

THE CONGRESSIONAL REVIEW ACT: A CHECK ON REGULATORS

The Congressional Review Act (CRA) was enacted in 1996 to give Congress a more active oversight role in the regulatory rulemaking process and an important check on the growing power of the administrative state. When Congress passes and the President signs legislation into law, federal agencies (such as the Environmental Protection Agency or the Federal Communications Commission) go about the process of implementing that legislation by publishing new, legally-binding rules in the Federal Register. Our Need to Know on How Regulations Are Made provides a more thorough look at this rulemaking process. Prior to the CRA, Congress had little direct control over the substance of new rules once they delegated the authority to regulators; to overturn a specific rule Congress had to go through the difficult process of enacting a whole new law. The CRA, however, creates a much more streamlined process whereby Congress can formally disapprove of a new rule once it is written and effectively force regulators to go back to the drawing board and revise it.

HOW DOES THE CRA WORK?

Once an agency publishes a finalized rule in the Federal Register, it must submit a report summarizing the new rule to both Congress and the Government Accountability Office. If Congress doesn't like what it sees in the new rule, the CRA provides special expedited procedures for 60 legislative days where lawmakers can pass a joint resolution formally disapproving of the rule. If the disapproval resolution passes both chambers and if the President signs it, the rule is effectively overturned ("shall have no force or effect"). Thereafter the agency must go back to the drawing board if it wants to rewrite the rule because they cannot subsequently publish a rule that is "substantially similar" to the one that was just overturned.

The expedited procedure is provided in the Senate in order to eliminate some of the procedural barriers that typically stand in the way of moving a bill forward. A Senate committee may not hold on to the disapproval resolution for more than 20 days, preventing leadership from killing the resolution by burying it in committee. Once it gets to the Senate floor, the resolution must receive a direct up-or-down vote with no amendments, no filibusters, and limited debate to prevent any other procedural delays. There is no such expedited procedure provided for the House, though the House already has discharge petitions to move legislation out of committee.

The CRA only applies to "major" rules - generally defined as regulations that have an annual effect on the economy of \$100 million or more. Furthermore, "rule" is broadly defined in the law to include any official agency action (including policy statements and guidance documents) that would impose such significant costs on the economy.

QUICK FACTS

- From 1996 to 2016, only one rule has ever been successfully overturned using the Congressional Review Act procedure.
- Of the 731 "major" rules that were published from 1996 to 2008, only one was successfully overturned using the Congressional Review Act procedure.

NOTABLE & QUOTABLE

"[I]t is important to emphasize that this approach means that Congress must be prepared to take on greater responsibility in the rulemaking process. If during the review period, Congress identifies problems in a proposed major rule prior to its promulgation, we must be prepared to take action."

- **Henry Hyde**, Former Rep. (R-IL) (1).

HAS THE CRA BEEN EFFECTIVE IN REINING IN OVER-ZEALOUS?

The short answer to this question is no. According to the most recent figures by the Government Accountability Office, since its inception in 1996, only one rule to date has been successfully overturned using the Congressional Review Act (2). The biggest barrier to the CRA's effective use is quite obvious: it needs the President's signature to be enacted, and the President is usually responsible for directing the agency to write the rule in a certain way in the first place. It wouldn't make sense for the President to overturn his own rule. Congress could override a Presidential veto, but the two-thirds vote that is needed to do so is a very high threshold.

The one successful CRA disapproval, overturning the Occupational Safety and Health Administration's (OSHA) controversial workplace ergonomics rule in 2001, provides a case in point. OSHA finalized a rule in the closing days of President Bill Clinton's administration, but when President George W. Bush took over in January 2001 he made overturning the rule a priority and had the backing of Republican majorities in both the House and the Senate. The disapproval was signed into law in March 2001, all within the 60-legislativeday window provided for the CRA. This confluence of political events and timing is just not that common.

Even if regulations are not officially overturned using the CRA, the resolutions can have other important users. They can be used to publicly exert pressure on an agency to delay, rewrite, or withdraw a rule. They can help to elicit general public or political support for overturning a rule, or for raising awareness of the high costs of a new regulation. Recorded votes on the resolutions can also be used to get Members of Congress on the record for where they stand on controversial regulations. All of this facilitates congressional oversight and strengthens lawmakers' bargaining power as they negotiate with regulators to limit negative effects of controversial rules.

CONCLUSION

The Founders wanted the elected representative in the legislative branch to make the laws that govern out country, not unelected and unaccountable federal regulators in the executive branch. The CRA helps to return to Congress some of the responsibility and oversight of rulemaking that lawmakers have tried to delegate away to bureaucratic "experts" in recent years. While thus far it has seen few direct successes, the CRA nevertheless serves as an important tool for market-minded lawmakers as they try to pare back the overgrown federal regulatory state. At the very least, federal agencies can no longer issue new rules and regulations on auto-pilot, without some check on their authority from Congress.

Endnotes:

1. Remarks of Representative Henry Hyde on the House Floor, CONGRESSIONAL RECORD, at H2999 (March 28, 1996) (online at www.gpo.gov/fdsys/pkg/CREC-1996-03-28/pdf/CREC-1996-03-28-pt1-PgH2986.pdf).
2. U.S. Government Accountability Office, Congressional Review Act (CRA) Faqs, (April 2014) (online at http://www.gao.gov/legal/congressact/cra_faq.html#9).

Americans for Prosperity Foundation's "Need to Know" informational series explores current events and recent scholarship on public policy issues from a free-market economics perspective. A full list of "Need to Know" briefings is available at www.AmericansForProsperityFoundation.org/NeetToKnow.
©2012 Americans for Prosperity Foundation. All Rights Reserved.