more than merely require that an agency adopt a regulation; it also provides considerable detail instructing the agency as to what the mandated regulation should require. What emerges in these cases is a conundrum—the CRA conundrum—created by a tension between the CRA and the detailed provisions of the substantive statute requiring adoption of a regulation. If an agency is obligated under the substantive statute to adopt a regulation meeting that statute's detailed strictures, how can it respond to a disapproval resolution without offending the CRA's ban on issuing a rule that is substantially the same as the disapproved one?

This Article identifies the CRA conundrum and then shows how agencies can tackle it, using, as an example, the predicament that the Securities and Exchange Commission faced over an energy extraction disclosure regulation that was called for under the Dodd-Frank Act but was subsequently disapproved by a later Congress. The key to resolving the conundrum is to recognize that Congress's choice of imprecision in the CRA—that is, its choice to use the word "substantially"—allows agencies to follow the more specific language contained in a substantive statute. The test for substantial similarity must be measured against the discretion the substantive statute affords the agency. As a general procedural statute, the CRA can only impose obligations on an agency with respect to matters over which the agency retains discretion. An agency that finds itself facing the CRA conundrum simply needs to make sure that any reissued rule is no

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longer substantially the same with respect to those portions of the regulation over which the substantive statute allows the agency room to maneuver. Even with highly detailed statutory provisions, an agency will almost always still have some discretion over some of the regulation's terms. That discretion must then be exercised in a substantially different way, even if by only making available opportunities for waivers or by extending deadlines for compliance. In the end, by viewing "substantial" from the proper perspective, the CRA conundrum can be readily solved.

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INTRODUCTION

Congress routinely enacts statutes mandating that federal agencies adopt specific regulations. When it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010, for example, Congress required the Securities and Exchange Commission (SEC) to adopt an anti-corruption regulation that would compel energy companies to disclose payments they make to foreign governments.[1] But substantive statutes such as the Dodd-Frank Act must be implemented in accordance with more general procedural statutes that govern the rulemaking process. And sometimes these procedural statutes can come into tension with substantive statutes.

The Dodd-Frank Act specifically required the SEC to mandate that energy firms publicly disclose information about their payments to government officials. That disclosure regulation was, like any regulation, subject to a process outlined in a separate statute known as the Congressional Review Act (CRA), which authorizes Congress to take steps to disapprove an agency regulation.[2] In 2017, Congress followed the process authorized in the CRA to pass a joint

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–22 (2010).

2. Congressional Review Act, 5 U.S.C. §§ 801–08.

resolution that disapproved the SEC's disclosure rule.[3] In doing so, Congress presented the SEC with a conundrum created by an apparent tension between the CRA and the Dodd-Frank Act.

That conundrum came about because, while Congress's 2017 resolution of disapproval nullified the SEC's disclosure rule, it did not amend the Dodd-Frank Act. It nevertheless did trigger a provision in the CRA that prohibits an agency from adopting any future regulation that is "substantially the same" as one that Congress has disapproved.[4] As a result, the SEC still needed to issue a regulation that would mandate energy companies disclose their payments to foreign governments, but it could not issue one that would be substantially the same as the old one. Although this might not ordinarily seem to pose a major problem for an agency, the two statutes placed the SEC in what one SEC Commissioner aptly described as a "difficult situation"[5] because the Dodd-Frank Act not only required the SEC to issue a disclosure regulation, it also provided considerable detail about what the agency needed to make sure that regulation said.[6]

The SEC thus faced a "novel and complex" puzzle.[7] On the one hand, the agency needed to adopt a regulation that comported with the detailed provisions of the Dodd-Frank Act. But on the other hand, the CRA prohibited the SEC from adopting a regulation that would be substantially the same as the old regulation.[8] What was the agency to do? The SEC eventually announced a proposal for a new disclosure regulation, Rule 13q-1,[9] that differed in several ways from the old one—thereby purportedly comporting with the CRA—but the proposed regulation also appeared, in important respects, to be inconsistent with the Dodd-Frank Act's requirements for how to design the disclosure rule.[10] To

3. Act of Feb. 14, 2017, Pub. L. No. 115-4, 131 Stat. 9.

4. 5 U.S.C. § 801(b)(2).

5. Statement on Resource Extraction, Caroline A. Crenshaw, Comm'r, U.S. Sec. & Exch. Comm'n (Dec. 16, 2020), https://www.sec.gov/news/public-statement/crenshaw-statement-resource-extraction.

6. *See* 15 U.S.C. § 78m(q)(2)(A) (obligating the Securities and Exchange Commission (SEC) to promulgate final rules that "require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer [or a related entity] . . . to a foreign government or the Federal Government for the purpose of . . . commercial development").

7. Statement on Resource Extraction, *supra* note 5; *cf.* ROBERT A. KATZMANN, JUDGING STATUTES, at x (2014) (observing how "unlocking the meaning of an unclear statute . . . is often much like trying to solve a puzzle.").

8. 5 U.S.C. § 801(b)(2).

9. Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2,522 (proposed Jan. 15, 2020).

10. *See infra* notes 40–43 and accompanying text.

solve the CRA conundrum, did the agency need to contravene one statute to comport with another?

A considerable corpus of legal commentary has focused over the years on the CRA.[11] Other scholars have identified and grappled with the ambiguity inherent in the CRA's substantially the same limitation.[12] But the conundrum created by the CRA's limitation in the face of substantive statutes mandating a regulation similar to the one disapproved by Congress has so far escaped attention, even though the problem has already arisen for agencies such as the SEC, and will undoubtedly continue to arise in the future.[13]

Although the CRA conundrum looks intractable, it can be resolved. The CRA's choice of the imprecise word "substantially" invites reconciliation between the CRA and any seemingly conflicting statutory demands. An agency can proceed by ensuring that those features of a new regulation that

11. *See* Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 282–83 (2022); Bridget C. E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387 (2020); Keith Bradley & Larisa Vaysman, *CRA Resolutions Against Agency Guidance*, 4 U. PA. J.L. & PUB. AFFS. 459 (2019); 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 (2018); Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J.L. & PUB. POL'Y 505 (2018); Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187 (2018); Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies' Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907 (2010); Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (2003).

12. *See, e.g.*, Finkel & Sullivan, *supra* note 11, at 710 (arguing that a rule will not be substantially the same as a disapproved rule so long as it has "a significantly more favorable balance of costs and benefits than the vetoed rule"); Cole, *supra* note 11, at 83–94 (outlining seven possible approaches to interpreting "substantially the same" and generally endorsing the approach taken by Finkel and Sullivan).

13. On the continuing appeal of using the Congressional Review Act (CRA) to disapprove of rules, see Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 23 (2019) (observing that the CRA will remain "an attractive tool for a future administration with unitary party control of the presidency, House, and Senate, which seeks to undo its predecessor's regulatory policies"). The only other work of legal scholarship I have been able to identify that gives anything more than a passing reference to the CRA conundrum simply discusses and cites approvingly my analysis here, which was previously issued as a working paper. John C. Ruple & Devin Stelter, *Charting a "Substantially Different" Approach to Land Management Planning Following a Congressional Review Act Joint Resolution of Disapproval*, 12 ARIZ. J. ENV'T L. & POL'Y 84, 97 (2021) ("We agree with Professor Coglianese that the prohibition against issuing a rule that is 'substantially the same' as a previously disapproved rule is best understood in light of agency discretion.").

remain within the agency's discretion are not substantially the same as the old rule. After all, a statute such as the CRA can only impose an obligation on an agency with respect to matters over which the agency has a choice. The agency just needs to make sure that any reissued rule is no longer substantially the same in terms of portions of the rule over which the agency can exercise its discretion. Even with highly detailed statutory provisions that call for new regulations that include specific terms or features, an agency, nevertheless, will still have some discretion available to it, which it can exercise in a substantially different way, even if only by, for example, extending deadlines for compliance or making available opportunities for waivers.

To put the point more generally, 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 an agency in designing the rule. A congressional disapproval resolution under the CRA does not relieve an agency from its obligation to produce a regulation that complies with other statutory obligations. Such a disapproval resolution does not amend the substantive statute, nor does it eliminate the substantive statute's requirement that the agency adopt a rule that meets certain criteria or contains specified elements. What counts as a substantial similarity or difference between two rules thus cannot be made simply by comparing the 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 the statutory requirement in the substantive law is to see whether the agency has exercised its discretion in substantially the same manner.

In Part I of this Article, I elaborate the nature of the CRA conundrum, using the recent predicament of the SEC as an illustration. Although this one agency's predicament suffices for the purpose of illustrating the CRA conundrum, other agencies have faced it or will face it in the future.[14] Having illustrated the predicament by reference to the SEC's disclosure rule, I then proceed in Part II to present a spatial account of regulatory discretion and show how it solves the CRA conundrum. I explain why the appropriate measure of the similarity of a subsequent rule must take into account the amount of discretion—that is, the decisionmaking space—available to the agency in adopting it.[15] Finally, in Part III, I take up possible alternative

14. The U.S. Department of Labor, for example, confronted a situation in which Congress disapproved a rule under the CRA even though "the statute continues to require the Secretary to issue regulations" addressing the very issue as the disapproved rule. Federal-State Unemployment Compensation Program, 84 Fed. Reg. 53,037, 53,037 (Oct. 4, 2019).

15. In fact, after I presented the analysis in this Article to the SEC, in the form of a

arguments that rely on *Chevron*[16] deference and on the legislative history underlying a resolution of disapproval. I show that these alternative accounts cannot dissolve the CRA conundrum. In the end, the solution lies in the spatial understanding presented in Part II.

Ultimately, tackling the CRA conundrum is important not merely for resolving the seeming uncertainty arising from a disapproved rule, especially given that the prospect of continued use of CRA disapprovals looms in the future.[17] It is also important because examination of the CRA conundrum provides still more general insights to the kinds of challenges of legal interpretation presented in an era of growing and increasingly complex statutory law.[18] Today, as ever before, agencies and courts will confront apparent conflicts between statutes and must find ways to reconcile them so that agencies can meet all the demands that Congress has imposed on them.

I. THE DODD-FRANK ACT, RULE 13Q-1, AND THE CRA CONUNDRUM

The CRA conundrum is not just an intellectual puzzle. It has in fact arisen, and it poses real-world challenges for regulatory agencies. To ground the conundrum in the reality that agencies confront, I begin with a brief explication of the SEC's predicament surrounding the Dodd-Frank Act's requirement that the SEC establish a rule on the disclosure of energy extraction firms' payments to governmental entities. I then turn to the CRA itself and show how Congress's disapproval of the SEC's disclosure rule, combined with the CRA's substantially the same limitation, create what I call the CRA conundrum.

A. *The SEC's Implementation of the Dodd-Frank Act's Rulemaking Mandate*

In 2010, Congress enacted § 1504 of the Dodd-Frank Act.[19] This provision instructed the SEC to adopt a rule requiring detailed reporting of payments made by natural resource extraction companies to

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comment on its proposed rule reissuing its disclosure rule after Congress's disapproval, the SEC adopted the basic conceptual framework provided here. *See infra* notes 96–97 and accompanying text.

16. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

17. Bethany Davis Noll & Richard L. Revesz, *Regulatory Rollbacks Have Changed the Nature of Presidential Power*, REGUL. REV. (Mar. 16, 2020), https://www.theregreview.org/2020/03/16/davis-noll-revesz-regulatory-rollbacks-changed-nature-presidential-power/.

18. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); KATZMANN, *supra* note 7.

19. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–22 (2010).

governmental entities, as a way of addressing concerns about corruption in countries that are rich in natural resources, such as oil.[20] The statute's language was detailed and specific. Through its approximately 800 words, the relevant statutory provision directed the SEC to, among other things, issue a rule that accords with express statutory definitions for integral terms, such as "payments" and "resource extraction issuer[s]."[21]

In response to the statutory mandate in § 1504, the SEC initially adopted a final rule in 2012.[22] The brief text of this initial version of Rule 13q-1 simply required resource extraction issuers to file reports using the SEC's Form SD (which stands for "specialized disclosure").[23] Form SD, in turn, required the disclosure of all payments made to the U.S. government or a foreign government for the purpose of the commercial development of oil, natural gas, or minerals.[24] Under the SEC's rule, entities needed to file Form SD using the SEC's EDGAR portal, which makes filings publicly available.[25] This initial version of the rule, however, was subsequently vacated in 2013 by the U.S. District Court for the District of Columbia because the court found the rule to be arbitrary and capricious due to its "denial of any exemption for countries that prohibit payment disclosure."[26] The court also held that the SEC had erroneously interpreted § 1504 to mandate public disclosure of all reports.[27]

On remand from the district court, the SEC issued a new rule in 2016.[28] This version, like the 2012 rule, required resource extraction companies to make disclosures using Form SD and the EDGAR portal.[29] Among the changes the SEC made to the 2012 version, the agency added a provision designed to defeat schemes to evade the required disclosure, and it authorized issuers to seek permission to follow an alternate reporting regime or to obtain an exemption from the rule's disclosure requirements.[30] It also

20. 15 U.S.C. § 78m(q). Although the animating purpose of this provision stemmed from concerns about payments of bribes to officials in foreign governments, the statute and subsequent rule made clear that it applied as well to payments made to the U.S. federal government.

21. *Id.* § 78m(q)(2)(A).

22. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012).

23. *Id.* at 56,417.

24. *Id.* at 56,418. The rule provided an exception to disclosure for "de minimis" payments, defined as a payment or a series of related payments of no more than $100,000. *Id.* at 56,419.

25. *Id.* at 56,418.

26. Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 11 (D.D.C. 2013).

27. *Id.* at 16.

28. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,360 (July 27, 2016).

29. *Id.* at 49,426–27.

30. *Id.* at 49,428.

indicated that, rather than making each company's report public, the SEC would merely make periodic public reports compiling the information disclosed under the rule.[31]

This second iteration of the rule also met resistance. Industry representatives, as well as some members of Congress, complained that the rule imposed burdensome compliance costs on energy firms.[32] In 2017, Congress passed, and the President signed, a joint resolution disapproving the rule[33] under the procedures outlined in the CRA.[34] Upon President Donald Trump's signing of the joint resolution of disapproval, the 2016 disclosure rule was null and void.

Perhaps buoyed by the aphorism "the third time is the charm," the SEC went to work yet again to issue the rule called for by the Dodd-Frank Act. In January 2020, the agency proposed yet another version of the rule.[35] As before, the proposed rule would require the submission of payment disclosures and, in other respects, it would keep many of the features of the 2016 rule.[36] But it would also make some changes too. Specifically, the new version of the rule, as proposed, would have expressly exempted from the rule's disclosure requirements all resource extraction issuers for whom providing the information would be "prohibited by the law of the jurisdiction" where the projects are located or would violate any of the issuer's preexisting contracts, as long as certain conditions were met.[37] The proposed rule would also broaden the "de minimis" exemption and allow exemptions for small companies and those firms going through initial public offerings.[38] Perhaps most significantly, the proposed rule would allow issuers to aggregate all payments of a particular type made to a level of government and disclose just the aggregated amount.[39]

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31. *Id.* at 49,427; *see also* Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2,522, 2,525 (proposed Jan. 15, 2020) (to be codified at 17 C.F.R. pts. 240, 249b) (summarizing similarities and differences between the 2012 and 2016 rules).

32. *See, e.g.*, 163 CONG. REC. H.848 (daily ed. Feb. 1, 2017) (statement of Rep. Hensarling); 163 CONG. REC. H.852 (daily ed. Feb. 1, 2017) (statement of Rep. Barr).

33. *See* Act of Feb. 14, 2017, Pub. L. No. 115-4, 131 Stat. 9.

34. 5 U.S.C. §§ 801–08.

35. Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2,522 (proposed Jan. 15, 2020) (to be codified at 17 C.F.R. pts. 240, 249b).

36. *Id.* at 2,567. Under the proposal, though, firms' disclosures would only need to be furnished to the SEC, rather than filed publicly.

37. *Id.*

38. *Id.*

39. *Id.* at 2,570–71 (describing that issuers may be making payments at the national, state, county, district, or municipality level); *see also id.* at 2,527–28 (summarizing changes made to the 2016 rules).

B. Congressional Oversight and the Creation of the CRA Conundrum

In proposing a new rule after its 2016 rule had been disapproved by Congress, the SEC found itself facing the CRA conundrum. Under the CRA, a disapproved rule no longer has any legal force or effect.[40] Furthermore, the agency that adopted the disapproved rule is precluded from issuing the same rule in the future.[41] The relevant provision of the CRA—§ 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 law enacted after the date of the joint resolution disapproving the original rule.[42]

As the SEC noted in the preamble to its proposed rule, the CRA does not explicitly denote what the phrase "substantially the same" means.[43] Moreover, no court has yet been presented with the occasion to construe these words in the CRA.[44]

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40. For instance, 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 [SEC] 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.

Act of Feb. 14, 2017, Pub. L. No. 115-4, 131 Stat. 9. This language follows the required template for such a disapproval resolution in the CRA. *See* 5 U.S.C. § 802(a).

41. 5 U.S.C. § 801(b)(2). Unlike with the district court's nullification of the SEC's 2012 rule, which emanated from the order issued by the judge, the preclusion of the 2016 version stems from the CRA, rather than from any language within Congress's 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 itself contained 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. *See* 131 Stat. at 9.

42. 5 U.S.C. § 801(b)(2).

43. Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. at 2,526 ("The CRA does not define the phrase 'substantially the same' . . . .").

44. 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 § 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; judicial review in such a case would be directed at an action based on the substantive statute, not one arising "under"

Discerning the meaning of substantially the same is pivotal to resolving the CRA conundrum. As the SEC correctly acknowledged in its preamble to its 2020 proposed rule, notwithstanding the CRA disapproval of the 2016 version of the disclosure rule, the agency still faced a statutory obligation to adopt a rule that both implemented § 1504 of the Dodd-Frank Act and complied with that substantive law's detailed provisions.[45]

But with its proposed rule, the SEC also appeared to be proposing modifications to its 2016 rule that conflicted with the Dodd-Frank Act, as several commenters on the proposed rule pointed out. In its approach to the question of whether disclosed payments can be aggregated, for example, the SEC's proposed rule appeared to conflict with the express terms of the Dodd-Frank Act, which calls for disclosure of "*any* payment"—not disclosure of an aggregated amount of payments.[46] In addition, some commenters questioned whether the SEC possessed the legal authority under the Dodd-Frank Act to enact some of the exemptions the proposed rule would allow.[47] Furthermore, the agency arguably came into tension with the Dodd-Frank Act by proposing a new definition of what constitutes an energy "project" that needs to be disclosed, with the proposed rule taking a looser approach that allowed for multiple activities to be treated as a single collective project.[48] The ability to aggregate payments across projects, as

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the CRA. Moreover, consistent with this conclusion, federal courts have in fact entertained CRA-based challenges to agency actions. *See, e.g.*, Ctr. for Biological Diversity v. Zinke, 313 F. Supp. 3d 976, 980 (D. Alaska 2018); United States v. S. Ind. Gas & Elec. Co., IP99-1692-C-M/S, 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. Oct. 24, 2002).

45. The SEC stated that "[a]lthough 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 [SEC] is statutorily obligated to issue a new rule." Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. at 2,526.

46. 15 U.S.C. § 78m(q)(2)(A) (emphasis added); *see also* Oxfam America & EarthRights Int'l, Comment Letter on Proposed Rule 13q-1, at 30–32 (Mar. 23, 2020), https://www.sec.gov/comments/s7-24-19/s72419-6984657-214635.pdf; Susan Rose-Ackerman, Comment Letter on Proposed Rule 13q-1 (Mar. 4, 2020), https://www.sec.gov/comments/s7-24-19/s72419-6911526-211213.pdf.

47. *See* Elise J. Bean, Comment Letter on Proposed Rule 13q-1, at 8–9 (Apr. 29, 2020), https://www.sec.gov/comments/s7-24-19/s72419-7135311-216167.pdf; Rose-Ackerman, *supra* note 46; *cf.* Ctr. for Progressive Reform, Comment Letter on Proposed Rule 13q-1, at 2 (Mar. 16, 2020), https://www.sec.gov/comments/s7-24-19/s72419-6960389-212777.pdf.

48. *See* The ONE Campaign, Comment Letter on Proposed Rule 13q-1, at 2 (Mar. 25, 2020), https://www.sec.gov/comments/s7-24-19/s72419-6996927-214761.pdf; Oxfam America & EarthRights Int'l, *supra* note 46, at 30–41; Publish What You Pay, Comment Letter on Proposed Rule 13q-1, at 36–40 (Mar. 16, 2020), https://www.sec.gov/comments/s7-24-19/s72419-6961610-212816.pdf.

well as over time in single jurisdictions, would make disclosure less granular and, thus, allow energy companies greater ability to hide bribes and other improper payments to foreign officials—in direct contradiction to the purpose of § 1504 of the Dodd-Frank Act.

In seeking to comply with one statute—the CRA—the SEC proposed a new rule that may well have diverged from its prior rule but, in so doing, failed to conform to the text and purpose of another statute—the Dodd-Frank Act. Instead of solving the CRA conundrum, what the SEC proposed would have crashed directly into it.

II. SOLVING THE CRA CONUNDRUM

Agencies need a solution to the CRA conundrum. How can they keep from adopting a rule that is substantially the same as a disapproved rule when a substantive statute clearly mandates that agencies adopt rules along the lines of those that Congress has subsequently disapproved? To solve the CRA conundrum, agencies need to have a clearer understanding of how much modification the CRA compels them to make if they seek to reinstate one of their rules that has been disapproved. The answer, as will become evident, lies in how the words "substantially the same" should be understood. These words, like many words in statutes that must be interpreted, cannot be assessed in the abstract. They need to be understood in the context of an administrative agency that is carrying out responsibilities authorized by, and sometimes dictated by, other statutes. The key to resolving the CRA conundrum lies in situating the assessment of what is substantially the same within the context of those facets of the rule over which the agency has discretion. In this Part, I show that the test under the CRA is whether the *discretionary facets* between two rules are substantially similar.

If one were to approach the CRA's substantially the same provision in the abstract, the challenge for an agency would be of the kind that arises whenever a statute contains highly ambiguous language. The word "substantially," after all, evinces no bright line.

Consider an 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 still obviously seem to be substantially the same as the original 100-word rule that Congress disapproved. Yet exactly how many words would need to be eliminated, added, or changed before the new rule would no longer be substantially the same as the rule that had been disapproved? Would ten words need to be changed? Twenty? Sixty? Seventy?

Other questions could be asked about this hypothetical 100-word rule. Suppose 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 new rule no longer be substantially the same as the old one simply because the words were different, but the meaning was the same? Or what if the new rule imposed different obligations on different individuals or entities but still was expected to achieve the same overall benefits to society and impose the same overall costs?

The CRA's text does not provide answers to these questions. More importantly, when it comes to the CRA conundrum, the text does not offer any answer either to what an agency should do in the face of a competing command from another substantive statute that requires it to adopt a rule along the lines of one that Congress has disapproved. The risk that agencies will face such competing commands is great in the modern era where so much law is grounded in statutes and executed via the adoption of administrative rules—many of which agencies are compelled by substantive statutes to adopt. The Dodd-Frank Act, for example, contains explicit provisions requiring agencies, including the SEC, to adopt nearly 250 specific rules.[49]

In these circumstances, when an agency is obligated to create a particular rule by another statute, and yet Congress disapproves such a rule under the CRA, the CRA conundrum calls out for resolution.[50] That resolution is facilitated by the very imprecision of the CRA's use of the word "substantially."[51] That ambiguity is a feature, not a bug, for it implies that

49. DAVIS POLK, SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, ENACTED INTO LAW ON JULY 21, 2010, at i (2010), https://www.davispolk.com/sites/default/files/files/Publication/efb94428-9911-4472-b5dd-006e9c6185bb/Preview/PublicationAttachment/efd835f6-2014-4a48-832d-00aa2a4e3fdd/070910_Financial_Reform_Summary.pdf ("By our count, the [Dodd-Frank] Act requires 243 rulemakings . . . .").

50. 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 U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 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 Article: namely, that the CRA and the substantive statute are in tension. To the extent that the substantive statute can be properly reinterpreted to eliminate that tension and to allow the agency room to make what would colloquially be deemed a substantially different rule, then there really would be no CRA conundrum presented.

51. 5 U.S.C. § 801(b)(2).

the CRA is not intended to impose a rigid restriction on an agency.

Congress was clear that a CRA disapproval resolution does not alleviate an agency's obligation to comply with another legal requirement that an agency adopt a rule similar to the one disapproved.[52] The text of the CRA expressly contemplates that other statutes impose rulemaking requirements on agencies, and it makes clear that a resolution of disapproval does not repeal those requirements. It does this in § 803, which provides a "special rule" that expressly extends any substantive statute's deadline for promulgating a rule by one year after a disapproval resolution's enactment.[53] Section 803 would not have been needed if Congress had intended a resolution of disapproval to be construed as a repeal of a substantive statute's requirement to promulgate a specified rule.[54]

Furthermore, it is a longstanding, firmly entrenched principle of statutory interpretation that repeals of statutes should be stated expressly. As early as 1814, the Supreme Court has made it clear that repeals by implication are disfavored.[55] Yet, a CRA resolution of disapproval must comport exactly with the sparse language provided for such resolutions in the CRA statute itself—none of which even remotely expresses any affirmative intent to repeal

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52. On obligation alleviation, see Cary Coglianese, *Obligation Alleviation During the COVID-19 Crisis*, REGUL. REV. (Apr. 20, 2020), https://www.theregreview.org/2020/04/20/coglianese-obligation-alleviation-during-covid-19-crisis/; Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 855 (2021).

53. 5 U.S.C. § 803.

54. For much the same reason, the CRA's applicability provision—§ 806(a)—cannot be taken as a sufficient basis for the CRA to override the requirements in a substantive statute. Such a view would run in tension with § 803's explicit acknowledgment of obligations imposed by other statutes. Furthermore, § 806(a) only begs the question of whether there really exists an irreconcilable difference created by another statute—and, for the reasons I explain *infra* notes 64–70 and accompanying text, no such irreconcilable difference exists. Even if we were to assume for sake of analysis that the CRA's applicability provision overrode even a potentially conflicting substantive requirement that an agency adopt a specified rule, the fact that virtually any other statute that might create such a CRA conundrum will have been adopted after Congress enacted the CRA means that the other statute's regulatory mandate would itself override and supersede the CRA's applicability provision. *See infra* notes 60–63 and accompanying text. In other words, the most that could be said is that § 806(a) overrides only those (i) prior enacted laws that (ii) irreconcilably conflict with the CRA. Neither of these two conditions will apply when the CRA conundrum arises. The latter condition will necessarily not apply. *See infra* notes 64–70 and accompanying text. And the former will have a near zero probability of applying. *See infra* notes 60–63 and accompanying text.

55. Harford v. United States, 12 U.S. (8 Cranch) 109, 109–10 (1814) ("[A] repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable.").

provisions of another statute.[56] The operative language in a CRA resolution of disapproval just states that Congress "disapproves the rule . . . and such rule shall have no force or effect."[57]

The Supreme 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."[58] The Court 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."[59]

But even if the CRA were to be viewed as in hopelessly irreconcilable conflict with another statute, this does not mean that the other statute's provisions must give way. Returning to the Dodd-Frank Act by way of illustration, even if there existed an irreconcilable difference between that Act and the CRA, it would be the Dodd-Frank Act that would impliedly repeal any application of § 801(b)(2) of the CRA. This conclusion follows directly from two other longstanding, well-accepted principles of statutory construction. First, specific statutes (such as the Dodd-Frank Act) take priority over general statutes (such as the CRA).[60] Second, later statutes prevail over earlier ones.[61] The Dodd-Frank Act was enacted in 2010, while the CRA was

56. The CRA specifies the precise terms that must appear in a joint resolution of disapproval that is eligible for the CRA's special legislative procedures and triggers other facets of the CRA. 5 U.S.C. § 802(a). For the actual text of the joint resolution disapproving the SEC's 2016 rule, see *supra* note 40 and accompanying text. That joint resolution comported with § 802(a).

57. 5 U.S.C. § 802(a).

58. Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936).

59. 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 also, 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.'" (first quoting *Mancari* 417 U.S. at 551; and then quoting Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S. 186, 193 (1968))).

60. *Morton*, 417 U.S. at 550–51 ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); United States v. Estate of Romani, 523 U.S. 517, 532 (1998) (noting that "it would be anomalous to conclude that Congress intended the priority statute to impose greater burdens on the citizen than those specifically crafted.").

61. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–44 (2000) (explaining that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." (citing *Estate of Romani*, 523 U.S. at 530–31)); *see also Posadas*, 296 U.S. at 503 (explicating the "well-settled" principles that "[w]here provisions in . . . two acts are in irreconcilable conflict, the

adopted in 1996—meaning that, if provisions in the two statutes were assumed to be 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 disapproval resolutions themselves do not contain any prohibition on the adoption of a substantially similar rule; only the 1996 CRA does.[62] If any irreconcilable conflict were to arise between the CRA and a statute mandating the adoption of a rule, it would only be because of § 801(b)(2) of the CRA—the more general statute and, presumably in almost all cases, the earlier one too[63]—not because of any provision in the disapproval resolution.

All this said, no reason exists to assume an irreconcilable conflict between any substantive statute and the CRA. This is because the phrase substantially the same is flexible and can and should be construed in a way that gives effect to both the CRA and the substantive statute underlying a disapproved rule.[64] 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.

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 for the sake of analysis that seventy of those words—the precise words themselves—had been expressly dictated by a substantive statute obligating the agency to issue the rule. How should a new rule that follows a disapproved one be judged if it contains those same seventy words but makes considerable changes to the thirty words that were not required by the substantive statute? Taking the overall 100 words into account, perhaps it might seem as if the new rule is still substantially similar to the old, disapproved rule, as seventy percent of the words are identical to the old rule. But that cannot be the correct conclusion, as it would imply that the CRA has repealed the substantive statute that required those seventy

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later act to the extent of the conflict constitutes an implied repeal of the earlier one" and that "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.").

62. *See* Act of Feb. 14, 2017, Pub. L. No. 115-4, 131 Stat. 9. Again, the language in a disapproval resolution must accord with the exact language the CRA expressly specifies for such a resolution—none of which states or even implies anything about the substantially the same limitation.

63. Most statutes mandating the adoption of specific rules call for these rules to be adopted within a limited timeframe of generally less than a few years after the passage of the statute. At this point in time, given that the CRA was adopted nearly thirty years ago, any agency rules being adopted now in response to a statutory mandate will almost certainly be at the behest of statutes adopted after the CRA.

64. 5 U.S.C. § 801(b)(2).

words—a result which, as already noted, also cannot be the correct conclusion under well-accepted statutory interpretation principles.[65]

The better conclusion is that the agency, having genuinely changed its approach in the portion of the rule over which it had discretion (that is, the thirty remaining words), acted in a manner faithful both to § 801(b)(2) of the CRA and to the commands within the underlying substantive statute. In fact, this is not only the better conclusion about how to construe the words "substantially the same" in the CRA, it is the *only possible* way to understand these statutory words in the context of other constraining substantive commands on an agency imposed by other statutes.

To return to the SEC's resource extraction disclosure rule, it is now possible to see how this helps resolve the CRA conundrum in a real-world setting. Given the specificity and detail in § 1504 of the Dodd-Frank Act—such as its requirement that an SEC rule mandate disclosure of "*any* payment"[66]—the SEC found itself in a position not at all unlike the hypothetical statute that compels the use of seventy percent of the words in a rulemaking. It could not alter its rule to require disclosure of only some payments, nor merely to mandate disclosure of an overall payment amount. The SEC had to require disclosure still of any payment, as that statutory term constrained the SEC's discretion.

In using a hypothetical 100-word agency rule to illustrate the predicament agencies such as the SEC can find themselves in, I do not claim, of course, that it is possible to quantify in numerical form the level of discretion left to an agency. Discerning the parts of a rule over which an agency has discretion—and those over which it does not—will call for making a qualitative judgment, not a quantitative one. Nevertheless, it should be clear that, in developing its Rule 13q-1, the SEC had much less discretion over the contents of its resource extraction payments rule than it would have had under a statute that simply contained a general authorization for the SEC to create rules "as may be necessary or appropriate,"[67] the kind of sweeping language not infrequently found in statutory authorizations of rulemakings.[68]

Every agency-promulgated rule will have multiple issues to address or different dimensions to cover—the who, what, when, and how of

65. *See supra* notes 55–63 and accompanying text.

66. *See supra* notes 6 and 46 and accompanying text.

67. *See, e.g.*, 15 U.S.C. § 78u-6(j) ("The [SEC] shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.").

68. For additional examples, see Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1350–51 (2017).

rulemaking.[69] In some cases, as with § 1504 of the Dodd-Frank Act, the substantive statute will dictate how to address some of these issues or dimensions. In the case of the SEC's Rule 13q-1, for example, some of these issues or dimensions had also been effectively dictated by prior judicial rulings, such as the district court's decision on the earliest version of the SEC's rule.[70]

When it comes to compliance with the CRA's substantially the same limitation, the interpretation that reconciles the CRA with the requirements in a substantive statute must be one that treats as unchangeable those parts of the rule that Congress has effectively written for the agency by requiring the agency to include certain features, definitions, or provisions in its rule. To determine whether a subsequent rule is substantially the same as a disapproved rule, the task then becomes one of assessing how similar the former rule is to the latter *in those aspects over which the agency has discretion*.

The basic idea, in other words, is to think spatially about agency discretion. To determine whether two rules are substantially the same for CRA purposes, an agency should first consider how much of the regulatory "space" the substantive statute has allowed the agency to fill.[71] The agency's obligation under the CRA is then to make sure that any new rule that follows a disapproved one is not substantially the same within the remaining space that the substantive statute has left for the agency to fill.

If a statute gives an agency virtually unbounded space within which to design a rule—say, by merely authorizing the agency to adopt a rule that is "appropriate and necessary" or a rule that simply advances the "public interest"—then a new rule can and should be compared with a disapproved rule on virtually every dimension. In such a situation, determining whether two rules are substantially the same can be conceived as effectively calling for the use of

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69. The SEC's preamble to its proposed rule seemed to recognize as much when it referred to "the amount, granularity, timing, scope of, and liability for, the required disclosures." Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2,522, 2,527 (proposed Jan. 15, 2020) (to be codified at 17 C.F.R. pts. 240, 249b). For related but general discussion, see Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1863–68, 1870 (2019); Cary Coglianese, *Regulation's Four Core Components*, REGUL. REV. (Sept. 17, 2012), https://www.theregreview.org/2012/09/17/regulations-four-core-components/.

70. *See* Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 9 (D.D.C. 2013).

71. In the sociolegal literature, other scholars have used the metaphor "regulatory space" for broader theoretical purposes. *See, e.g.*, Leigh Hancher & Michael Moran, *Organizing Regulatory Space*, *in* CAPITALISM, CULTURE, AND ECONOMIC REGULATION 271 (Leigh Hancher & Michael Moran eds., 1989); Colin Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, 2001 PUB. L. 283. The notion of regulatory space has also sometimes been used by administrative law scholars. *See* Peter L. Strauss, *"Deference" is Too Confusing–Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143 (2012) (using "space" as a metaphor in conceptualizing *Chevron* deference).

the "compare documents" function in Microsoft Word to see how many words are different between the two rules. But if a statute gives much less discretion to an agency, and actually spells out features and provisions that a rule must contain, then the appropriate test of similarity demands first putting to the side those facets of the relevant agency rules that are mandatory and then comparing what is left. One might even say that, if a statute already fills up half of the proverbial décor in a regulatory "room," the test under the CRA is to compare what the agency has done in terms of decorating the room's other half.

For an agency such as the SEC, this spatial understanding of regulation means that it should not, cannot, and, more notably, need not violate the Dodd-Frank Act to make a subsequent rule sufficiently different from a disapproved one to comport with the CRA. In issuing a new resource extraction disclosure rule, the SEC simply needed to ensure that the new rule was substantially different with respect to those facets of the rule over which the agency had discretion.

III. ON THE APPLICABILITY OF *CHEVRON* AND LEGISLATIVE HISTORY

What remains to be considered are two additional arguments for reconciling the demands of a substantive statute such as the Dodd-Frank Act with the constraints of the CRA: *Chevron* deference, and a reliance on legislative history. Perhaps what counts as substantially the same should be analyzed using the *Chevron* framework—which would suggest that the very ambiguity of "substantially" should lead courts to allow agencies to resolve these matters on their own. Or perhaps the answer for how agencies should respond in the face of any given CRA disapproval resolution depends on mining the legislative history underneath that very resolution.

Although both of these alternative perspectives have emerged to varying degrees as contenders in the quest for resolution of the CRA conundrum, neither are persuasive nor helpful in solving this puzzle of competing statutory dictates. The failings of these alternative perspectives only reinforce that the conundrum's resolution depends on the spatial understanding of regulatory discretion articulated in Part II and on an assessment of similarity within the context of how an agency has designed a new rule within its discretionary space.[72]

A. Chevron *Deference*

As explained in Part II of this Article, a spatial understanding of regulatory discretion reasonably accommodates both the CRA and the Dodd-Frank

72. *See supra* Part II.

Act. The very reasonableness of this understanding might lead some observers to want to invoke the framework articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[73] After all, *Chevron*—which currently remains good law, even if the Supreme Court seems to ignore it[74]—calls upon courts to defer to agencies' reasonable understanding of ambiguous statutory provisions.[75] It might seem that few statutory provisions could be more ambiguous than the CRA's substantially the same provision.[76]

The *Chevron* approach to resolving the CRA conundrum might take two subtly distinct forms. The first form would use *Chevron* to bolster the spatial account developed in Part II. In other words, applying this first form of the *Chevron* argument might imply that an agency such as the SEC should receive deference if it adopted a spatial approach to interpreting the CRA, given that the CRA's substantially the same terms are ambiguous and that the spatial understanding is reasonable.

A second, and more expansive form of the *Chevron* argument would entail using *Chevron* to make the CRA conundrum disappear altogether. This form of the argument would emphasize that the conundrum comes about only because of an ambiguity created by two statutes' provisions being seemingly at odds with each other. In the face of this ambiguity, *Chevron*'s step one would be satisfied.[77] The argument would then be that the courts should defer to the agency's new rule as long as it is reasonable, as the new rule, by definition, would reflect the agency's resolution of the ambiguity created by the conflicting statutes. Effectively, this is just a way of the courts saying to the agency: "Don't worry, be happy."[78] As long as what the agency decides to do in response to a disapproval resolution seems reasonable, then any statutory ambiguity created by an apparent conflict with the CRA's

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73. 467 U.S. 837, 842–43 (1984).

74. Richard J. Pierce, Jr., *Is* Chevron *Deference Still Alive?*, REGUL. REV. (July 14, 2022), https://www.theregreview.org/2022/07/14/pierce-chevron-deference/.

75. *Chevron*, 467 U.S. at 843–45, 865–66.

76. Although still a standing precedent, *Chevron*'s future status remains an open question, as some Supreme Court justices question the doctrine's constitutionality and others have criticized or ignored it for other reasons. If the Court should repudiate or abandon *Chevron*, that will obviously mean it cannot be used to solve the CRA conundrum. But if *Chevron* deference does manage to survive, even if in limited circumstances such as when relevant statutory provisions contain "broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable'" (as then-Judge Kavanaugh once urged), then the *Chevron* arguments considered in the text of this Article will remain plausible to consider. *Cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153–54 (2016). They will just not be persuasive arguments for the reasons provided in the text.

77. *See Chevron*, 467 U.S. 842–43 (noting that the first step a court must take is to determine whether the statute is clear).

78. BOBBY MCFERRIN, DON'T WORRY BE HAPPY (EMI-Manhattan Records 1988).

substantially the same limitation should be enough to make the agency's rule eligible for deference and for the courts to allow it to proceed.

But under either form of the *Chevron* argument, a court would not be justified in giving an agency deference in the face of ambiguity created by the CRA's terminology. *Chevron* deference is grounded on an implied delegation to an agency,[79] and a general procedural statute such as the CRA, which applies to agencies across the federal government, contains no implied delegation to any individual agency.[80] In the SEC example, even though Congress has authorized the SEC to implement aspects of the Dodd-Frank Act, it has not delegated to the SEC (nor to any other agency) the authority to construe ambiguous terms in the CRA nor to resolve ambiguities created by the CRA's terms. *Chevron* deference is simply not available to agencies for their interpretations of procedural statutes generally applicable across the federal government, no matter how reasonable those interpretations may be.[81]

The issue of *Chevron* deference is thus largely a distraction. Moreover, the spatial understanding of substantially the same presented in Part II 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 view of the CRA at *Chevron* step one and could not proceed to step two, as that would imply that there exist alternative reasonable ways to resolve the CRA conundrum.[82] The reality is that the spatial understanding in Part II is the only way to respond and fulfill the long-held principle of statutory construction that when two statutes appear to clash, "effect should be given to both [statutes] if possible."[83]

79. *See* Coglianese, *supra* note 68, at 1343, 1346–49.

80. *See* Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (denying *Chevron* deference to an agency's interpretation of the Administrative Procedure Act because it "is not a statute that the [agency] is charged with administering").

81. *See* 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, 97–101 (2018) (arguing that the SEC cannot win *Chevron* deference for an interpretation of a general statute such as the CRA); Arianna Skibell & Geof Koss, *SEC Rule Repeal Sets Stage for Unprecedented Legal Fight*, E&E NEWS (Feb. 10, 2017, 7:11 AM), https://www.eenews.net/eedaily/2017/02/10/stories/1060049856 (attributing a similar conclusion to the author of this Article).

82. *Cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–86 (2005). *See generally* Coglianese, *supra* note 68, at 1378–83 (explaining the meaning of step two and how a court that reaches it must have concluded that there exist more than one possible meaning of a statute).

83. Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936).

Even if arguments urging *Chevron* deference were more convincing, such deference could never sustain an agency position that construes the CRA's substantially the same provision in a manner that allows the agency to ignore mandatory terms of a substantive statute. Such a direct conflict with a substantive statute could never be a reasonable one. *Chevron*, in other words, cannot provide a basis for an agency obligated by a substantive statute to adopt a rule that says *X* to respond to a CRA disapproval resolution by adopting a rule that instead says *Y*. The rule would still need at least to say *X*.

Furthermore, no court could give proper deference to an interpretation that a CRA disapproval resolution had amended a substantive statute and released the agency from its responsibility to comply with the latter statute's requirements. Such a claim that a CRA disapproval resolution amends or repeals a substantive statute would never be reasonable. The text of such a resolution of disapproval is stipulated by the CRA itself to read, quite sparsely, as follows: "That Congress disapproves the rule submitted by the [agency] relating to [the rule being disapproved], and such rule shall have no force or effect."[84] Nothing in a resolution worded this way—as disapproval resolutions expressly must be worded under the CRA[85]—appears in any relevant way to be ambiguous. Nor is it possible to see how any interpretation of this sparse text could ever sustain a reasonable interpretation that another statute has been effectively amended or repealed by such a resolution.

B. Legislative History

In the preamble to the SEC's reissuance of the resource extraction disclosure rule following its disapproval, the agency looked to the legislative history of the joint resolution of disapproval for guidance as to what its options might be for a subsequent rulemaking.[86] Some of the SEC's

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84. 5 U.S.C. § 802(a). The CRA defines a joint resolution under the Act as one in which "the matter after the resolving clause . . . is as follows," with what follows being the language quoted above in the text accompanying this footnote. *Id.* The only allowable difference is for "[t]he blank spaces [to be] appropriately filled in." *Id.* The blank spaces appear where the bracketed words are located in the text accompanying this footnote.

85. *Id.*

86. For example, in its proposed rule, the SEC stated:

> Given this legislative history, and the absence of further general guidance from the CRA or any specific legislative guidance from Congress addressing the form of a new rulemaking, we looked to the concerns raised by members of Congress during the floor debates on the joint resolution to assist us in developing a rule . . . .

Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2,522, 2,526 (proposed invocation of legislative history was innocuous. For example, the SEC quite appropriately acknowledged that even some members of Congress who voted for the disapproval resolution did so while recognizing that the agency still needed to go back and follow the dictated elements of the Dodd-Frank Act in issuing a new rule.[87] More concerningly, though, the SEC also cited in its preamble 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.[88] That flawed claim by these sponsors 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:

> [I]f 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. 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 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.[89]

But clearly a resolution of disapproval can in no way work to "prohibit the reissuance" of a rule that is mandated by another duly enacted statute. As already noted, disapproval resolutions must follow a specific—and sparse—

Jan. 15, 2020) (to be codified at 17 C.F.R. pts. 240, 249b); *see also id.* at 2,528 ("In proposing these provisions and other aspects of this rulemaking, we have striven to achieve an appropriate balance between implementing the statute as required by Congress and addressing the concerns expressed by commenters and members of Congress."); *id.* at 2,528 n.78 (emphasizing that "the estimated cost of compliance of the 2016 Rules and the potential for competitive harm were specifically noted by the members of Congress who voted to disapprove the rules") (citing member statements in the *Congressional Record*).

87. *Id.* at 2,526 n.60 ("A number of members who supported the joint resolution noted that the [SEC] would be obligated to issue a new rule fulfilling the statutory mandate.").

88. The legislative history of the CRA 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. *See* 142 CONG. REC. 8,196 (1996) (statement of Sens. Nickles, Reid, and Stevens). 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.*

89. 142 CONG. REC. 8,199 (1996) (statement of Sens. Nickles, Reid, and Stevens). In its proposed rule, the SEC quoted all but the first sentence of this passage. Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. at 2,526 n.63.

form specified in the CRA.[90] Nothing in this sparse language even remotely speaks to another statute at all, let alone could constitute a legislative repeal of another statute's requirement that an agency issue a regulation. Moreover, as noted earlier, § 803 of the CRA expressly contemplates that an agency which once faced a statutory deadline to issue a disapproved rule would still need to reissue the rule.[91]

Just as the legislative history of the CRA provides no basis for concluding that a disapproval resolution repeals or amends another statute, it would be problematic for an agency to rely on any legislative history leading up to a disapproval resolution as a basis for implying 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.[92] Moreover, legislative history needs to be at least connected to statutory law and used in service of giving meaning to it. Because none of the words contained in a CRA disapproval resolution speak in any way to amending or repealing another statute, any legislative history that may pertain to how a separate statute ought to be construed would be devoid of any connection to the disapproval resolution. All a disapproval resolution does is remove the force and effect of a specific agency rule; it does not speak at all to the statute underlying the disapproved rule.[93]

In the end, regardless of what might transpire in legislative deliberations leading up to a resolution of disapproval, nothing in such a resolution could ever make legislators' views about a prior 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 simply cannot act through a CRA disapproval resolution, or through statements in the legislative history leading up to such a resolution, to bypass the normal bicameral and presentment requirements to amend a statute that requires an agency to promulgate a specific rule.[94] If Congress wants to repeal or change the parameters of an obligation imposed on an agency by a substantive statute, it cannot do so under the CRA, a process which is directed only at administrative rules. It needs to adopt separate legislation repealing or changing the substantive statute.

90. *See supra* notes 40 and 56 and accompanying text.

91. *See supra* note 53 and accompanying text.

92. *See, e.g.*, Epic Sys. Corp. v. Lewis 138 S. Ct. 1612, 1631 (2018) ("[L]egislative history is not the law.").

93. *See supra* notes 40 and 56 and accompanying text.

94. *Cf.* INS v. Chadha, 462 U.S. 919, 954–55 (1983) (holding that legislative action requires "bicameral passage [in Congress] followed by presentment to the President").

CONCLUSION

Until Congress repeals or amends a substantive statute that requires an agency to promulgate a specific rule, the agency is bound to respect that statute's requirements and issue a subsequent rule with all the terms and features called for by the substantive statute. Nothing in the CRA changes this fundamental rule-of-law duty. And any court that should happen to review the matter will properly hold the agency to what the substantive statute requires.

In the case of an agency such as the SEC, which faced both statutory obligations under the Dodd-Frank Act and a CRA resolution disapproving an earlier version of a rule established to fulfill the agency's obligations under the Dodd-Frank Act, the disapproval resolution could not, as the SEC eventually recognized, alleviate the agency's underlying substantive statutory obligations. When the Dodd-Frank Act required the SEC to adopt a rule compelling energy extraction companies to disclose publicly any payment they make to governments, the agency could not lawfully adopt an altogether different kind of disclosure requirement merely to make its rule different from an earlier one that Congress disapproved.[95] It still had to adopt a rule that included the terms and features called for by the Dodd-Frank Act.

An agency need not, and must not, violate its obligations under substantive statutes mandating specific rules to comport with the CRA because, even when a rule is disapproved under the CRA, there is a readily available and eminently sensible way of overcoming the CRA conundrum. When a statute mandates that an agency adopt a rule, as the Dodd-Frank Act did with respect to Rule 13q-1, the question is not whether to assess substantially the same in the abstract. Rather, the CRA's substantially the same limitation must be understood by reference to the degree of agency discretion that is afforded by the original, substantive statute. It is telling that, in the end, when finalizing its proposed rule, the SEC articulated an understanding of substantially the same that follows the analysis presented in this Article. The SEC explicitly recognized the principle that it cannot weaken a disclosure regime in contravention of requirements in the Dodd-Frank Act, even if in the name of satisfying the CRA.[96] Instead, the SEC stated that the test for compliance with the CRA should be based only on the "central discretionary determinations" the agency had made in its disapproved rule.[97]

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95. The Dodd-Frank Act's public disclosure provision can be found at 15 U.S.C. § 78m(q)(2)(A).

96. The analysis presented in this Article had been presented to the SEC in a comment submitted by the author to the agency in response to its proposed rule.

97. Disclosure of Payments by Resource Extraction Issuers, 86 Fed. Reg. 4,662, 4,665 (Jan. 15, 2021) (to be codified at 17 C.F.R. pts. 240, 249b). That said, SEC Commissioners disagreed over what was actually discretionary under the Dodd-Frank Act. By a 3–2 vote

In an era of increasing dependence on statutory law and administrative rulemaking, it is important to make clear that agencies cannot use the CRA to expand their discretion by revising aspects of a previous rule they were required by a substantive statute to include in the rule. In circumstances where a substantive statute spells out in detail what a rule must entail, an agency may still have some degree of discretion, if only to offer the possibility of granting limited waivers or perhaps phasing in or otherwise delaying the date for compliance with a new rule. In such situations where agencies have been given virtually no other discretion under a substantive statute as to the form and content of a rule, the inclusion of such a limited exemption option, or a delayed compliance date, would suffice to satisfy the CRA by making the subsequent rule substantially different in the relevant space of available agency discretion.[98]

A spatial understanding of what it means to be substantially the same holds the key to reconciling the apparent conundrum created when a general procedural statute, such as the CRA, comes into tension with the requirements of a more specific substantive statute, such as the Dodd-Frank Act. Only under such a spatial approach, focused on an agency's available discretion, can the agency give due effect to its obligations under both the CRA and the substantive statute.

along party lines, the SEC approved the proposed rule's loosening of the definition of energy projects and its allowance for the aggregation of payment information, claiming these changes did not conflict with the Dodd-Frank Act's requirement of reporting of "any" payment. Notably, the two dissenting Commissioners argued that these changes did not comply with the Dodd-Frank Act. Statement on Resource Extraction, *supra* note 5; Statement on Rules Governing the Disclosure of Payments by Resource Extraction Issuers, Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n (Dec. 16, 2020), https://www.sec.gov/news/public-statement/lee-resource-extraction-2020-12-16.

98. Skibell & Koss, *supra* note 81 (noting my observation that "delaying the compliance period or providing more opportunities for waivers" could suffice to make a new rule substantially different from an old one).