Insight

Administration Compliance with the Congressional Review Act

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Under the Congressional Review Act (CRA), Congress has the right to review and rescind "major" federal regulations, rules with an annual economic impact of $100 million or more. However, during the Obama Administration, there are likely several rules that impose substantial economic burdens, but instead were labeled "non-major," including the individual and employer mandates under the Affordable Care Act.

In total, these regulations have imposed more than $1 billion in costs and 25,000 paperwork burden hours, but Congress has little oversight power if these supposedly non-major rules are effective immediately. Major rules, on the other hand, undergo a waiting period before they become effective, during which time Congress can review the regulation and potentially rescind the measure. None of the rules below were initially listed as major by the White House or agenices. In addition, many of the rules below never even included a discussion of major rule status under the CRA.

Regulation	Annual Cost (millions)	Paperwork Hours
Regulations to Incorporate Swaps	$703	5
Integrated Mortgage Disclosures	$275	-8,450,000
Confirmation, Compression, Swap Trading	$106	975,063
Individual Health Care Mandate		7,500,000
Employer Health Care Mandate		
		Totals: $1 billion in costs; 25,068 burden hours

To conduct this study, the American Action Forum (AAF) examined all recent rules with annual costs or benefits greater than $100 million annually. AAF then cross-referenced those rulemakings with the Government Accountability Office's (GAO) major rule database. GAO alone has the responsibility under the CRA to "report to Congress on whether an agency, in promulgating a major rule, has complied with the process." After receiving a major rule, GAO has 15 days to submit a report to Congress. Despite significant burdens that should have likely triggered major rule status, none of these rulemakings were listed as major, which would prompt a formal report to Congress.

Initial AAF research suggested eight rules that might have evaded scrutiny under the CRA. However, it was later discovered that when several agencies jointly issue a regulation, a rule can appear as both major and non-major on GAO's database. For example, one entry implementing the Mental Health Parity Act declares that the rule is "non-major," while another entry for the same rulemaking listed it as "major." These entries both appeared on the same page of the Federal Register, but the only apparent difference is the IRS measure was declared non-major, and the HHS entry was labeled as major.

According to the Congressional Review Act: "'Major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] finds has resulted in or is likely to result in an annual effect on the economy of $100,000,000 or more." All but two of the above rules imposed more than $100 million in annual costs alone, according to the cost-benefit analyses in the regulatory text.

The rules that do not list monetized thresholds above $100 million nevertheless impose substantial burdens, including two rules from the Affordable Care Act. Although there is no set threshold for the number of hours that triggers major rule status, 7.5 million hours, which the individual mandate imposes, is a substantial burden. If compliance with the individual health care mandate costs $13.33 per hour ($100 million in total), it should trigger the CRA. However, the administration included no discussion of major rule status in the regulatory text, and GAO lists the measure as non-major.

Perhaps more disturbing, the recently finalized employer mandate contains no regulatory analysis at all, much less a mention of the CRA. Of course, even the administration recognizes that the employer mandate will impose significant costs, which is one reason why it delayed the regulation twice. However, the text of the rule declined to admit that new mandates would impose paperwork. The Small Business Administration disagreed, noting that the administration should have published an initial assessment for public analysis or a supplemental analysis. No such assessment exists.

One of these five rules, "Regulations to Incorporate Swaps," does not list a definitive annual cost number. However, it does estimate costs per swap execution facility (SEF) member of $201,600 annually; with 3,500 affected SEFs, annual costs could approach $720 million. Even if this calculation is inaccurate, there is a corresponding paperwork collection associated with the rulemaking that lists $211 million in annual costs, a threshold high enough to produce major rule status.

One possible explanation for these missing rules under the CRA is that OIRA did not formally review any of them. Although two of the rules are from IRS, records reveal that the White House did not officially review the individual or employer mandates. The other rules were published by independent agencies. It is possible that a shorter informal review time to designate rules as major allowed these independent agency agencies to evade closer scrutiny.

CONGRESSIONAL ACTION

For Congress, there are profound implications for discrepancies in the CRA process. These non-major regulations take effect immediately, as opposed to the standard waiting period for major rules. There have been more than 40 joint resolutions of disapproval under Congress's right to rescind regulations pursuant to the CRA. Although only one has succeeded, the CRA is an important oversight tool. In fact, the CRA is one of the few vehicles for Congress to examine independent agency actions because OIRA only scrutinizes cabinet agency actions.

The fault for these “missing” regulatory actions does not rest entirely on independent agencies or GAO; the OIRA Administrator has the responsibility to determine major rule status. Section 804 of the CRA grants OIRA’s Administrator the sole authority to determine major rule status. It seems probable that these missing rules are the responsibility of the administration, although agencies themselves have omitted analyses under the CRA.

CONCLUSION

With several rules labeled as non-major that should have likely been declared major, it’s clear there are pitfalls in the CRA process, from the initial regulatory analysis, to OIRA’s review, to GAO’s major rule report to Congress. These discrepancies raise troubling issues of regulatory transparency and accountability.