November 28, 2016

Unified Republican Government Likely to Ax Dozens of Regulations

More than 150 significant regulations finalized since mid-2016 may be on the chopping block after President-elect Donald Trump takes the oath of office.

Next year will mark the first time in over a decade that Republicans will control both chambers of Congress and the White House. This has generated tremendous interest around the Congressional Review Act (CRA)—a rarely used but powerful tool available to Congress to "fast track" resolutions rejecting recent regulations. To date, the CRA has only been successfully used once to rescind a regulation. That occurred in January 2001, when the new Republican Congress passed and President George W. Bush signed a joint resolution disapproving the ergonomics rule issued by the Occupational Safety and Health Administration. That rule was finalized on Nov. 14, 2000, under then-President Bill Clinton.

The limited track record of success is not due to a lack of appetite on the part of lawmakers. Instead, it is the result of the political makeup in Washington since the CRA was enacted in 1996. For example, resolutions of disapproval were not plausible over the past two years due to the division in party control of Congress and the White House. To illustrate that point, five of President Obama's 10 vetoes in 2015-16 came on resolutions of disapproval that were passed by the Republican Congress. This longstanding dynamic has changed with the election. The unified Republican government coming to power next year presents a dynamic similar to 2000.

For reasons we discuss below, the scope of rules that might be blocked under the CRA will be limited to those that were finalized less than 60 legislative days before adjournment of the 114th Congress. However, that date is expected to extend back to late May given the projected days in session during the Lame Duck. Therefore, at least 48 "major" regulations (measured as having an economic impact of $100 million or more) along with dozens of others could be on the chopping block.

For the list of major rules that are potentially eligible to be overturned under the CRA in the 115th Congress, please refer to **this memorandum** prepared by the Congressional Research Service.

Background in Brief: Congressional Review Act

The CRA was a component of the Republican Party's 1994 "Contract with America" and enacted as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) signed into law on March 29, 1996. The CRA (5 U.S.C. § 801-808) requires federal agencies—including independent regulatory agencies—to report their final rulemaking activities to Congress and provides lawmakers with a special set of procedures under which they can consider a "resolution of disapproval" to overturn those rules. The two key components of the CRA that could make it an effective regulation killer are: (1) resolutions of disapproval cannot be filibustered in the Senate; and (2) resolutions of disapproval are not subject to amendment.

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The CRA requires all federal agencies to submit covered final rules (broadly defined) to both chambers of Congress and the Comptroller General before they can take effect. The submission needs to contain a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; and the proposed effective date of the rule. Upon receipt of the report, members of Congress have specified time periods (outlined in detail below) in which to submit and take action on a joint resolution of disapproval. If both chambers pass the resolution, it is sent to the president for signature or veto. If the president were to veto the resolution, Congress could vote to override the veto with a two-thirds majority of the House and Senate.

Congressional Procedures Under the CRA

Upon receiving the final rule and report from an agency, a period of 60 "days of continuous session" begins during which any member of Congress may introduce a joint resolution of disapproval for the rule. The Congressional Research Service (CRS) notes in a report: "For the purposes of the Act, a rule is considered to have been 'received by Congress' on the later date of its receipt in the Office of the Speaker of the House or its referral to Senate committee." In calculating "days of continuous session," every calendar day is counted, including weekends and holidays. The count is only paused for periods where either chamber (or both) is in recess for more than three days, pursuant to an adjournment resolution.

Each chamber of Congress has special rules for consideration of a resolution of disapproval. In the Senate, resolutions are considered according to special procedural rules outlined in the CRA, which provide a mechanism for moving a rule out of committee after 20 days, prohibiting filibusters or amendments, and limiting floor debate. For resolutions introduced in the House, there is no petition procedure to move a resolution out of committee. When either the House or Senate has adopted the resolution, it sends it to the other chamber for consideration without the possibility of amendments.

Additional Time between Congresses and Implications for 2017

Section 801(d) of the CRA also provides that, if a final rule is submitted with less than 60 days of session remaining in the Senate or House before Congress adjourns a session *sine die*, a new period for review becomes available to the incoming Congress. In such instances, the rule is treated as if it had been submitted to Congress and published in the *Federal Register* on the 15th legislative day of the new session for purposes of calculating the time periods described above. In essence, the 115th Congress will have a new 60-day shot clock (starting mid-January) for considering a resolution of disapproval on covered rules finalized in the latter half of 2016.

In terms of what rules could fall into this category based on when they were issued, a recent report by CRS estimated that "… agency final rules submitted to Congress after May 30, 2016, will be subject to renewed review periods in 2017 by a new president and a new Congress." The lame-duck session could further alter that deadline, either moving it forward or back. For example, a later than expected adjournment by the Congress in December could push the date of rules subject to the CRA to those submitted to Congress in June. However, a shorter than anticipated

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lame-duck may move the date to earlier in May.

This will all come into play next year following President-elect Donald Trump's inauguration on Jan. 20, after which time the unified Republican Congress might begin approving and sending to the White House resolutions of disapproval. There has been some question about whether Congress could include multiple regulations in one resolution of disapproval. However, prevailing view is that only rule-by-rule disapprovals are allowed. To address this issue, Rep. Darrell Issa (R-CA) introduced the Midnight Rules Relief Act, which the House of Representatives passed Nov. 17, 2016. Only three Democrats supported final passage. The bill would amend the CRA to allow Congress to consider a joint resolution to disapprove multiple regulations (en bloc).

This document is intended to provide you with general information regarding the Congressional Review Act. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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