

Investigations, Compliance and Defense

A New Day for the CRA

By: [Katie B. Johnson](#), [Jessica A. Martinez](#), and [Vaishalee V. Yeldandi](#)

Only 19 days in, the 117th Congress has already taken its place in history. On January 3, 2021, the 117th Congress was sworn in, expecting to begin its work with a divided government: a Democrat-controlled House of Representatives and Republican-controlled Senate. Just two days later, however, runoff elections in Georgia completely upended that calculus after Reverend Raphael Warnock and Jon Ossoff pulled off improbable victories in their respective elections, giving Democrats (who count two Independents among their caucus) 50 Senate seats and, with Vice President Kamala Harris as the tie-breaking vote, the Senate majority. With Joe Biden as President, Nancy Pelosi as Speaker of the House, and Chuck Schumer as the Democratic Leader of a tied Senate, the Democrats have unified control of the executive and legislative branches for the first time since 2011. This gives Democrats a unique tool to quickly unwind regulatory actions undertaken by the outgoing administration that could otherwise take years through the regular rulemaking process—the Congressional Review Act (CRA), 5 U.S.C. § 801. This article walks through how the CRA works in practice and what Trump-era midnight regulations are most likely to find their way to the chopping block.

How the Congressional Review Act Works

Regulations issued by the Trump administration in late 2020 could be rolled back under authority granted to Congress under the CRA.^[1] The CRA requires agencies to submit all final rules to Congress and the Government Accountability Office (GAO).^[2] Once Congress receives notice of a rule, Members of Congress have 60 “days of continuous session”^[3] to introduce a special joint resolution of disapproval of the rule.^[4] If Congress adjourns *sine die* before the end of this 60-day period, the period to file and act on a disapproval resolution restarts in the next session of Congress. This time period, known as the “lookback” period, depends on the *sine die* adjournment in either chamber and is ultimately determined by the House and Senate Parliamentarians.^[5] Thus, it is expected that any regulations finalized after August 21, 2020 are subject to a potential joint resolution of disapproval under the CRA in the 117th Congress, although this date has not been officially announced by the Parliamentarians.^[6]

Prior to 2017, the first year of the Trump administration, Congress had only used the CRA once, early in the administration of George W. Bush when Congress voted to overturn an Occupational Safety and Health Administration (OSHA) regulation promulgated during the waning days of the Clinton administration.^[7] This practice changed dramatically, however, with the Trump administration—after the 2017 inauguration, the Trump administration and Congress made aggressive use of the CRA to overturn 16 regulations, with a focus on those related to environment/energy, labor, education, gun control, reproductive health, telecommunications, and transportation.^[8]

How the Biden Administration Is Likely to Use the CRA

The Biden administration is likely to use the CRA process to target regulations finalized by the Trump administration after August 21, 2020 that are:

- most incongruent with the Biden administration’s policy goals;
- unlikely to be struck down quickly through litigation; and
- cover areas where the Obama-era regulations are considered significantly preferable from a policy

perspective.

The procedural strictures embodied in the CRA illuminate why regulations that meet these three standards are most likely to be the focus of the Biden administration's efforts to overturn the Trump administration's last-ditch regulatory efforts. *First*, the enactment of a joint resolution of disapproval means that the disapproved rule will either fail to take effect or will be retroactively negated. This presents an attractive option for rules that the incoming administration views to be particularly problematic, like the "secret science" rule described below. *Second*, and relatedly, the CRA provides that a joint resolution of disapproval not only invalidates the rule, it also prevents the agency from issuing another rule that is "substantially the same" unless Congress authorizes the agency to do so in a later law.^[9] This will require the Biden administration to conduct a careful analysis of any anticipated future rulemaking and the prior regulations in the relevant space. *Third*, once a CRA joint resolution reaches the Senate floor, filibustering (assuming it has not been abolished) is not allowed, amendments are disallowed, floor debate is limited to a maximum of 10 hours, and only a simple majority is needed for the joint resolution to be passed in the chamber.^[10] This leaves little recourse for the Republican minority to prevent Trump administration regulations from being overturned, unless they are able to convince one or more Democratic Senators to defect from their caucus.

How the CRA's Timing Constraints Will Impact Its Use

Even with this broad power, Democrats in Congress will still have to be very strategic and targeted with their use of the CRA. That is because, under the CRA, Congress has only a limited time period—within 60 days of continuous session—to act on Trump-era rules that were submitted during the lookback period, beginning on the 15th legislative day in the House and the 15th session day in the Senate of the 117th Congress.^[11] This must be balanced with competing priorities presented in the early days of a new administration, including new legislation and confirming cabinet positions. For example, Democrats have made it known that they will prioritize the John R. Lewis Voting Rights Act, which would restore the preclearance formula under the Voting Rights Act struck down by the Supreme Court's *Shelby County v. Holder* decision in 2013, and that they also plan to focus on the For the People Act of 2021 (H.R. 1), which if passed would result in a complete overhaul of the American electoral system, including campaign finance, redistricting, and an expansion of mail-in voting.^[12] Also at the top of Democrats' priority list is likely to be a stimulus effort to boost the struggling economy in the wake of the COVID-19 pandemic. Drafting, amending, and debating such a measure will take a significant amount of time and effort early in 2021. Delayed scheduling of confirmation hearings for cabinet positions and the subsequent floor votes are also likely to eat up Senate floor time,^[13] particularly for nominees viewed as controversial.^[14] Last, though certainly not least, following President Trump's historic second impeachment by the House just last week, an impeachment trial remains to be held in the Senate, taking up a significant amount of additional floor time early in the 117th Congress. Once the article of impeachment is transmitted, the trial will be set to begin almost immediately thereafter and will freeze other Senate business until a verdict is reached, unless Senators Schumer and McConnell can come to an agreement to circumvent these rules.^[15]

These and other competing priorities may leave Congress with little time to consider joint resolutions of disapproval in the early months of the Biden administration, and are likely to force a more targeted review and effort to focus invalidation on the most critical eligible regulations.

The Biden administration also has to ensure it has sufficient support in both chambers of Congress before putting a CRA vote to the floor, because a failed vote on a joint resolution accelerates the time in which the rule becomes effective, in essence having the complete opposite of the intended effect.^[16] If either chamber considers and rejects a joint resolution, the rule at issue would instead go into force immediately, regardless of the layover period in its effective date.^[17]

How the CRA Impacts Future Rulemaking

As noted above, the CRA provides that a joint resolution of disapproval not only invalidates the challenged rule, it also prevents the agency from issuing another rule that is “substantially the same” unless Congress authorizes the agency to do so in a later law.^[18] The term “substantially the same” is not defined in the CRA, and the few courts that have analyzed this issue have concluded that such a decision is not subject to judicial review.^[19] In past administrations, this risk served as a deterrent to use of the CRA because administrations were fearful that a disapproval resolution would later prevent an agency from regulating in the same space.^[20]

As the first administration to aggressively use the CRA, the Trump administration was not deterred by the prohibition on issuing later rules that are “substantially the same.” Indeed, in 2019, the Trump administration reissued a version of a rule that Congress had struck down in 2017, marking the first time an agency reissued a rule after the original was disapproved using the CRA.^[21] Although the CRA does not require that an agency explain itself when reissuing a rule, in promulgating the new rule, the agency in question argued that the new rule had a “substantially different scope and fundamentally different approach” and thus was not “substantially the same” as the disapproved rule.^[22] In response to a commenter who argued that this rule was in fact “substantially the same,” the agency responded that the commenter had simply misunderstood the CRA provision, and argued that the provision “does not prohibit re-regulating ‘the same matter;’ rather, it prohibits issuing a regulation on the same matter that is ‘substantially the same’ as the rescinded regulation.”^[23] This response, however, did little to clarify the issue or the propriety of the reissued rule, though the lack of further challenges has left the door open for more aggressive interpretations of this provision.

The ambiguity of this provision, and the lack of clarity regarding whether it is subject to judicial review, could lead the Biden administration to take a more aggressive approach to the CRA. Under a forward-leaning interpretation of the statute, if the Biden administration were to regulate in the same space in the future, it could argue that strengthening (or weakening) a rule is not “substantially the same” as a previously disapproved regulation.

Trump Administration Rules Subject to the CRA under a Biden Administration

The Trump administration’s use of the CRA could serve as a roadmap to the Biden administration with respect to which rules to overturn. Public statements to date have already made clear that the Biden administration would be willing to roll back Trump-era regulations using the CRA and other related mechanisms.^[24]

There are many rules that may be on this Congress’s CRA priority list, including the following that were submitted in late August 2020 or afterwards:

- A Department of Labor rule that makes it easier for an employer to define a worker as an independent contractor;^[25]
- A Department of Labor Office of Federal Contract Compliance Programs rule that has been criticized for allowing federal contractors to discriminate against LGBTQ people in the name of protecting religious liberty;^[26]
- A Department of Energy rule known as the “showerhead rule,” which rolled back Obama-era water efficiency standards for showerheads;^[27]
- An Environmental Protection Agency rule known as the “secret science” rule, which limits the use of scientific studies that do not make their underlying data available to the public;^[28]
- A Department of Treasury Office of Comptroller of the Currency rule prohibiting banks from withholding credit on the basis of social, political, or environmental reasons;^[29]
- A Department of Homeland Security US Citizenship and Immigration Services rule that would replace the H-1B visa lottery with a system that would grant petitions based on the highest salary offered;^[30]

- A Department of Transportation Federal Motor Carrier Safety Administration rule that would grant the Association of American Railroads and the American Short Line and Regional Railroad Association and member railroads an exemption to the prohibition against driving more than 14 hours or driving more than 60 hours on duty within seven consecutive days, or 70 hours within eight consecutive days.^[31]

This list is but a sample of the many regulations submitted by the outgoing Trump administration that are potentially subject to disapproval pursuant to the CRA under the Biden administration. How exactly the Biden administration will choose to yield this powerful tool in its early days and where it will focus its efforts remains to be seen, but it seems almost certain that we will be seeing a number of Trump administration regulations on the chopping block in very short order thanks to the CRA.

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[1] 5 U.S.C. § 801.

[2] 5 U.S.C. § 801(a)(1)(A).

[3] When calculating the number of days of continuous session, periods when either chamber is adjourned for more than three days do not count towards the 60-day time period, although weekends and holidays do count if neither chamber is in recess.

[4] 5 U.S.C. § 802(a).

[5] Christopher M. Davis & Richard S. Beth, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, Congressional Research Service (Dec. 15, 20160, <https://fas.org/sqp/crs/misc/IN10437.pdf>). A *sine die* adjournment marks the final adjournment for the year, whether at the end of the first or second session of a two-year Congress.

[6] It is unclear as of this writing when the Parliamentarians will announce the finalized date.

[7] Bethany Davis Noll & Richard Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 17 n.72 (2019), available at https://minnesotalawreview.org/wp-content/uploads/2019/11/Noll_Revesz_FINAL.pdf; *The Congressional Review Act (CRA): Frequently Asked Questions*, Congressional Research Service at 25 (Jan. 14, 2020), <https://fas.org/sqp/crs/misc/R43992.pdf>.

[8] Among the notable rules that were overturned: the Stream Protection Rule; Disclosure of Payments by Resource Extraction Issuers; Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness; Federal Acquisition Regulation; Fair Pay and Safe Workplaces; Protecting the Privacy of Customers of Broadband and Other Telecommunications Services. See *The Congressional Review Act (CRA): Frequently Asked Questions*, Congressional Research Service at 26 (Jan. 14, 2020), <https://fas.org/sqp/crs/misc/R43992.pdf>; see also Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, NY Times (May 18, 2017), <https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html>.

[9] 5 U.S.C. § 801(b)(2). This could also potentially be problematic if the administration wants to promulgate a regulation in the same space in the future.

[10] 5 U.S.C. § 802(d).

[11] 5 U.S.C. §801(d)(1).

[12] Zach Montellaro, *GOP Pushes Voting Restrictions, While Democrats Back Expansions*, Politico (Jan. 11, 2021), <https://www.politico.com/newsletters/weekly-score/2021/01/11/gop-pushes-voting-restrictions-while-democrats-back-expansions-792698>.

[13] Paul Kane, et al., *Biden in Danger of Having No Confirmed Cabinet Secretaries on First Day of Presidency*, Wash. Post (Jan. 7, 2021), https://www.washingtonpost.com/politics/biden-cabinet-confirmations/2021/01/07/a5e99198-4fbc-11eb-bda4-615aaefd0555_story.html.

[14] Alan Rappeport and Jim Tankersley, *Atop the Powerful Budget Committee at Last, Bernie Sanders Wants to Go Big*, NY Times (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/politics/bernie-sanders-budget-committee.html>.

[15] Nicholas Fandos and Catie Edmondson, *Senate Plans Trial for Trump as G.O.P. Weighs Risks of Convicting*, NY Times (Jan. 14, 2021), <https://www.nytimes.com/2021/01/14/us/politics/impeachment-senate-trial-trump.html>.

[16] *Id.*

[17] 5 U.S.C. §§ 801(a)(3), 801(a)(5).

[18] 5 U.S.C. § 801(b)(2).

[19] See *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1236-37 (10th Cir. 2020) (finding that it was “not obvious that an agency’s decision to reissue a disapproved-of rule—pursuant to authority conferred by statutes other than the CRA—would fall within § 805’s limited scope”).

[20] For example, in 2017 the House passed a resolution of disapproval regarding a Department of Interior regulation restricting methane pollution. This resolution failed in the Senate because three Republican Senators, including Senator John McCain, voted against it; Senator McCain stated that he voted against the resolution of disapproval because he feared the agency would be blocked from issuing further methane regulations if it passed. Tom DiChristopher, *John McCain Just Delivered Trump a Rare Loss in His Bid to Roll Back Energy Rules*, CNBC (May 10, 2017), <https://www.cnbc.com/2017/05/10/mccain-delivered-trump-a-rare-loss-in-his-bid-to-kill-energy-rules.html>.

[21] US Department of Labor, “Federal-State Unemployment Compensation Program,” 20 C.F.R. § 620 (2019); *The Congressional Review Act (CRA): Frequently Asked Questions*, Congressional Research Service at 19 (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

[22] US Department of Labor, “Federal-State Unemployment Compensation Program,” 20 C.F.R. § 620 (2019); *The Congressional Review Act (CRA): Frequently Asked Questions*, Congressional Research Service at 19 (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

[23] US Department of Labor, “Federal-State Unemployment Compensation Program,” 20 C.F.R. § 620 (2019).

[24] See Coral Davenport, *Democrats Eye Trump’s Game Plan to Reverse Late Rule Changes*, NY Times (July 30, 2020), <https://www.nytimes.com/2020/07/17/climate/trump-regulations-election.html>.

[25] US Department of Labor, “Independent Contractor Status Under the Fair Labor Standards Act,” 29 C.F.R. § 780, 788, 795 (2021), <https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act>. It appears, however, that the Biden administration may elect to “freeze” this “midnight rule” from taking effect by issuing a memorandum that would stop any agency rules or guidance from going into effect if their effective date is after January 20. Ben Penn, *Independent Contractor Final Rule Planned for Jan. 7 Release*, Bloomberg Law (Jan. 7, 2021), <https://news.bloomberglaw.com/daily-labor-report/independent-contractor-final-rule-planned-for-jan-7-release>.

[26] Office of Federal Contract Compliance Programs, “Rule Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” 41 C.F.R. § 60 (2021), <https://www.federalregister.gov/documents/2020/12/09/2020-26418/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption>.

[27] US Department of Energy, “Energy Conservation Program: Definition of Showerhead,” 10 C.F.R. § 430 (2021), <https://www.federalregister.gov/documents/2020/12/16/2020-27280/energy-conservation-program-definition-of-showerhead>.

[28] Environmental Protection Agency, Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 C.F.R. § 469 (2021), <https://www.federalregister.gov/documents/2021/01/06/2020-29179/strengthening-transparency-in-pivotal-science-underlying-significant-regulatory-actions-and>.

[29] Office of Comptroller of the Currency, “Fair Access to Financial Services,” 12. C.F.R. § 55 (2021), <https://www.occ.gov/news-issuances/federal-register/2021/nr-occ-2021-8a.pdf>.

[30] US Citizenship and Immigration Services, Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, 8 C.F.R. § 214 (2021), <https://www.federalregister.gov/documents/2021/01/08/2021-00183/modification-of-registration-requirement-for-petitioners-seeking-to-file-cap-subject-h-1b-petitions>.

[31] Federal Motor Carrier Safety Administration, “Hours of Service of Drivers: Association of American Railroads and American Short Line and Regional Railroad Association; Application for Exemption,” 85 FR 84096 (2021), <https://www.federalregister.gov/documents/2020/12/23/2020-28341/hours-of-service-of-drivers-association-of-american-railroads-and-american-short-line-and-regional>.
