Overview
President-elect Biden's victory provides Congress with a valuable opportunity to overturn recent Trump Administration rulemakings through the use of the Congressional Review Act (CRA). The CRA allows Congress to negate a final agency rulemaking with a simple majority vote in both chambers and the President's signature. With the Georgia Senate runoffs having given Democrats majority control of the Senate, the CRA is almost certain to play a significant role early in the 117th Congress.

Here, we walk through the mechanics of the CRA, review how it was used in 2017 to undo certain Obama-era regulations, and forecast some of the agency rulemakings finalized after August 21, 2020 that could be overturned.

The CRA's Mechanics
Enacted in 1996, the CRA requires agencies to report final rulemakings to Congress before they may take effect. Once Congress receives a report on a particular rule, Members of Congress have 60 "days of continuous session" (more on that below) in which to introduce a joint resolution disapproving of a rule, which, if passed by both the House and Senate by simple majority votes, is submitted to the President for signature.

If the resolution is signed, the CRA states that the disapproved rule "shall not take effect (or continue)." In other words, the rule is deemed not to have taken effect at all and is retroactively negated.

The CRA, moreover, states that a rule may not be re-issued in "substantially the same form" as the disapproved rule unless authorized by a further act of Congress. What constitutes a rule in "substantially the same form" is not specified in the CRA, nor does the CRA state who makes this determination.

Finally, the statute prohibits judicial review of any "determination, finding, action, or omission" under the CRA. Courts have examined this provision, and most have interpreted it broadly, prohibiting judges from reviewing both congressional and agency action for CRA compliance.

The key to the CRA is in its timing and the expedited procedures to which it is entitled in the Senate. Once a final rule is submitted to Congress, a clock starts and Members have 60 "days of continuous session" to submit a joint resolution disapproving the rule under the CRA.

In the Senate, a CRA disapproval resolution enjoys certain "fast track" privileges. First, and so long as it is considered during the 60 "days of continuous session" period, the resolution cannot be filibustered. Second, a CRA resolution can be discharged from a committee after 20 calendar days, with a petition signed by at least 30 Senators. Third, because the resolution cannot be filibustered, it is only subject to 10 hours of debate on the Senate floor with no amendments in order.

If, within 60 "session" days in the Senate or 60 "legislative" days in the House after receipt of a rule, Congress adjourns sine die (i.e., without a reconvening date), the time period to act resets in the next session beginning on the 15th "session" day in the Senate and the 15th "legislative" day in the House.
The CRA in Action

The CRA becomes a powerful tool following a Presidential election when there is a change of occupancy in the White House, particularly (but not necessarily) if the same political party also controls one or both houses of Congress.

Prior to 2017, the CRA had been successfully invoked only once to overturn a rule (in 2001 to disapprove a Labor Department rule relating to ergonomics). Beginning in January 2017, with a newly inaugurated President Trump in the White House, the Republican-controlled Congress commenced a CRA blitz, ultimately negating more than a dozen agency rules finalized under President Obama.

These rules included:

- Two Department of Labor rules on saving arrangements for non-governmental employees;[10]
- Two Consumer Financial Protection Bureau rules related to arbitration agreements and indirect auto lending;[11] and,
- A Department of Health and Human Services rule on compliance with Title X requirements.[12]

Trump Rules Subject to the CRA in the 117th Congress

The 116th Congress adjourned sine die on Sunday, January 3, 2021, at 11:58 AM – two minutes before the 117th Congress gaveled into session. As a result, by most calculations, agency rules finalized after August 21, 2020, could be subject to reversal under the CRA.[13]

Controversial rules that could be subject to the CRA include:

- The Department of Labor’s final rule that expands the definition of when an employee can be considered an independent contractor for purposes of benefits and labor laws;[14]
- The Environment Protection Agency’s “transparency” final rule that limits the EPA’s ability to consider scientific research where the raw data is not completely public;[15]
- The Federal Communications Commission’s Order on Remand with respect to net neutrality;[16]
- The Commodity Futures Trading Commission’s final rule amending regulations of speculative position limits for derivatives;[17]
- The Environmental Protection Agency’s final rule that allows a “major source” of hazardous air pollutants to reclassify as an “area source” after acting to limit emissions;[18] and,
- The Federal Energy Regulatory Commission’s final rule on calculating energy rates pursuant to the Public Utility Regulatory Policies Act of 1978.[19]

As the above indicates, the CRA is ostensibly a straightforward Congressional tool – an expedited process for a “legislative veto” of regulations. In operation, however, the CRA can get very complicated very fast.

We encourage anyone with an interest in a final agency rule issued since mid-August 2020 to be on alert for Congressional action at the outset of the 117th Congress.

Please do not hesitate to contact us if we can provide an analysis of any specific rule or otherwise be of assistance with respect to CRA matters.

[1] 5 U.S.C. § 801 et seq. President-elect Biden also plans to issue a memo as soon as he takes office to halt or delay “midnight regulations,” i.e., agency rules and guidance issued by the Trump administration that have not taken effect by Inauguration Day. See Jonathan Easley, Biden Aims to Freeze Trump’s ‘Midnight Regulations,’ THE HILL (Dec. 30, 2020).
[5] 5 U.S.C. § 802(a). When determining “days of continuous session,” all calendar days are counted (including weekends and holidays). Days when either the House or Senate (or both) are adjourned for more than three days are not counted.
\[9\] 5 U.S.C. § 801(d).


[13] The House and Senate Parliamentarians are the sole definitive arbiters of the operation of the CRA mechanism, including the "lookback" date to which the CRA clock resets in the 117th Congress. See Maeve P. Carey et al., The Congressional Review Act Frequently Asked Questions (R43992), CONG. RSCH. SERV. 17 (Jan. 14, 2020).


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