Compliance Chrestomathy

Notes from the Compliance Cutting Room Floor

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Unintended Consequences

Back in the 20th century, the American sociologist, Robert Merton, promoted the phrase "unintended consequences," to denote outcomes that are not the ones foreseen and intended by a purposeful action.

According to modern sociology, there are three types of unintended consequences:

- **Unexpected Benefits**: A positive unexpected benefit, also referred to as luck, serendipity or a windfall;
- **Unexpected Drawback**: An unexpected detriment occurring in addition to the desired effect of the policy; and
- **Perverse Result or "Backfire"**: A perverse effect contrary to what was originally intended, when an intended solution makes a problem worse.

The great Scottish empiricists, such as Adam Smith and David Hume, discussed the concept.

But let's just call it Murphy's Law – the fandangled notion that anything that can go wrong will go wrong.

The current iteration of attempts to decombobulate, degrade, defund, and deregulate the Consumer Financial Protection Bureau ("CFPB") seems to be forging ahead ineluctably using slash and burn tactics that may someday be rued as excessively countervailing responses.

One way the Congress is handling its attack – or, *au courant*, "reform" – is to pump up a swelling addiction to the Congressional Review Act ("CRA"), a device not used all that much over the years but used more and more these days. The CRA is a 1996 law that gives lawmakers a mechanism for overturning agency rules they don't like within 60 legislative days after such rules are reported to Congress or published in the Federal Register.

Case in point is the Senate's recent scrimmage to neuter the CFPB's guidance on auto lending. Although this particular

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target rule is not mortgage compliance, it certainly shows the addiction is growing. Last year, the CRA was deployed to whack the CFPB's Arbitration Rule, which I wrote about HERE and HERE. But, like any addiction, the end never justifies the means.

In the subject guidance, the CFPB endeavored to prevent discriminatory mark-ups by auto lenders that operate through dealerships. Now you might think, What's wrong with that? Seems something like preventing discrimination should be regulated, right? However, auto industry groups and many lawmakers have criticized this guidance relentlessly since its issuance in 2013. Their gambit is to argue that the CFPB was grabbing power and arrogating to itself authorities it does not have, especially since the rulemaking process was not followed.

Now, on the surface, it may appear that the auto industry and lawmakers have an authentic fondness for following the rulemaking process. Far be it from me to assert that their interests are motivated by anything other than an abiding dedication to the rule of law.

In any event, this past Wednesday the Senate used the CRA to narrowly approve a resolution rolling back the guidance. Although the CFPB didn't believe the 2013 guidance counted as a rule under the CRA, the Government Accountability Office determined otherwise last year after a review requested by one of the Senators, who was obviously deeply distressed, bothered, and concerned about following the rule of law and for no other reason.

So, if the resolution passes the House and is signed by the President, it will be the first time the CRA has been successfully used to repeal this kind of informal agency guidance, establishing what legislative nerds call a "proof of concept" for a new strategy that lawmakers could use to challenge agency interpretations of laws going back years.

These Senators, clearly and conspicuously being deeply disquieted and afflicted by the issuance of such guidance, have contended that using the CRA to go after guidance is entirely consistent with both the text of the CRA and the intent of its drafters and, specifically in the case of the CFPB, it is a necessary counteractant to this roguish consumer advocacy agency that is trying to squeak past them some guidance on non-discrimination in auto lending.

But what about that three-headed dragon of unintended consequences, the kindly Unexpected Benefits, the fire-breathing Unexpected Drawback, and the rapacious Perverse Result?

Consider this potentially unintended consequence: an agency may not be able to continue to bring enforcement actions based on valid legal positions in guidance once that very guidance has been upturned by the CRA.

Consider this potentially unintended consequence: if the guidance doesn't create a new standard that an agency may

hold a defendant to, but rather lays out a statement of how the agency reads a particular law, then rescinding this kind of nonbinding guidance would not necessarily stop the agency from arguing the same position in a court case.

Consider this potentially unintended consequence: assuming the guidance is nonbinding, an agency would be setting itself up for failure if it argued the position in court, since such a claim would likely cause Congress to cry foul, notwithstanding the likely possibility that a court would interpret the CRA resolution as having effectively rejected the position's legal viability.

Consider this potentially unintended consequence: rather than wait for a CRA resolution to trip up its guidance efforts, an agency might be more inclined in the future to avoid issuing guidance in the first place.

Consider this potentially unintended consequence: lack of guidance may lead to eroding consumer trust and diminish business efforts to earn that trust, leading to a diminution of certainty in the marketplace, reduction in standards, and adversely impacting the examination and enforcement process.

There is a name for this kind of gambit: the "chilling effect." Being unsure of guidance may mean exposure to enforcement or unpredictable results.

What enforcement actions would an agency predictably bring?

Not sure; nobody knows; maybe this; maybe that; let's wait and see. You go first!

at April 24, 2018

Labels: CFPB, Congressional Review Act, Consumer Financial Protection Bureau

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