

E-ALERT | Government Affairs

January 10, 2011

USE OF THE CONGRESSIONAL REVIEW ACT IN THE 112TH CONGRESS TO OVERTURN OBAMA ADMINISTRATION REGULATIONS

On Wednesday, January 5, the 112th Congress — which includes a Republican-controlled House of Representatives and a narrow Democratic majority in the Senate — began. Republican leaders in both chambers have stated that they hope to use the Congressional Review Act (CRA) to overturn regulations issued by the Obama Administration. Potential targets include:

- Federal Communications Commission rules on net neutrality;
- Environmental Protection Agency waste, water, and other rules, including new rules regulating carbon emissions from factories and power plants;
- Department of Education rules establishing measures for determining whether certain postsecondary educational programs lead to gainful employment;
- rules implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, including the formation and activities of the Bureau of Consumer Financial Protection and the implementation of the Volcker Rule;
- rules implementing the Patient Protection and Affordable Care Act, including the new information reporting requirements on Form 1099, the enforcement of the individual mandate, and the creation and regulation of the state insurance exchanges;
- Medicare rules that allow the government to pay doctors who advise on options for end-of-life care; and
- Transportation Safety Administration passenger screening rules.

THE CONGRESSIONAL REVIEW ACT

The CRA provides expedited procedures by which Congress may disapprove an administrative “rule” by enacting a joint resolution of disapproval. A “rule” is broadly defined by reference to the Administrative Procedure Act and includes regulations issued by both executive and independent agencies (such as the FCC and EPA). Before a regulation can take effect, the issuing agency must report the regulation to Congress. After the report is made, Congress generally has 60 days to introduce and pass a joint resolution of disapproval under the CRA’s special procedures, but the counting of the 60 days differs depending on whether the joint resolution is being introduced or considered and whether consideration is taking place in the Senate or the House of Representatives.

If a joint resolution of disapproval is timely enacted with respect to a particular regulation, then the regulation will not take effect — or, if the regulation already has gone into effect, it will be treated as if it had never gone into effect. Moreover, the regulation may not be reissued in substantially the same form, nor may a new regulation that is substantially the same be issued, unless it is specifically

authorized by subsequently enacted legislation. The CRA may be used only to disapprove a regulation in its entirety.

The primary advantage of using the CRA to invalidate an undesirable regulation is its expedited procedures, particularly in the Senate. For example, if a joint resolution of disapproval is introduced in the Senate, and the jurisdictional committee fails to report it to the full Senate within a specified period, a petition of 30 senators may place the joint resolution on the Senate's calendar. In addition, Senate consideration of the joint resolution is not subject to filibuster, and debate is limited. Once debate begins, the Senate may not move on to the consideration of other business until the joint resolution is disposed of.

Enactment of a joint resolution of disapproval under the CRA requires a majority vote in each chamber of Congress and signature by the president. If the president vetoes a joint resolution of disapproval, then Congress must override the veto in order to block the rule from taking effect. Because the president typically can be expected to support a rule issued by an agency of his or her administration, to be enacted, a joint resolution of disapproval will most often require the support of supermajorities in both chambers of Congress.

For this reason, the CRA has been used successfully only once. In November 2000, the outgoing Clinton administration issued final ergonomics regulations. Also in November 2000, the election results gave control of both chambers of Congress and the presidency to the Republican Party. In March 2001, the Republican Congress used the procedures under the CRA to cancel the ergonomics regulations issued in late 2000 by the previous Clinton administration. In that situation, supermajorities were not needed because the new President Bush supported the overturn.

WHAT'S NEXT?

Although enactment of a joint resolution of disapproval under the CRA is rare, it is not unprecedented, and the procedure has been used to influence Congress members with respect to other remedial legislation or to pressure the issuing agency to modify or withdraw a regulation. The recent enthusiasm shown by Republican leaders for use of the CRA should be of interest to those who support or oppose the regulatory initiatives listed above — or other regulations that may be of interest to legislators. We are available to discuss scenarios and strategies for use of (or opposition to use) this nuanced legislation.

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