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News Alert

Recent and Forthcoming Environmental Rules and Guidance Could Be Reversed Under Congressional Review Act: Three Steps for Stakeholders to Consider

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If Joe Biden is elected President, and the Democrats win control of both the House and Senate, the new Administration could potentially use the Congressional Review Act ("CRA" or "Act") to reverse recent and still-to-come Trump Administration rules.

Key Takeaways: What Rules May be Subject to CRA Reversal and What Should Stakeholders Do Now?

Dozens of Trump Administration rules and guidance, from any Executive agency, promulgated on or after Monday, June 1, 2020, are potentially vulnerable to summary reversal under the little-known procedures of the Congressional Review Act. A rule that is reversed cannot be reissued in "substantially the same form" without Congressional statutory authorization. That means that significant environmental rules could be rescinded and could only be re-issued with congressional authorization unless the rule were significantly revised—a lengthy and unlikely process. Furthermore, CRA resolutions require only simple majorities to pass each house of Congress, and are not subject to a filibuster in the Senate.

Until recently, the CRA look-back procedures had been used rarely since their enactment in 1996. Prior to 2017, Congress used the CRA's regulatory recall procedures only once (to overturn the Clinton Administration's workplace ergonomics rule in 2001). In the first months of 2017, however, a Republican-led Congress and Trump Administration used the CRA to nullify sixteen "midnight rules" issued at the end of the Obama Administration. These

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included several key environmental rules including the Interior Department's Stream Protection Rule (which concerned mountaintop removal coal mining operations), the Bureau of Land Management's Planning 2.0 rule for managing hundreds of millions of acres of federal lands, and a Fish and Wildlife Service rule regarding non-subsistence takes of wildlife on National Wildlife Refuges in Alaska.

Taking a page from the Trump Administration playbook, a Biden Administration and Democratic Congress could potentially use the CRA to rescind scores of Trump Administration rules. And the CRA could have significant reach—a "rule" can include qualifying guidance, interim final rules, and certain interpretive rules.

Stakeholders may wish to take the following actions now:

1. **Know the Rules.** Catalogue which recently issued rules may be subject to the CRA and which ones are likely to receive congressional scrutiny in the event of unified Democratic control of the White House and Congress.
2. **Know the Impact.** Understand which rules have the most impact on your facility operations and business objectives. Analyze what might happen if these rules are suspended. Develop contingency plans.
3. **Know your Options.** Determine whether to advocate for preservation or repeal of the rule. Rules take considerable time and energy to develop, but so does congressional authorization. There may be opportunities to avoid CRA reversal and retain favorable provisions of rules by working with agencies.

Background

The CRA (5 U.S.C. §§ 801–808) authorizes Congress to overturn final federal rules, with special "fast-track" procedures available in the Senate to preclude use of a filibuster. The Act requires all federal agencies to submit copies of final rules before their effective date to both houses of Congress and the Government Accountability Office (GAO). For sixty calendar days following submittal, excluding those during which either chamber is adjourned for more than three days, Members of Congress may introduce a "joint resolution of disapproval" of the rule. If Congress approves that resolution by simple majority in each chamber and either (1) that resolution is then signed by the President, or (2) Congress successfully overrides a presidential veto, the rule is abrogated.

However, for a rule submitted to Congress when there are fewer than sixty "session days" remaining in the Senate, or fewer than sixty "legislative days" remaining in the House, before Congress adjourns for the calendar year, members of the new Congress will have another sixty days (with the same exclusions as before) to introduce a joint resolution of disapproval of that rule, beginning on the fifteenth legislative/session day of the new Congress. A new Biden Administration and Democratic Congress would therefore have several months to reconsider and rescind Trump Administration rules submitted during the 2020 "lookback period."

Once disapproved, the rule may not be reissued in "substantially the same form" without subsequent statutory authorization. The statute does not define "substantially the same form," and federal courts have not yet ruled on its meaning.

Scope

Congressional disapproval is far-reaching. First, the entire rule is rescinded. The CRA does not allow congressional line-item vetoes of rules, *i.e.*, it may not modify individual provisions of a rule to prevent such provisions from being reissued. Rather, Congress may use the CRA only to disapprove of a rule in its entirety.

Second, because guidance documents can fall within the definition of "rule," the CRA gives Congress a range of potential targets and opportunities to roll back key interpretive guidance. With certain limited exceptions, the CRA adopts the broad definition of a "rule" under APA section 551. 5 U.S.C. § 804(3). Accordingly, for the purposes of the CRA, a rule is "the whole or a part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy." Guidance may therefore be a "rule" for CRA purposes if it fits within this definition. Although a new administration may withdraw a guidance document at will, congressional use of the CRA would prevent the agency from ever issuing new guidance in "substantially the same form," making the withdrawal more permanent.

This is particularly important because, notwithstanding the Trump Administration's initial effort to discourage agency reliance on guidance documents, Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 15, 2019); Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 15, 2019), many agencies, including those with jurisdiction over environmental, health and safety issues (EPA, Interior, OSHA, etc.) have issued extensive guidance, including guidance to reverse previous policy or guidance. A Democratic-led Congress could reverse Trump Administration guidance and could use the CRA disapproval process to prevent substantially similar guidance from being reissued in the future.

To date, Congress has used the CRA to rescind only one guidance document. In 2018, Congress issued a joint resolution of disapproval to overturn the Consumer Financial Protection Bureau's March 2013 bulletin addressing indirect auto lending and compliance with the Equal Credit Opportunity Act. Similarly, the Government Accountability Office has also issued opinions that other guidance—including the 2013 Interagency Guidance on Leveraged Lending and the 2000 Trinity River Record of Decision—were "rules" subject to the CRA because they constituted "general statements of policy."

Which Trump Administration Rules and Guidance May Be Vulnerable to CRA Disapproval in 2021?

The exact start date for the lookback period cannot be conclusively determined until the House has adjourned for the calendar year. That may be as late as December 31, 2020. Based on the number of days the House has been in session so far this year and the House Majority Leader's current session schedule for the remainder of the year, the 60 legislative day "lookback period" likely began on Monday, June 1, 2020. This date is subject to change as the House adds or cancels legislative days, particularly due to COVID-19.

Using this current estimate, any final rules and interim final rules and certain interpretive rules, policy statements, or other guidance documents issued by federal agencies on or after June 1 may be vulnerable to a joint resolution of dismissal under the CRA in 2021.

CRA May Apply to Rules Promulgated Earlier

A Biden Administration and Democratic Congress could potentially use the CRA to rescind Trump Administration rules (including qualifying guidance) promulgated prior to June 1, 2020, if those rules were not submitted to Congress. Despite the CRA's submission requirement, federal agencies do not consistently submit guidance documents to Congress, which arguably frustrates Congress's ability to review such "rules" under the Act. Because the CRA contains a provision barring judicial review, courts have generally declined to review claims challenging an agency's failure to submit a rule. *See, e.g.*, *Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 346 (D.C. Cir. 2018); *Kan. Nat. Res. Coal. v. U.S. Dep't of Interior*, 382 F. Supp. 3d 1179, 1182–83 (D. Kan. 2019); *but see Tugaw Ranches, LLC v. U.S. Dep't of Interior*, 362 F. Supp. 3d 879, 884–86 (D. Idaho 2019).

Beveridge & Diamond has assembled a team—including members with former senior U.S. and state government experience—that is closely watching the CRA and other election-related developments across

multiple environmental, energy, and natural resources subject areas. Please let us know if and how we can assist you in planning for the impacts of either a change or continuation of the Administration and Congress in January 2021.