Insight

The End of the CRA and Path to One-in, Two-Out

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The Congressional Review Act (CRA) allows Congress, under expedited procedures, to repeal recent rules. The current Congress is focusing specifically on last-minute regulations from the Obama Administration. To date, the House and Senate have repealed eight regulations. But this regulatory reform party is going to end soon and according to the Congressional Research Service and the Senate Republican Policy Committee, May 9 is the last day for the Senate to consider CRA votes without threat of the filibuster.

After May 9th, is the regulatory modernization effort stalled? Given, the administration's one-in, two-out regulatory budget and the desire for reform in Congress, May will act as bridge to introduce the next stage of the process. The CRA votes provided initial saving to agencies and to the broader economy, but the next stage will involve the introduction of the administration's Unified Agenda, a schedule of regulations, and even attempts in the House and Senate to produce a comprehensive reform bill that can break through the filibuster. The CRA might be old news by the summer, but regulatory modernization will only just be getting started.

CRA Tally

To date, Congress has finalized the repeal of $3.7 billion in total costs ($1.1 billion annually) and reduced paperwork by more than 4.2 million hours. President Trump is expected to sign all of these measures. However, Congress and the administration are hardly finished with CRA resolutions and there is still time to add considerably to this list.

In addition to the 13 resolutions jointly passed by both chambers, the House has passed two additional resolutions, creating $1.8 billion in additional savings and lowering paperwork by more than 82,000 hours. If the Senate concurs and the president signs these measures, total

savings could jump to $5.5 billion ($1.4 billion annually) and 4.3 million fewer hours.

Those are impressive totals, given the limited pool of regulations from which they could examine. There have been more than 30 CRA resolutions introduced and if all were passed and signed into law, the deregulatory tally could rise to $9.6 billion ($2.5 billion annually) and 7.6 million fewer paperwork hours. The largest remaining rule that has not received a vote involves "Exploratory Drilling in the Outer Continental Shelf," at $2 billion in total costs. One measure that seems likely never to receive a vote is EPA's fracking standards rule, published June 3, 2016. The CRA cutoff is June 13, meaning the highest total from CRA votes is likely $8.7 billion in total savings ($2 billion annually).

CFPB Outlier

There is one exception to the discussion above: Director Richard Cordray of the Consumer Financial Protection Bureau (CFPB). Director Cordray's term expires in 2018, but as an independent agency (pending judicial review) without other commissioners, he can dictate the pace and substance of new regulation from CFPB. It's no surprise that majorities in the House and Senate are not fond of CFPB's structure and they have been critical of past rulemakings. Conceivably, any regulation Director Cordray approves could be struck down via the CRA.

There are some hints about the pending measures CFPB could pursue in the next few months, although there will be more clarity when the administration releases an updated Unified Agenda of federal regulation in May. According to the fall 2016 agenda, CFPB has 15 rulemakings in the proposed or final rule stage. The pending final measures include:

- Prepaid Accounts
- Expedited Funds Availability Act
- Consumer Civil Penalty Fraud
- Revised Arbitration Guidelines
- Company Privacy Polices
- Federal Mortgage Disclosure Requirements
- Inflation Adjustment Rule
- Disclosure of Records and Information
- Consumer Lease Thresholds
- Consumer Credit Thresholds

- Exemption Thresholds for Higher-Priced Mortgages

Initially, CFPB does not consider any of these measures as "major," but the agency has issued eight major rules since 2012, so it is unlikely it will fail to issue a notable rule in 2017. If it does, it appears Congress and the administration will thoroughly examine, and perhaps repeal, any controversial CFPB regulation.

A Bridge to Reform

What happens after the period for expedited CRA procedure expires on May 9th? Does regulatory reform wither with other legislative and administrative priorities? With the savings from CRA votes, agencies will be able to "bank" them to offset future regulatory costs. As the cabinet and remaining members of the administration start implementing policy, the regulatory and deregulatory pace of the administration will increase. Here are the cabinet agencies who are already in the negative under President Trump's one-in, two-out regulatory agenda.

- Defense: $400 million
- Interior: $360 million
- Education: $100 million

What do these initial savings mean for the agencies in 2017. Much depends on the Unified Agenda and regulatory schedule the administration has for each agency, but history can serve as a guide. Pick 2013, the year with the lowest regulatory burdens during the Obama Administration ($29.5 billion). That year the Department of Defense did not impose any final regulatory costs, so presumably the repeal of the contractor blacklisting rule will provide more than enough savings; the agency technically will not be required to find regulatory offsets, assuming a modest pace for the remainder of the fiscal year.

For the Department of Interior, it imposed just $1.3 million in burdens in 2013. The previous year, this figure was $131 million. Again, because Interior is not a prolific regulator, savings from CRA votes will provide more than enough flexibility for the agency. It too will not likely require massive investments in retrospective review to meet the president's goal of $0 in net costs by the end of the fiscal year.

The Department of Education is also not an active regulator, outside of its controversial "gainful employment" rules. For instance, the agency actually cut $163 million in costs in 2013 and imposed just $7.3 million in burdens in 2012. Gainful employment rules obliterated those savings in 2014, when the agency imposed $4.3 billion in total costs. Thus,

absent major market interventions like gainful employment or a burdensome implementation of the Every Student Succeeds Act, Education should be able to work with $100 million in initial savings to easily meet its regulatory budget goal in 2017.

For the agencies not listed above, they start at $0; for any new regulatory costs, they'll need to find equivalent (or greater) offsets. During the Obama Administration, the most active regulators were EPA, and the Departments of Energy and Health and Humans Services.

EPA has certain regulatory programs that are largely on statutory autopilot, namely National Ambient Air Quality Standards (NAAQS). If a statutory or judicial deadline forces Administrator Scott Pruitt's hand, then the agency could impose a rule with millions of dollars in annual costs. Consider that during the previous administration, the average EPA rule cost $318 million annually, including rules that eliminated burdens. Examining rules with only positive costs yields an average of EPA measure of $370 million in regulatory burdens. Thus, even an average rule would force the agency to find equivalent offsets from amending or repealing old rules. The largest deregulatory measure from the agency that AAF has on record is $176 million in savings from 2008.

Energy has a broader mandate to implement efficiency standards and President Obama used that broad mandate to implement 30 significant efficiency rules during his tenure. For comparison, Presidents Bill Clinton and George W. Bush combined for ten efficiency rules. If Secretary Rick Perry does choose to impose additional regulation, it will be helpful to know the average Energy rule during the Obama Administration imposed $200 million in annual costs. AAF does not have a record of any deregulatory measure from the agency since 2005. Perhaps that information alone is enough to motivate officials to search for possible savings.

Finally, implementation of the Affordable Care Act (ACA) could have hardly made HHS any busier during the previous administration. However, undoing the ACA will probably result in new rules that impose costs, even if the net effect of repealing past regulation might result in net savings. Given the broad authority of HHS, there are several Medicare and Medicaid rules that operate on "autopilot," gradually imposing burdens. The agency has several "transfer" rules that merely move money from the federal government to state and local health care providers. Yet, these regulations can also impose notable regulatory burdens. During the Obama Administration, the average HHS measure imposed $87 million in burdens, including deregulatory rules; excluding those yields an average of $103 million. For perspective, President Obama's regulators managed to find three deregulatory acts at HHS that generated at least $100 million in annual savings, so cutting costs is not an impossible task at HHS.

Conclusion

Given the lodestar executive orders on regulatory reform, the composition of the president's cabinet, and the pace of CRA resolutions, it does not appear reform efforts will disappear on May 9. Congress and the administration have taken forceful action to address past regulations. The next step involves working within the regulatory budget to find obsolete or burdensome past rules and advancing a balanced approach to federal intervention.