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INSIGHTS

The Congressional Review Act May Be Coming Soon to a Rule Near You

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The Congressional Review Act (CRA) has been in the news of late, yet few people know its history, purpose or challenges. Although used only once in its first 20 years, the Act was resurrected at the outset of the Trump Administration. In the first four months of 2017, the new Administration used the CRA to withdraw 14 rules promulgated late in the Obama Administration. There is an effort now to try to use the CRA to nullify even older rules, promulgated over the past 20 years, which could threaten to create more uncertainty for the regulated community.

The CRA was originally part of Newt Gingrich's 'Contract with America,' contained in legislation called the 'Small Business Regulatory Enforcement Fairness Act' that was signed into law by President Clinton in 1996. 5 U.S.C. §§ 801-808. The stated purpose of the statute was to allow Congress the ability to review and nullify any "major rule" promulgated by a federal agency (a 'major rule,' in essence, is one that has an annual effect on the economy of more than $100 million; see 5 U.S.C. § 804(2)). The CRA is given effect through the following principle provisions:

1. Requires all federal agencies to submit to each house of Congress and the Comptroller General all new major rules for review, before becoming effective;

2. Congress then has 60 legislative days to review the new rule (not calendar or business days);

3. If the House and Senate pass, by a simple majority, a Joint Resolution to nullify the rule during that review timeframe, the Resolution is then forwarded to the President for approval;

4. If a CRA Joint Resolution is approved by the President, the rule promulgated cannot become effective, and;

5. No federal agency can promulgate a new rule that is "substantially the same" without express Congressional directive or approval (5 U.S.C. Section 801(b)(2)).

Note that 60 legislative days is much longer than 60 calendar days (since 2001, Congress has only been in session on average for 138 days per year, and those days are often widely spaced, thus 60 legislative days can span a two-year period). The 60 legislative day requirement explains why there was such a flurry of CRA actions in the first four months of the new Trump Administration, as there were still several new rules in that time window that were

promulgated under the Obama Administration that Trump wanted to 'claw back.' The 60 legislative day time window to invoke the CRA for Obama era rules has now passed, but the current Administration as well as some non-governmental organizations (such as the Pacific Legal Foundation) are looking at other ways to use the CRA to nullify even older rules.

Some members of Congress are currently trying to use two approaches to expand application of the CRA: (1) by identifying those rules that were not submitted to Congress for CRA review in the past; and (2) by arguing that significant guidance should also be construed as rules, and thus also subject to withdrawal if never submitted to Congress for review under the CRA.

The CRA requirement to submit major rules to Congress was not widely followed in the years following enactment in 1996. As a result, some legislators and the Trump Administration are making the argument that those rulemakings that were not submitted to Congress for CRA review never became effective and should now be withdrawn (by one of various means). Several independent entities have reviewed "major rules" promulgated since 1996 and concluded that as many as 348 major rules did not fully comply with the review submittal requirements of the CRA between 1996 and 2016 (full review meaning submittal to the House, the Senate and the Comptroller General). At least 92 major rules did not comply with any of the three submittal requirements (see CRA Eligible Rules, Argive (March 24, 2017); Brookings Institution Report (April 14, 2017)). Some of the rules not fully compliant with CRA review provisions include several issued by PHMSA.

In addition, Senator Pat Toomey (R-PA) and others are arguing that the CRA extends to guidance, as well as formal rulemaking. Senator Toomey has asked the Government Accountability Office (GAO) for a determination of whether some older agency guidance meets the criteria for a rule, and thus now becomes eligible for nullification by the CRA. That argument potentially goes so far as to assert that posters published by the Department of Labor constitute a rule in the guise of guidance that should have been subject to CRA review. The GAO has already opined on at least two such requests, agreeing that FDIC guidance should have been considered to be a rule and submitted for CRA review, and agreeing that a BLM Management Plan should have been construed as a rule (see GAO Decision B-329272, Oct. 19, 2017; GAO Decision B-329065, Nov. 15, 2017).

Section 805 of the CRA, entitled "Judicial Review," consists of a single sentence stating that "[n]o determination, finding, action or omission under this Chapter shall be subject to judicial review." In itself, that is an unusual judicial review provision, but on its face, it does not prohibit challenge to the statute itself. Not surprisingly, the Constitutionality of the CRA (in response to the recent renewed interest in the statute) has been challenged as being an unconstitutional violation of separation of powers. The argument is that the CRA creates an improper legislative review of executive branch function, and then insulates that review from the judicial branch.

Earlier this month, a federal court in Alaska dismissed the first Constitutional challenge to the CRA based on a separation of powers argument. See Center for Biological Diversity v. Zinke, No. 3:17-cv-00091-SLG (May 9, 2018). More judicial challenges to the CRA are expected, as the attempts to expand its applicability continue. Constitutional challenges are likely to end up before the Supreme Court eventually.

In the meantime, there are indications that the renewed interest in use of the CRA may cut both ways. Senator Sherrod Brown (D-Ohio) recently introduced a Joint Resolution to nullify the Administration's rule rescinding "net neutrality" rules, and some Republicans are joining his efforts. If the composition of Congress changes after the 2018 mid-term elections, the Democrats may invoke the CRA to nullify recent Trump rulemakings or guidance. In addition, at least two lawsuits were recently filed by a non-governmental organization asking courts to enforce the CRA with respect to rules they believe Congress should overturn as burdensome in accordance with their authority under the CRA. See Kansas Natural Resource Coalition v. Department of Interior (D. Kan.); Tugaw Ranches, LLC. v. Department of Interior (D. Idaho)

The CRA laid dormant for 20 years, then was revived with the advent of the Trump Administration. Renewed interest in the CRA was intended to nullify rules promulgated near the end of the Obama Administration. The 60 legislative day timeframe to review Obama era rulemaking has passed, but the CRA is now being invoked to revoke even older rules and guidance. If successful, withdrawal of longstanding rules may threaten more uncertainty for the regulated community, where compliance efforts interwoven with larger programs and budgets may be suddenly drawn into question, challenging consistency, predictability and a level playing field for competitiveness.

Attempts to press application of the CRA to rules promulgated more than 60 legislative days ago will face continued judicial challenge, however, and almost certainly end up before the Supreme Court. At the same time, different challenges have already begun against recent Trump era rulemakings and guidance. Those challenges could find purchase if the composition of Congress changes in the 2018 mid-terms. It seems likely that the terms and application of the CRA itself will be under review for amendment by whatever Congress is in place by the end of 2018. Given the potential for disruption, it is possible that any new Congress could well decide to nullify the CRA itself.