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The Congressional Review Act: A Primer

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Overview

The Congressional Review Act (CRA) represents an attempt by Congress to reestablish some control over the agency rulemaking process. Before a new regulation can take effect, the CRA requires all federal agencies to submit to Congress for review a copy of the final regulation and a report detailing the reasons for its promulgation. Importantly, the CRA also establishes a unique set of legislative procedures, through which Congress may adopt a joint resolution of disapproval that nullifies agency final regulations. The CRA is a complex statute that involves varying time limits, carryover provisions for changes in sessions of Congress, procedures for expediting legislative consideration of the joint resolution, and important limitations.

Varying Time Limits

Effective dates. Under the CRA, **the effective dates of all “major” rules are delayed for 60 calendar days** after they are submitted to Congress or after they are published in the *Federal Register*, whichever date is later. In contrast, **the effective dates of “non-major” rules are** determined by the Administrative Procedure Act, which generally requires that the effective dates for new rules be **at least 30 calendar days after the rule is published in the *Federal Register***. The purpose of the delay in effective dates is to allow Congress to review the regulation before it goes into effect.

Legislative Consideration Period. Once it has received a final regulation, Congress only has a limited time period in which to introduce a joint resolution of disapproval for that regulation. **Starting on the date on which the regulation is received, either house must introduce the joint resolution within 60 days of continuous session**, that is, within 60 calendar days “excluding days either House of Congress is adjourned for more than 3 days during a session of Congress.” Because it is measured by days of continuous session, the legislative consideration period will likely extend well beyond the effective dates for regulations under consideration. The CRA, however, specifically provides that Congress can still adopt a joint resolution of disapproval for a regulation even if that regulation has taken effect, provided that the joint resolution is introduced during consideration period. **If Congress adopts a joint resolution of disapproval, it must then submit to the president for consideration. If the president vetoes the joint resolution, the regulation will become effective unless Congress can override the veto within 30 session days after receiving the president’s veto.**

Carryover Provisions

To ensure that both houses have enough time to review a regulation, the CRA includes special provisions for regulations submitted to Congress soon before it adjourns its annual session *sine die*. Specifically, these provisions apply to regulations that are submitted either less than 60 legislative days in the House of Representatives or less than 60 session days in the Senate before adjournment *sine die* takes place. Under these provisions, **a rule that is submitted during this carryover period is treated as if it was published in the *Federal Register* on the 15th legislative day (in the case of the House of Representatives) or the 15th session day (in the case of the Senate) after Congress convenes its next annual session.** The exact start date of the carryover period varies from year to year, based upon (1) how much time Congress takes off during the session and (2) the precise date on which Congress has adjourned *sine die*. In the past, this start date has been as early as May 12 and as late as September 9.

Procedures for Expediting Legislative Consideration:

The CRA contains a number of provisions for expediting legislative consideration of a joint resolution of disapproval. Many of these provisions apply to the Senate only.

Senate. As with other legislation, joint resolutions of disapproval, once introduced, are referred to the relevant House or Senate committees. To ensure that the joint resolution does not spend too much time in a Senate committee, **the CRA provides that the joint resolution may be taken out of committee and placed onto the Senate's legislative calendar.** This action is authorized if the committee has not reported a disapproval resolution within 20 calendar days after the regulation was submitted to Congress or published in the *Federal Register*, and it must be prompted by a petition supported by at least 30 Senators. To ensure that the joint resolution is acted upon quickly once on the Senate Calendar, **the CRA also limits debate time and prohibits common procedural tactics that are intended to delay action** such as certain kinds of motions, points of order, and amendments. Starting from the date on which the regulation was submitted to Congress or published in the Federal Register, Congress has 60 session days to employ these procedures and adopt a joint resolution of disapproval.

"Receiving House." Once one house of Congress has adopted a joint resolution of disapproval, it is then sent over to the receiving house for consideration. The CRA provides that any joint resolution sent over in this fashion will not be referred to committee in the receiving House. Instead, **the procedure of the receiving House will remain the same "as if not joint resolution has been received."** The CRA does provide, however, that **any vote in the receiving House will be on the joint resolution that was sent over.** This provision is intended to expedite consideration of the joint resolution by avoiding the need for conference committees to resolve differences between the houses on the same joint resolution.

Important Limitations

Major Rules. The CRA defines a major rule as one that is likely to have an annual effect on the economy of \$100 million or more; that will increase costs and prices for certain constituencies such as consumers or state and local governments; or that will have some other adverse effect on

the economy. The CRA authorizes the Office of Information and Regulatory Affairs in the White House Office of Management Budget to determine whether a particular rule is a “major rule.” Designation of a rule as a major rule affects its effective date for the purposes of implementing the CRA.

Prohibitions on “Substantially Similar” Rules. Under the CRA, when Congress adopts a joint resolution of disapproval for a regulation, this not only nullifies the regulation in question, it also prohibits a federal agency from reissuing the same regulation again or from promulgating a regulation that is substantially similar, unless the new or reissued regulation is supported by a new statute adopted after the joint resolution of disapproval. It is not clear how different a new regulation must be from a disapproved old regulation in order to satisfy this requirement.

Judicial Review. The CRA provides that any “determination, finding, action, or omission” made pursuant to the CRA cannot be challenged in court.

Bundling Regulations. It is not clear whether or not Congress can “bundle” together more than one regulation into a single joint resolution of disapproval in order to expedite legislative consideration of multiple regulations. The emerging consensus suggests that the bundling of regulations in this fashion is not supported by the CRA.

Disapproving Parts of Regulations. If Congress find only one part of a larger regulation to be objectionable, it is not clear whether or not Congress can introduce a joint resolution of disapproval that one part. The resolution of this uncertainty is particularly important given the prohibition on promulgating substantially similar rules.

If you have any further questions about the materials in this document, please contact Rena Steinzor or James Goodwin at 202-747-0698.