Insight

Will these Repealed Rules Ever Return?

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With the repeal of several regulations under the Congressional Review Act (CRA), it's fair to ask if agencies will reissue them again. For those arguing for complete repeal, there are arguments supporting this position. In 2001, Congress and President Bush overturned an ergonomics rule. After sixteen years, the agency has not chosen to restart the rulemaking process. For those who want these rules to return, there is some evidence in the text of the CRA and in the Congressional Record that suggests a few rulemakings should return. A balanced approach suggests rules with "narrowly circumscribed" statutory authority or measures with finite quantitative parameters will likely never be re-proposed, but regulations with statutory or judicial mandates or measures with broad statutory authority could return.

Background

Surprisingly, the U.S. Senate passed the CRA 100-0, as part of a broader regulatory reform package signed by President Clinton. One of its chief sponsors was Democratic Senator Harry Reid from Nevada. There are some misconceptions about the scope of the CRA, but it's just another law passed by Congress and signed by the president. The only real difference is CRA resolutions are allowed expedited procedures in the House and Senate. Drafters of the law were clear on this point, "[E]nactment of a joint resolution of disapproval is the same as enactment of a law." However, enacting a resolution overturning a previous law creates a paradoxical situation where the law still remains, but Congress has affirmatively eliminated one aspect of it.

Rules that are repealed via the CRA, "may not be reissued in substantially the same form." Unfortunately, there is little clarity on what this phrase means. What is a substantially dissimilar resource extraction or ergonomics rule? That the ergonomics rule was never re-

proposed during the Obama Administration likely indicates regulators were weary of wading into this legal uncertainty. The Congressional Record from when the CRA was passed provides some clues, but no definitive answers.

In 1996, drafters of the CRA noted that "substantially the same form" language was included so that an agency couldn't return to a nearly identical rule shortly after Congress already struck down an earlier version. They then established three broad scenarios for agencies once Congress passed a CRA resolution of disapproval:

- If the law that authorized the regulation provided broad discretion to the agency, the agency "may" exercise broad discretion to issue a new rule. This is probably the strongest argument in favor of dissimilar rules returning after a CRA vote.
- Next, if the law that authorized a regulation did not mandate a specific rule, the agency "may exercise its discretion" not to issue a new rule. Essentially, if there were no statutory mandate to issue a regulation and Congress acts to overturn a rule, a new regulation is unlikely, but still possible.
- Finally, if the statute mandates a "particular rule and its discretion in issuing the rule is narrowly circumscribed," then a CRA vote will, "work to prohibit the reissuance of any rule." This hints that with certain rules, a CRA measure just acts as altered legislative intent, a quick reversal of policy.

Beyond these three criteria for examining the possibility of new rules, there is one concrete example when agencies will re-propose a regulation. Section 803 of the CRA covers rules with statutory or judicial deadlines. If such a deadline exists and Congress nevertheless repeals a regulation under the CRA, "that deadline is extended until the date [one] year after the date of enactment of the joint resolution." In other words, the legal deadline is still in place for the agency to act, but the CRA vote just extends it for the agency to reissue a substantially dissimilar rule.

Examples

This legislative history is instructive, but a few recent examples, from CRA resolutions passed by Congress and other recent final rules, could help to determine if agencies will resurrect some of these regulations.

First, the vote overturning the resource extraction rule serves as an interesting test case. It was mandated by section 1504 of Dodd-Frank, but a court struck down the first iteration of the measure. Then, the Securities and Exchange Commission (SEC) finalized another rule in 2016, within the period during which Congress could strike it down in 2017.

How did Congress reconcile the statutory mandate of Dodd-Frank against a vote to overturn the regulation? Congressman Jeb Hensarling was blunt, expecting the rule to return in some form. He said, "Let's also remember that this joint resolution does not repeal section 1504 of Dodd-Frank. I wish it did, but it doesn't." He then expected SEC to redo the rule at some point, noting the resolution, "[S]imply tells the SEC to go back to the drawing board, comply with the Dodd-Frank Act, and come up with a better rule that will not put American public companies at an unfair disadvantage and cost us jobs."

What does this mean for how SEC weaves its way through a prior court opinion and a CRA vote? There is no certainty, but this seems like the case of "narrowly circumscribed" Congressional intent and then a subsequent CRA resolution overturning the rule. Section 1504 of Dodd-Frank merely requires an "annual report" from companies to contain information about the payments made to foreign governments for extraction of oil, gas, and minerals. Perhaps the third iteration of the rule will impose far fewer compliance costs, satisfying industry and Congress, but there are no clear lines.

To illustrate the ambiguousness of "substantially similar," consider the Department of Labor's (DOL) recent overtime expansion, from $23,000 to $47,000 annually. The rule, which costs roughly $2.9 billion to implement, is not eligible for repeal under the CRA, but imagine a substantially dissimilar rule? Is $50,000, $40,000, or $30,000 dissimilar? What if there is no overtime expansion for a decade after a resolution of disapproval and the new threshold is set to $60,000? However, adjust for inflation and maybe that figure is roughly $47,000, nearly the identical rule.

Regulation with set quantitative figures makes it nearly impossible to discern a rule that might be eligible for reissue and one that courts would likely strike down as "substantially similar." As a final example, consider FAA's 2013 rule requiring commercial pilots to have 1,500 hours of previous flying experience, which is not eligible for a CRA vote. Congress set the 1,500-hour rule in statute and there was little discretion on the part of the implementing agency. This is probably the clearest example of "narrowly circumscribed" statutory authority. Because the CRA acts as any other law, a CRA resolution overturning the 1,500-hour rule would work to completely nullify the standard. It would be impossible for the agency to implement a dissimilar rule in light of a previous statutory mandate of 1,500 hours and a recent CRA vote.

As for the current slate of rules that could be repealed using the CRA, none have set quantitative limits like the overtime expansion or the 1,500-hour rule. However, if Congress were to overturn eligible energy efficiency standards, which typically do have set quantitative standards, agencies would face the difficult path of trying to weave their way through a CRA resolution and legal uncertainty. These factors are the primary reason why

many regulators will choose not to regulate again in the area where the CRA vote struck down the previous rule. Thus, the practical effect of some CRA resolutions will be a complete bar to re-proposed rules, even if the legal effect leaves some leeway.

A Hybrid Approach

When evaluating whether the regulations repealed during the first half of 2017 return, it might be instructive to break them into three categories:

- Quantitative statutory justification;
- Narrowly circumscribed statutory instructions;
- Broad discretion.

Generally, as discussed above, the first two categories make it unlikely a court would ever allow agency action after a successful CRA vote. Again, knowing whether $50,000 or $60,000 is substantially dissimilar is an amorphous and nearly impossible task. In practice, agencies are likely to abandon any new efforts dealing with set quantitative figures, even if the agency has some discretion.

Likewise, narrowly circumscribed initial authority from Congress operates in the same manner. It is similar to the quantitative limitation, but broader. Although SEC's resource extraction rule is likely to return, potential litigants could make the case Dodd-Frank's authority was narrowly circumscribed. This could cabin future rulemaking, even though the regulation wasn't quantitative in nature. Another example of narrowly circumscribed could be preexisting conditions coverage from the Affordable Care Act. This provision is not eligible under the CRA, but it is difficult to imagine a scenario of an agency finding another dissimilar method to implement such a specific requirement.

Finally, many of the rules Congress is striking down exist in a legal world with broad statutory authority. For example, the Department of Interior likely has the power to regulate natural gas flaring on federal lands. However, the House has voted to repeal the most recent rule aiming to reduce emissions. It is conceivable, yet probably not during the Trump Administration, that the agency could construct a different rule within its existing statutory authority. But if it did so, it would be wading into uncharted legal territory.

Until an agency decides to re-finalize a rule that Congress struck down under the CRA, there will be no firm answers as to what constitutes a substantially dissimilar rule. Then, a party must sue, arguing the rule is similar and courts will have to decide. This is a circumstance the framers of the CRA contemplated, "In deciding cases or controversies

properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land." It will likely take several years before even a single court weighs in on the definition of substantially similar.

Conclusion

For now, all of the rules Congress and the administration strike down will not return anytime soon, save SEC's resource extraction measure, which could make an appearance in 2018 or 2019. Political forces and legal uncertainty will restrict agency actions reimplementing rules previously struck down. The administration's regulatory budget will also serve as a deterrent against re-finalized rules from the CRA. Not only will an agency need to redo old rules and navigate the substantially similar definition, but also find two old rules to amend during the process.

Will these repealed rules ever return? In the next four years, no. Given the pace of resolutions of disapproval, during the next eight to ten years, a brave agency is likely to test Congress and the courts and attempt to resurrect a once-felled regulation.