SQUIRE PATTON BOGGS

The Congressional Review Act: A Powerful Reform Tool, but Not a Panacea

January 5, 2017

With the election of a new President and a new Congress, attention naturally turns to what options are available for not only making new policy, but also for rolling back policy initiated during the previous Administration. The Congressional Review Act (CRA) may provide just the tool for the 115th Congress to roll back some Obama Administration regulations. This legislative mechanism has been rarely used, but will provide an opportunity for a new, unified Republican government to wipe some of the slate clean. In fact, congressional leaders just announced that they will begin targeting recently passed rules. House Majority Leader Kevin McCarthy told reporters that he was working with colleagues to gather a list of half dozen or so regulations for review under the Act. Clearly, many policy makers, in and out of Congress, see it as a powerful regulatory tool to be put to use starting January 20. But it is no panacea.

Broadly stated, the aim of the CRA is to give Congress more control over the administrative state by providing for expedited legislative review of newly promulgated rules. Under the CRA, when an executive agency issues a new regulation, Congress may, by joint resolution, disapprove of it. With the President's signature, the joint resolution invalidates and thus prevents the regulation from taking effect.

Historical Context and the Narrow Window of Relevance

The CRA emerged from a long history of attempts by Congress to garner greater control over administrative regulation. Since the New Deal, Congress has found itself unable to handle, by specific legislation, the many regulations required by a complex, modern economy. It has tended to delegate, therefore, broad swaths of authority to executive agencies. At the same time, Congress has worried that such broad delegations may leave too much power in the hands of an ever-growing bureaucracy, whose rules may not suit the needs of industry or the preferences of various constituencies. For a time, Congress sought to fix this problem with the legislative veto, whereby each or both houses reserved the ability to negate rules emerging from executive agencies. But in 1983, the Supreme Court ruled the legislative veto unconstitutional, stating that Congress could not invalidate the actions of agencies all on its own.

Seeking a replacement, and thus some form of control, Congress passed the Congressional Review Act in 1996, as a part of the Small Business Regulatory Enforcement Fairness Act. The CRA review process is, in some ways, like the legislative veto. It allows Congress, through a joint resolution brought to the floor in expedited fashion, to disapprove of new rules promulgated by executive agencies. The catch, however, is that such a joint resolution must also be signed by the President before the rule is invalidated.

Because presidents are not usually enthusiastic about invalidating the rules of their own administration, the CRA has been largely left unused by Congress. However, the CRA finds renewed possibilities during transitions underway now – namely, when a new party seizes control of the presidency, while also controlling both Houses of Congress. For one, outgoing presidents typically seek to pass "midnight regulations" as their administrations wind down, and in anticipation of a change in control. The Obama Administration has proven no exception. And incoming presidents, at least when hailing from the opposing party, will typically be interested in reversing many of those new regulations. President-Elect Donald Trump has been clear about his desire to reverse a variety of Obama Administration actions, some of which can be addressed through an Executive Order, but others of which will undoubtedly be addressed by the 115th Congress. With a new Republican Congress behind him, President-Elect Trump will have the opportunity to leverage the CRA to roll back policies issued in the waning days of the Obama Administration.

The Procedure

Under the CRA, before any new rule may take effect, the issuing agency must submit it to Congress. "Major rules" – those with an annual cost of $100 million or more to the economy, a major effect on prices or other significant adverse effects – may not take effect for at least 60 days. During that time, Congress may enact, by simple majority vote in each house, a joint resolution of disapproval. When signed by the President, the rule is nullified. Note that a complex scheme of measuring time until a rule takes effect – whether counting by legislative days, calendar days or otherwise – ensures that even adjournments and breaks, as well as misaligned House and Senate calendars, will not prevent either the House or Senate from having ample time to review new rules. When a major rule is submitted in the final 60 days of a congressional session, for instance, there is a special extended review period. As a result, a disapproval resolution may still issue within 75 legislative days of when the next session of Congress convenes.

The CRA provides an expedited legislative path for these resolutions of disapproval. In the Senate, a submitted new rule is referred to the relevant committee, which has 20 days to report on a disapproval resolution. If it does not, such a resolution can, nevertheless, be brought to the floor upon a petition signed by 30 senators. Once a disapproval resolution reaches the floor, the CRA precludes the use of the filibuster, sets time limits for debate (up to 10 hours) and eliminates other procedural hurdles. (Ten hours of debate may not seem like much time to debate an issue, but in the Senate it can seem like a lifetime.)

The House, for its part, considers the submitted rule under its general procedures. And crucially, when a disapproval resolution is sent from either the House to the Senate, or the Senate to the House, the chamber in receipt may not refer the resolution to a committee, but must bring the matter to the floor in the form approved by the other body.

Finally, disapproval resolutions may only be enacted as individual, stand-alone measures, using a template that is outlined in the Act itself. This ensures that unrelated bills are not combined with disapproval resolutions in order to exploit the expedited procedures under the CRA. It also ensures that there are no discrepancies between the House and Senate versions of disapproval resolutions, bypassing the need for a conference report and allowing the joint resolution to move swiftly to the President's desk.

In an effort to address these limitations, the House on Wednesday approved the "Midnight Rules Relief Act of 2017," which would amend the CRA to provide for en bloc consideration in resolutions of disapproval for so-called "midnight rules." Given that Senate Democrats are likely to block consideration of the legislation, the one-rule-at-a-time disapproval resolution will likely be in effect during the 115th Congress.

Once a joint disapproval resolution is passed by both Houses and signed by the President, the new rule is effectively nullified. It may not be "reissued in the same form," and further, any new variation that is "substantially the same" as the previously rejected rule is prohibited as well, barring express statutory authorization enacted subsequent to the disapproval resolution. In the event that Congress has rejected a rule that an agency is otherwise required to issue, the agency is given an automatic one-year extension to attempt to fashion something different to meet the requirement.

The CRA Is About to Get Its First Real Test in a Long Time

The Congressional Review Act has not been used frequently in the past. In fact, only one rule – relating to ergonomics standards – has ever been rejected with this process. That occurred in 2001, when President George W. Bush agreed with Congress to reject the ergonomics rule adopted by OSHA in the waning days of the Clinton Administration.

That the CRA has been used so infrequently is not surprising. As mentioned, it is a promising mechanism in the unique situation of a transfer of the presidency from one party to the other, which also controls Congress. In 2015, the Republican Congress sought to use the CRA to block President Obama's Clean Power Plan, but as expected, he vetoed the measure when it reached his desk. Further, the stand-alone requirement in the Senate means that each disapproval resolution will likely consume the entire permitted time for debate, using up a valuable share of limited available floor time. Finally, there may be alternative legislative methods to eliminate several regulations at once, such as through the appropriations process and a denial of funding.

Nevertheless, this may be the time when Congress finally begins to realize the potential of the Congressional Review Act. President-Elect Donald Trump has pledged to cut federal regulation, and Congressional Republicans have promised for years to begin to roll back Obama-era agency actions. Current estimates are that over 160 rules will carry over from the Obama Administration into the review period of the new Congress.

The House can easily move disapproval resolutions. The challenge will be, as always, getting anything through the Senate, even with expedited procedures in place to move things along. Leader McCarthy and other congressional leaders recognized as much when they spoke with the press this week. Given the limitations built into the CRA and the challenge of getting 10 hours of Senate floor time for each disapproval resolution, Republicans in Congress will likely need to prioritize their use of the CRA, while looking for other mechanisms (such as reconciliation) to advance their policy objectives. In the end, without reform to the CRA, the 115th Congress will be challenged to move more than a handful of resolutions to the President's desk for his signature. In short, they have a powerful tool to use, but it is no panacea.

If you would like to learn more about the CRA or our Public Policy Practice, please contact the authors of this article.

Contacts

Jeffrey L. Turner
Managing Partner, Washington DC
T +1 202 457 6434
E jeff.turner@squirepb.com

Jeffrey G. Long
Associate, Cincinnati
T +1 513 361 1246
E jeffrey.long@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.

All Rights Reserved 2017