Insight

CRA Loophole Could Offer Billions in Repeal Options

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Recently, the *Wall Street Journal's* Kimberly Strassel reported on a "Regulatory Game Changer" that might allow conservatives in Congress to repeal regulations dating back to the beginning of the Obama Administration, not just the last few months. This loophole might exist because in order for a rule to "take effect" under the Congressional Review Act (CRA), a report containing details about the regulation must be submitted, "to each House of the Congress and to the Comptroller General." Under the law, "submission" means the latter of formal publication or when Congress receives the rule. Thus, with some rules having never been transmitted to Congress, the fate of the regulation is still pending. As American Action Forum (AAF) research has found in the past there are often discrepancies in CRA compliance. Rules that were found to have discrepancies have imposed costs of $24 billion with more than 8.6 million paperwork burden hours.

Ms. Strassel's article highlights that the original drafters of the CRA contemplated this scenario. Typically, a new Congress and administration would only have the last 60 session or legislative days to review and repeal past regulations. However, even after a regulation is officially published in the Federal Register, it must also be submitted to Congress, typically through "Executive Communications" that appear in the Congressional Record (CR). As AAF and the Administrative Conference of the United States have found, there are thousands of rules never submitted to Congress. Thus, according to the plain language of the CRA, they cannot take effect because they have not been formally submitted. Even if regulators have started to enforce them, one option for the new administration is to formally transmit the rules to Congress and start the clock for a CRA resolution of disapproval.

According to the latest AAF research, there are at least five regulations with notable costs and paperwork burdens never transmitted to Congress and dozens of other minor rules as well. These measures include regulations implementing sections of Affordable Care Act and Dodd-Frank, disability rules for commercial facilities, and the FDA's recent trans fat ban. The chart below highlights the five largest rules without a record of formal transmission to Congress and accompanying regulatory burdens.

Rule	Year	Cost (in millions)	Paperwork Hours
Nondiscrimination on the Basis of Disability	2010	$12.9 billion	
Banning Trans Fats	2015	$11 billion	
Adoption of Regulations to Incorporate Swaps	2012	$740 million	7.4 million

Medical Loss Ratios for Medicare Advantage	2013	$19 million	130,000
Efficiency Standards for Prerinse Spray Valves	2016	$2 million	
Totals		**$24 billion**	**7.6 million hours**

To find these rules, AAF searched the Executive Communications for the Senate and House records of the CR. Ideally, final rules published in the Federal Register should be searchable in the CR by their title, regulatory docket number, or by their "Regulation Identifier Number" (RIN). If a rule appeared in the Federal Register, but not the CR for both the House and Senate editions, AAF logged the regulation and its possible regulatory burdens.

The largest rule above, Nondiscrimination on the Basis of Disability, affects commercial compliance with the Americans with Disabilities Act. It was jointly published with a related rule that only affected government intuitions, but it does not appear regulators transmitted the commercial compliance measure through to the Senate. Although the commercial facilities regulation was submitted to GAO, the language of the CRA suggests it must be transmitted, "to each House of the Congress" and GAO. However, this is ultimately a matter for House and Senate leaders and their respective parliamentarians. Here, it appears the agency met its burden on two of the three requirements.

The second rule on the list, banning trans fats, was listed as a notice, but the CRA generally has an expansive view of what constitutes a rule. In addition, the trans fat ban was listed as a declaratory order and listed a compliance date, although it does not begin until June 18, 2018. With $11 billion in total costs and up to $440 billion in benefits, there could be plenty of debate between Democrats and Republicans over the future of the rule. There is also the possibility the Trump Administration has wide discretion to amend and delay the rule without use of the CRA. If Congress were to formally disapprove of the rule, regulators would never be able to ban trans fats again, barring new authority from Congress.

It also appears a Dodd-Frank measure was never transmitted to Congress under the CRA. "Adoption of Regulations to Incorporate Swaps," was a Commodity Futures Trading Commission (CFTC) rule from 2012 that established a comprehensive new framework governing security-based swaps. Yet, GAO has no record of transmission and it does not appear in the CR.

Finally, it appears at least one Affordable Care Act rule was never officially transmitted to the Senate. Medical Loss Ratios (MLR) for Medicare Advantage Plans was published on May 23, 2013, but there is no Executive Communication filed with the Senate, although there is a House record. There is a formal record at GAO. If a parliamentarian agrees, repealing this rule via the CRA would represent one of the easiest paths for Congress to undo a portion of the Affordable Care Act.

Sunk Costs

It is possible the above list could expand as Congress finds other rulemakings never submitted under the CRA. The catch is with some older measures, the incentive to fully repeal the rule will be mooted by past implementation. With regulations from the first term of President Obama, it is possible that the rule has been fully implemented and sunk costs have already been imposed. Repealing the rule might do little for the affected parties. Every regulation is different and there might be several major rules that affected businesses would happily forget, but for some, compliance has already taken its toll.

Even if repealing a past rule might provide little in the way of regulatory relief, it is possible using the CRA for these regulations could at least increase compliance with the law. As AAF and others have documented, there are thousands of rules that fail to comply with the specific procedure of the CRA. Perhaps a few CRA votes on these measures would increase compliance for this important, but little-used, check on executive power.

Conclusion

With more than $24 billion in available regulatory costs, there are a few options for Congress to consider when it examines rules under the "CRA loophole." None of these rules are as controversial as the "Clean Power Plan" or the "Volcker Rule," but with Dodd-Frank and Affordable Care Act rules technically still pending, use of the CRA could extend beyond just rules issued since last June. Congress has been aggressively reviewing past regulations from President Obama and a botched CRA process may offer up a few more rules to scrutinize in the coming weeks.