

Securities Regulation Daily Wrap Up, BLOCKCHAIN—Senators seek to overturn SEC guidance on safeguarding crypto assets, (Feb 2, 2024)

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The GAO concluded that the SEC's guidance document was a "rule" for purposes of the Congressional Review Act.

Sen. Cynthia Lummis (R-Wyo) has introduced a resolution to disapprove the SEC's Staff Accounting Bulletin No. 121 under the Congressional Review Act (CRA). The resolution asserts that the guidance document, issued by the SEC's Division of Corporation Finance, and purporting to set forth best practices for maintaining the custody of crypto assets, is a "rule" for purposes of the CRA and, thus, may be disapproved by Congress. A letter of opinion from the Government Accountability Office issued on October 31, 2023, would appear to support the senator's assertion. A [press release](#) announcing the move indicated that, in addition to Sen. Lummis, the resolution is supported by Reps. Reps. Wiley Nickel (D-NC) and Mike Flood (R-Neb), who are [sponsoring](#) the House version of the resolution.



SAB 121. The text of [SAB 121](#) sets forth in Q&A format a number of questions discussing how firms are expected to custody crypto assets. Like many items of SEC guidance, SAB 121 states at its beginning that: "The statements in staff accounting bulletins are not rules or interpretations of the Commission, nor are they published as bearing the Commission's official approval. They represent staff interpretations and practices followed by the staff in the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the federal securities laws."

Senator Lummis's press release specifically noted the potential for confusion regarding customer assets and bank assets that may arise as SAB 121 is applied in practice. "SAB 121 has massive implications, and the SEC should have received feedback on it from the federal banking regulators and the public before implementing this legally binding directive," said Sen. Lummis. "I have serious concerns over the impact of this bulletin on consumer protection and ensuring well-regulated financial institutions are able to provide safe custody for Americans' hard-earned financial assets."

A consistent theme of the resolutions is that the SEC lacks authority over much of the crypto industry. "Gary Gensler and the Security and Exchange Commission continue to overstep their authority, and it's time for Congress to weigh in on Staff Accounting Bulletin No. 121," said Rep. Nickel.

Can Congress disapprove guidance? The CRA explicitly applies to "rules" adopted by federal agencies, but it is somewhat less clear if the CRA also applies to agency actions that fall short of formal rules, such as agency guidance and policy documents. Thus, there may arise questions about whether the resolution to disapprove the SAB 121 falls within the bounds of the CRA. For a closer look at the CRA, one can begin with some key definitions in the CRA and in the related Administrative Procedure Act (APA), to which the CRA often refers:

- The APA defines "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing" (5 U.S.C. §551(4)).

- Although the CRA refers to the APA definition of “rule,” the CRA also excludes several categories of actions from that definition, including: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties (5 U.S.C. §804(3)).

According to several Congressional Research Service publications, the CRA was intended by its sponsors to apply more broadly to agency actions, potentially including actions that are not traditional notice and comment rules (See reports issued [February 27, 2023](#) and [November 12, 2021](#)).

In the case of SAB 121, the GAO issued a [letter](#) that [explained](#) the following: “We conclude the Bulletin is a rule for purposes of CRA because it meets the APA definition of a rule, and no exceptions apply. Therefore, the Bulletin is subject to the requirement that it be submitted to Congress.”

During the prior Administration, then-SEC Chair Jay Clayton had issued a [statement](#) reiterating the legally non-binding character of SEC staff guidance. Said Clayton: “The Commission’s longstanding position is that all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties. Statements issued by SEC staff frequently include a disclaimer underscoring the important distinction between the Commission’s rules and regulations, on the one hand, and staff views on the other.”

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