

It Ain't Over 'til It's Over -- The Congressional Review Act & the Search for Zombie Regulations

Posted on December 7, 2017 by [Allan Gates](#)

Enacted in 1996, [the Congressional Review Act \(CRA\)](#) affords Congress the opportunity to review and disapprove final rules of federal agencies. In the first 20 years of its existence, only one regulation was disapproved using the CRA. In the first 100 days of the Trump administration, however, Congress invoked the CRA to disapprove thirteen separate regulations. The [White House advertised](#) the CRA disapproval resolutions as the top legislative accomplishment of the administration's first 100 days, proudly claiming that President Trump had signed more CRA resolutions than any other President in history.

By mid-summer most observers assumed the push to roll back Obama-era regulations using the CRA was over because the statute provides a narrow window of time for introducing resolutions of disapproval (generally 60 legislative days from the date the regulation is received by Congress), and it similarly limits the time within which expedited legislative procedures – including passage by simple majority vote in the Senate – can be used.

But wait, there's more –

The window of time for introducing a disapproval resolution under the CRA begins to run on the day a regulation is submitted to Congress. And it turns out agencies have not always been careful about sending their rules to Congress. According to a [2014 report](#), hundreds of final regulations published in the Federal Register each year have never been reported to Congress. Moreover, since the rules subject to review under the CRA are not limited to those published in the Federal Register, the report suggests there may be thousands of unreported interpretive rules, guidance documents, "Dear Colleague letters," and the like.

Conservative activists aware of the inconsistent agency filing practices have begun to argue that all older regulations that were not reported to Congress are still subject to CRA review. One conservative group has established a separate website, [RedTapeRollback.com](#), proclaiming that:

"Powerful new ideas to use the CRA for older rules not reported to Congress are causing great excitement. This is a regulatory game changer!"

The website includes a database of rules it claims were not reported; and the website urges its visitors to, "Help us find and report more rules that were never submitted to Congress."

The activists promoting use of the CRA to attack older, unreported regulations offer three rollback strategies. First, private parties who are subject to the requirements of an older, unreported regulation could argue the regulation has never taken effect. There is certainly [language in the CRA](#) to support such an argument:

"Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress [a report containing a copy of the rule.]"

[Another provision of the CRA](#), however, has language that may preclude a private party's ability to obtain judicial review of claims based on the CRA:

“No determination, finding, action, or omission under this chapter shall be subject to judicial review.”

The second strategy calls for the Trump administration to identify undesirable rules that were never reported to Congress, state that the rules have never taken effect because of the agency's failure to report them, and abandon or vacate the rules. Under this scenario, the Trump administration would roll back undesirable rules immediately without the necessity of going through notice and comment rulemaking procedures otherwise required to repeal the rules.

The third strategy suggests the Trump administration could identify undesirable rules that were never reported, report them to Congress, and encourage Congress to adopt resolutions of disapproval. If this occurs, [Section 801\(b\)\(2\)](#) of the CRA precludes reissuance of a disapproved rule in the same or similar form unless Congress affirmatively adopts legislation authorizing the promulgation.

It may well be that the activists' frothy enthusiasm for expanded use of the CRA will come to very little. It is possible, perhaps even likely, that most of the unreported rules were insignificant, unobjectionable, or even exempt from reporting and review under the CRA. Moreover, as a practical matter it is unlikely that Congress would be willing to devote significant amounts of floor time to debate the disapproval of a large number of older, unreported regulations. Nevertheless, a cursory examination of RedTapeRollback's database of supposedly unreported rules cannot help but give one pause. Think the 2010 Chesapeake Bay TMDL and EPA's 2008 Rapanos Guidance.

Interest in use of the CRA did not end with the flurry of disapproval resolutions in the first one hundred days of the Trump administration. At a September House Subcommittee on Regulatory Reform [oversight hearing](#) focused on agency compliance with the CRA, witnesses urged Congress to attack older regulations that were never reported to Congress. In late October, Congress passed and the President signed a disapproval resolution invalidating an [arbitration regulation](#) adopted by the Consumer Financial Protection Bureau, an independent agency whose regulations are not ordinarily subject to Executive review and approval.

The recent surge in use of the CRA has not gone without opposition. The Center for Biological Diversity (CBD) has [filed suit](#) to vacate a CRA resolution that nullified an Interior Department regulation limiting the methods used to hunt wolves and bears in Alaska wildlife refuges. Among other things, CBD argues that the CRA limitation on issuance of future regulations without express approval of Congress infringes on the constitutionally protected separation of powers. The court's decision in the CBD case is likely to provide guidance on the reach of the language quoted above that limits judicial review of claims arising under the CRA.

Against this background it is safe to say that we have not seen the last of the CRA in the Trump administration. As Yogi Berra once said, “It ain't over 'til it's over.”

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