Holland & Hart

Leveraging the Congressional Review Act to Shape Policy in the New Congress



Troy Lyons

Senior Director of Federal Affairs
202.654.6906
Washington, DC
tmlyons@hollandhart.com



Kelly Johnson

Partner
202.654.6933
Washington, DC
kajohnson@hollandhart.com



Andrew Wheeler

Partner and Head of Federal Affairs
202.654.6936
Washington, DC
arwheeler@hollandhart.com

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Crucial Time to Act— When the 119th Congress convenes on January 3, 2025, there will be significant interest in overturning recent rules of the Biden Administration using the Congressional Review Act (CRA) (5 U.S.C. §§ 801-808). Given the many competing legislative priorities and limitations on use of the CRA, **now is the critical time to assess whether your regulatory priorities could be handled under the CRA and develop a targeted strategy with key congressional stakeholders**. By proactively crafting this plan, your organization can be best positioned to capitalize on opportunities and drive the legislative and regulatory changes necessary to meet your goals for the upcoming Congress.

Congressional Review Act

The CRA allows Congress to quickly overturn federal rules issued by executive branch agencies in the final months of an outgoing Administration. For purposes of the CRA, a "rule" includes both regulations, subject to notice-and-comment rulemaking, as well as some other federal agency actions such as certain guidance documents and policy memoranda. Designed to strengthen Congress's oversight of regulatory activities and curb potential overreach by federal agencies, the CRA provides an effective tool for Congress to nullify regulations. With a unified Republican government, Congress has a unique opportunity to use the CRA to challenge Biden-era actions.

The CRA does not apply to presidential actions or non-rule agency actions such as orders. It also does not apply to proposed rules from the Executive Branch issued in the final months of the Biden Administration. In 2017, after President Trump took office, the Republican-controlled Congress passed 16 joint resolutions of disapproval, successfully nullifying several major Obama-era regulations.

The Process

60-Day Window: Congress has 60 legislative days (not calendar days) to introduce a Resolution of Disapproval after an agency finalizes a rule. The 60-day period starts from the day the rule is submitted to Congress. Rules cannot be combined for purposes of the CRA and a Resolution of Disapproval applies to an entire rule. It cannot be used to invalidate only a portion of a rule.

Lookback Period. Because of Congressional concerns about "midnight rulemaking" at the end of an Administration, rules submitted within 60 days of *sine die* adjournment are subject to CRA procedures in the next

Congress (the “lookback” period). Initial indications are that the lookback period for Biden Administration rules will commence around August 1, 2024.

Passage. Only a simple majority vote is required for a Resolution of Disapproval to pass the House of Representatives and Senate. If signed by the president, the rule is overturned.

The president can veto the resolution, but Congress can override the veto; however, that outcome is unlikely with a unified Republican government. In 2021, President Biden successfully vetoed three joint resolutions of disapproval: the Department of Labor's ESG Rule, the Securities and Exchange Commission's Crypto Asset Guidance, and the National Labor Relations Board's Joint Employer Rule.

Fast-Track Procedures: The most important feature of the CRA is the special parliamentary procedure established for Resolutions of Disapproval in the Senate. Committee consideration of a Resolution is limited in the Senate and a Resolution is limited to a maximum of 10 hours of debate before a vote. Significantly, a Resolution of Disapproval cannot be filibustered. Resolutions cannot be amended under the expedited consideration process.

Effectiveness: Once a Resolution of Disapproval is signed into law, the underlying rule cannot take effect or continue to remain in effect if its effective date has passed. In addition, an agency cannot issue a new rule that is “substantially the same” unless Congress specifically authorizes it to do so. There is significant ambiguity as to what “substantially the same” means especially when an agency has a separate statutory, regulatory or court order mandate.

Conclusion

Understanding the nuances of the CRA process and strategically using the CRA will significantly shape the regulatory landscape in 2025. Holland & Hart's Federal Affairs team can develop and execute a strategic legislative plan to effectively outline potential paths forward to align your priorities with the use of the CRAt.

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