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Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA's Ergonomics Standard

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Summary

On March 29, 1996, the President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBRFA), P.L. 104-121, 110 Stat. 857-874, Subtitle E of which for the first time established a mechanism by which Congress can review and disapprove, by means of an expedited legislative process, virtually all federal agency rules. In its current form, however, the efficacy of the review scheme as a vehicle to control agency rulemaking through the exercise of legislative oversight may appear to some observers to be problematic despite the nullification of OSHA's controversial ergonomics standards in March 2001. In retrospect, it appears that that action was the result of a unique confluence of circumstances not likely to soon recur: the White House and both Houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing administration; longstanding opposition to the rule in Congress and by a broad coalition of business interests; and encouragement of repeal by the President. On the other hand, several rules have been affected by the presence of the review mechanism, suggesting that the review scheme has had some influence.

Among potential impediments to the law's use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands, as was the case between April 1996 and January 2001. Moreover, a number of critical interpretive issues remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. Some might argue that these potential impediments and uncertainties have contributed to the fact that of a total of 33 joint resolutions of disapproval that have been introduced to date since April 1996, only one has succeeded in passing and that one may have been sui generis because of the unique circumstances accompanying its passage. During that period 36,052 major and non-major rules have been reported and become effective.

This report will provide a brief explanation of how the review scheme was expected to operate and describe how it has in fact been utilized. The possible reasons for the limited use of the review scheme thus far are assessed and congressional remedial proposals and other options are discussed.

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Introduction

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Among potential impediments to the law's full use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands, as was the case between April 1996 and January 2001. Moreover, a number of critical interpretive issues remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. Some might argue that these potential impediments and uncertainties have contributed to the fact that of a total of 33 joint resolutions of disapproval that have been introduced to date since April 1996, only one has succeeded in passing and that one may have been sui generis for the reasons described above. During that period over 36,052 major and non-major rules have been reported and become effective.

This report will provide a brief explanation of how the review scheme was expected to operate and describe how it has in fact been utilized. The possible reasons for the limited use of the formal review mechanism thus far are assessed and congressional remedial proposals and other options are discussed.

Review of Agency Rules

The congressional review mechanism, codified at 5 U.S.C. 801-808, and popularly known as the Congressional Review Act (CRA), requires that all agencies promulgating a covered rule must submit a report to each House of Congress and to the Comptroller General (CG) that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted. Section 801(a)(1)(A). Each House must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee. Section 801(a)(1)(C). In addition, the promulgating agency must submit to the CG (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made "available" to each House. Section 801(a)(1)(B).

Section 804(3) adopts the definition of "rule" found at 5 U.S.C. 551(4) which provides that the term rule "means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy."[1] The legislative history of Section 551(4) indicates that the term is to be broadly construed: "The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well."[2] The courts have recognized the breadth of the term, indicating that it encompasses "virtually every statement an agency may make,"[3] including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus a broad range of agency action is potentially subject to congressional review.

The Comptroller General and the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a "major rule," defined as a rule that will likely have an annual effect on the economy of $100 million or more, increase costs or prices for

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[1] Section 804(3) excludes from the definition "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties."

[2] Attorney General's Manual on the Administrative Procedure Act 13 (1948).

[3] *Avoyelles Sportmsmen's League, Inc., v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to the Administrator of OIRA. Section 804(2). If a rule is deemed major by the OIRA Administrator, the CG must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801(a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the CG's report "shall include an assessment of the agency's compliance with the procedural steps required by Section 801(a)(1)(B)."[4] Section 801(a)(2)(A). The CG has interpreted his duty under this provision narrowly as requiring that he simply determine whether the prescribed action has been taken, *i.e.*, whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, not to examine the substance of the actions.

The designation of a rule as major also affects its effective date. A major rule may become effective on the latest of the following scenarios: (1) 60 calendar days after Congress receives the report submitted pursuant to Section 801(a)(1)[5] or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one House votes and fails to override the veto, or 30 calendar days after Congress receives the veto message; or (3) the date the rule would otherwise have taken effect (unless a joint resolution is enacted). Section 801(a)(3).

Thus the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by Section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under Section 808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds "good cause that notice and public procedure thereon are

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[4] See, *e.g., Chem Service, Inc. v. EPA,* 12 F.3d 1256 (3d Cir. 1993)(memorandum of understanding); *Caudill v. Blue Cross and Blue Shield of North Carolina,* 999 F.2d 74 (4th Cir. 1993)(interpretative rules); *National Treasury Employees Union v. Reagan,* 685 F.Supp 1346 (E.D. La 1988)(federal personnel manual letter issued by OPM); *New York City Employment Retirement Board v. SEC,* 45 F.3d 7 (2d Cir. 1995)(affirming lower court's ruling that SEC "no action" letter was a rule within section 551(4)).

[5] The General Counsel of GAO has ruled that the 60-day period does not begin to run until *both* Houses of Congress receive the required report. See B-289880, April 5, 2002, opinion letter to Hon. Edward M. Kennedy, Chairman, Senate Committee on Health, Education, Labor and Pensions from Anthony H. Gamboa, General Counsel. The situation involved a Department of Health and Human Service's (HHS) major rule published in the Federal Register on January 18, 2002 with an announced effective date of March 29, 2002. The House of Representatives, however, did not receive the rule until February 14, 2002. HHS thereafter delayed the effective date of the rule until April 15, 2002, in an attempt to comply with the CRA. But the Senate did not receive the rule until March 15, 2002. The General Counsel determined that the rule could not become effective until May 14, 2002, 60 days following the Senate's receipt.

impracticable, unnecessary, or contrary to the public interest."[6] Second, the President may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement. Section 801(c). Finally, a third route is available under Section 801(a)(5) which provides that "the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under Section 802."[7]

All other rules take effect "as otherwise allowed by law" after having been submitted to Congress under Section 801(a)(1). Section 801(a)(4). Under the Administrative Procedure Act, a final rule may go into effect 30 days after it is published in the Federal Register in final form. 5 U.S.C. 553(d). An agency, in its discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

All covered rules are subject to disapproval even if they have gone into effect. Congress has preserved for itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1). Such held over rules are treated as if they were published on the 15th session day of the Senate and the 15th legislative day of the House in the succeeding session and as though a report under Section 801(a)(1) was submitted on that date. Section 801(d)(2)(A), (e)(2). But a held over rule takes effect as otherwise provided. 801(d)(3). The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session.

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time. Section 801(f). If a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take

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[6] Reviewing courts have generally applied the Administrative Procedure Act's good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. See, *e.g.*, *Action* on *Smoking and Health v. CAS*, 713 F.2d 795, 800 (D.C. Cir. 1987). However, since Section 805 precludes judicial review for any "determination, finding, action or omission under this chapter", there could be no court condemnation of a good cause determination. But the rule would still be subject to congressional vacation and retroactive nullification.

[7] In *Leisegang v. Sect'y of Veterans Affairs*, 312 F.3d 1368, 1373-1376 (Fed. Cir. 2002), the appeals court held that Section 801(a)(3) "does not change the date on which [a major rule] becomes effective. It only affects the date when the rule becomes operative. In other words, the CRA merely provides a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation." At issue in the case was the date from which certain veterans benefits would be calculated. The benefit statute provided that it would be the date of the issuance of the rule. The government argued that the CRA was a superceding statute and that the effective date was when the CRA allowed it to be operative. The appeals court agreed with the veterans that the date of issuance, as prescribed by the law was determinative.

effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. Section 803. A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, before any reissued or new rule that is "substantially the same" as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule. Section 801(b)(2).

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval.[8] A joint resolution of disapproval must be introduced within 60 calendar days (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress) after the agency reports the rule to the Congress in compliance with Section 901(a)(1). Timely introduction of a disapproval resolution allows each House 60 session or legislative days to pass it and thereby get the benefit of expedited consideration procedures, retroactive nullification of an effective rule, and the limitation on an agency from promulgating a "substantially similar" rule without subsequent congressional authorization to do so by law.

The law provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 Members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to debate, amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of. Section 802(d)(1). Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other business are not in order. Section 802(d)(2). At the conclusion of debate an up or down vote on the joint resolution is to be taken. Section 802(d)(3).[9]

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[8] For an in-depth discussion of procedural issues that may arise during House and Senate consideration of disapproval resolutions, see Richard S. Beth, CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, October10, 2001 (CRA Procedure).

[9] There is some question whether a motion to proceed is nondebatable because of the absence of language so stating. Arguably, the nondebatability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall efficacy of the CRA's statutory scheme and thus may be implied. Alternatively, debate on such a motion may be limited by Section 803(d)(2) which limits debate on joint resolutions, as well as "all debatable motions," to 10 hours. Ultimately, a resolution of this question by the Senate Parliamentarian, or the Senate itself, may be necessary. However, at the commencement of the debate on S.J.Res. 6, the ergonomics rule, the presiding officer declared that "The motion to proceed is not debatable. The question is on agreeing to the motion." The motion was agreed to. 147 Cong. Rec. S 1831 (daily ed. March 6, 2001). At least one other precedent exists in which it was ruled that a motion to proceed to a budget resolution under the Budget Act was nondebatable despite the silence of the Act on the matter. *See,* 127 Cong. Rec. S 4871 (May 12, 1981).

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one House passes a joint resolution before the other House acts, the measure of the other House is not referred to a committee. The procedure of the House receiving a joint resolution "shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House." Section 802(f)(1)(2).

Section 805 precludes judicial review of any "determination, finding, action or omission under this chapter." This would insulate from court review, for example, a determination by the OIRA Administrator that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency determination that "good cause" requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General's assessment of an agency's report. The legislative history of this provision indicates that this preclusion of judicial review would not apply to a court challenge to a failure of an agency to report a rule. This appears not to be a judicially settled matter.[10]

Finally, the law provides a rule of construction providing that a reviewing court shall not draw any inference from a congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute. Section 801(g).

Utilization of the Review Mechanism Since 1996

As of October 1, 2004, the Comptroller General had submitted reports pursuant to section 801(a)(2)(A) to Congress on 562 major rules.[11] In addition, GAO had cataloged the submission of 35,490 non-major rules as required by Section 801 (a) (1) (A). To date, 33 joint resolutions of disapproval have been introduced relating to 26 rules. One rule, OSHA's ergonomics standard in March 2001, has been disapproved, an action that may prove to be unique to the circumstances of its passage. A second rule, the Federal Communication Commission's rule relating to broadcast media ownership was disapproved by the Senate but was not acted upon by the House. The following chart details the subjects and actions taken on the introduced resolution.

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[10] See discusion *infra* at pp 26-32.

[11] General Accounting Office, Reports on Federal Agency Major Rules, which may be found at [http://www.gao.gov/decisions/majrule/majrule.htm].

Resolutions of Disapproval Under the Congressional Review Act (April 1996 - October 2004)

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
104th Congress					
9/17/1996	S.J.Res. 60	Sen. Trent Lott	HCFA/ HHS	Hospital reimbursement under Medicare	Failed in passage in Senate by UC
105th Congress					
3/4/1997	H.J.Res. 59	Rep. Don Young (+5)	USFWS/ DOI	Polar bear trophies from Canada	Hearing (House Committee on Resources)
3/20/1997	H.J.Res. 67 *(Same as S.J.Res. 25)*	Rep. Roger Wicker (+54)	OSHA/ DOL	Occupational exposure to methylene chloride	Referred to Subcommittee of House Committee on Education and the Workforce
4/10/97	S.J.Res. 25 *(Same as H.J.Res. 67)*	Sen. Thad Cochran (+5)	OSHA/ DOL	Occupational exposure to methylene chloride	Referred to Senate Committee on Labor and Human Resources
6/18/1997	H.J.Res. 81	Rep. Joe Scarborough	FCC	Revision of cable television leased commercial access rules	Referred to Subcommittee of House Committee on Commerce
6/10/98	S.J.Res. 50 *(Same as H.J.Res. 123)*	Sen. Christopher Bond	HCFA/ HHS	Surety bond requirements for home health agencies under Medicare and Medicaid programs	Referred to Senate Committee on Finance
6/17/1998	H.J. Res 123 *(Same as S.J.Res. 50)*	Rep. Jim Nussle (+65)	HCFA/ HHS	Surety bond requirements for home health agencies under Medicare and Medicaid programs	Referred to Subcommittees of House Committees on Ways and Means and Commerce

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
106th Congress					
5/20/1999	H.J.Res. 55	Rep. Ron Paul (+68)	USPS	Delivery of mail to a commercial mail receiving agency	Referred to Subcommittee of House Committee on Government Reform
7/13/2000	H.J.Res. 104	Rep. Ron Paul	EPA	National pollutant discharge elimination system program and federal antidegradation policy and the water quality planning and management regulations concerning total maximum daily load	Referred to Subcommittee of House Committee on Transportation and Infrastructure
7/17/2000	S.J.Res. 50 *(Same as H.J.Res. 106)*	Sen. Michael Crapo (+18)	EPA	Water pollution under the total maximum daily load program	Referred to Senate Committee on Environment and Public Works
7/18/2000	H.J.Res. 105	Rep. Marion Berry (+23)	EPA	Total maximum daily loads under the Federal Water Pollution Control Act	Referred to Subcommittee of House Committee on Transportation and Infrastructure
7/18/2000	H.J.Res. 106 *(Same as S.J.Res. 50)*	Rep. Jay Dickey	EPA	Water pollution under the total maximum daily load program	Referred to Subcommittee of House Committee on Transportation and Infrastructure

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
107th Congress					
3/1/2001	S.J.Res. 6 *(same as H.J.Res. 35; H.Res. 79 provided for its considera tion in the House*)	Sen. Don Nickles (+6)	OSHA/ DOL	Ergonomics	Became Public Law 107-5 on 3/20/2001
3/7/2001	H.J.Res. 35 *(same as S.J.Res. 6)*	Rep. Ann Northrup (+32)	OSHA/ DOL	Ergonomics	Referred to Subcommittee of House Committee on Education and Workforce
3/15/2001	H.J.Res. 38	Rep. Ron Paul (+14)	HHS	Standards for privacy of individually identifiable health information	Referred to Subcommittees of House Committees on Energy and Commerce, Ways and Means, and Education and the Workforce
3/20/2001	S.J.Res. 9[1]	Sen. Barbara Boxer (+6)	USAID	Restoration of the Mexico City Policy	Referred to Committee on Foreign Relations
4/4/2001	H.J.Res. 43	Rep. Joe Knollenberg	DOE	Residential central air conditioners and heat pumps	Referred to Subcommittee of House Committee on Energy and Commerce
4/4/2001	H.J.Res. 44	Rep. Joe Knollenberg	DOE	Clothes washers	Referred to Subcommittee of House Committee on Energy and Commerce
5/22/2001	S.J.Res. 14	Sen. Barbara Boxer	EPA	Delay in the effective date of new arsenic standard	Referred to Senate Committee on Environment and Public Works

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
5/22/2001	S.J.Res. 15	Sen. Barbara Boxer	DOE	Postponement of the effective date of energy conservation standards for central air conditioners	Hearing by Senate Committee on Energy and Natural Resources (7/13/2001)
5/14/2002	H.J.Res. 92 *(Same as S.J.Res. 37)*	Rep. Eliot Engel (+56)	HHS	Modification of Medicaid upper payment limit for non-State government owned or operated hospitals	Referred to Subcommittee of House Committee on Energy and Commerce
5/14/2002	S.J.Res. 37 *(Same as H.J.Res. 92)*	Sen. Paul Wellstone (+13)	CMS/ HHS	Modification of upper payment limit for non-State government owned or operated hospitals	Referred to Senate Committee on Finance
10/8/2002	S.J.Res. 48 *(Same as H.J.Res. 119)*	Sen. John McCain (+10)	FEC	Prohibited and excessive contributions: non-federal funds or soft money	Referred to Senate Committee on Rules and Administration
10/8/2002	H.J.Res. 119 *(Same as S.J.Res. 48)*	Rep. Christopher Shays (+1)	FEC	Prohibited and excessive contributions: non-federal funds or soft money	Referred to House Committee on House Administration
108th Congress					
1/7/2003	H.J.Res. 3	Rep. William Thomas (+106)	CMS/ HHS	Revisions to payment policies under the Medicare physician fee schedule for calendar year 2003 and other items	Referred to House Committees on Energy and Commerce and Ways and Means

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
3/20/2003	H.J.Res. 41	Rep. Lane Evans	DVA	Acquisition procedures for health-care resources	Referred to House Committees on Veterans Affairs and Government Reform
5/22/2003	H.J.Res. 58	Rep. Thomas Trancredo (+7)	Treasury	Section 326(a) of USA PATRIOT ACT (acceptance of certain unverifiable forms of identification by financial institutions)	Referred to Subcommittee of House Committee on Financial Services
7/15/2003	S.J.Res. 17 *(Same as H.J.Res. 72)*	Sen. Byron Dorgan (+24)	FCC	Broadcast media ownership	Passed Senate without amendment by Yea-Nay vote (55-40); received in House, held at desk
10/16/2003	H.J.Res. 72 *(Same as S.J.Res. 17)*	Rep. Maurice Hinchey (+2)	FCC	Broadcast media ownership	Referred to Subcommittee of House Committee on Energy and Commerce
4/7/2004	S.J.Res. 31 *(Same as H.R. 4236)*	Sen. John Edwards	OCC	Bank activities and regulations	Referred to Senate Committee on Banking, Housing, and Urban Affairs
4/7/2004	S.J.Res. 32 *(Same as H.R. 4237)*	Sen. John Edwards	OCC	Bank activities and regulations	Referred to Senate Committee on Banking, Housing, and Urban Affairs
4/28/2004	H.R. 4236 *(Same as S.J.Res. 31)*	Rep. Luis Gutierrez (+35)	OCC	Bank activities and regulations	Referred to Subcommittee of House Committee on Financial Services
4/28/2004	H.R. 4237 *(Same as S.J.Res. 32)*	Rep. Luis Gutierrez (+35)	OCC	Bank activities and regulations	Referred to Subcommittee of House Committee on Financial Services

Note: Not included in this tabulation are bills designed to disapprove agency rules but that were not joint resolutions under the Congressional Review Act. For example, H.R. 3735, introduced on April 28, 1998, by Rep. Ron Paul, was

intended to disapprove a rule requiring the use of bycatch reduction devices in the shrimp fishery of the Gulf of Mexico. The bill was in response to Amendment 9 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, issued as a final rule implementing the amendment on April 14, 1998. The bill's findings section indicated that approval of the amendment was inconsistent with the requirements of the Magnuson-Stevens Fishery Conservation Act and the Administrative Procedure Act. The disapproval section indicated that the rule "shall have no force or effect."

1. On June 22, 2001, Senator Boxer also introduced S.J.Res. 17, which was intended to disapprove a memorandum issued by the President on March 29, 2001, (66 FR 17301) restoring the Mexico City Policy. However, the Congressional Review Act does not apply to actions by the President. See text at pp. 16-17.

OSHA's ergonomics standard had been controversial since the publication of its initial proposal for rulemaking in 1992 during the Bush Administration.[12] OSHA circulated a draft proposal in 1994 which was met with strong opposition from business interests and the formation of an umbrella organization, the National Coalition on Ergonomics, to oppose its adoption. In 1995 OSHA circulated a modified draft proposal, particularly with respect to coverage and regulatory requirements. At the same time, congressional opposition resulted in appropriations riders that prohibited OSHA from promulgating proposed or final ergonomics proposals during the fiscal years 1995, 1996, and 1998.[13] The riders did not prohibit OSHA from continuing its development work, however, which included responding to concerns that scientific knowledge of ergonomics was inadequate for rulemaking and that the cost of industry implementation of a broad standard would be extraordinarily costly. Congress mandated reports from the National Academy of Sciences which found a significant statistical link between workplace exposures and musculoskeletal disorders, but also noted that the exact causative factors and mechanisms are not understood. In 2000, congressional attempts to pass another appropriation rider, as well as stand alone prohibitory legislation, failed, and on November 14, 2000, OSHA issued its final standard which became effective on January 16, 2001.[14] Most employer responsibilities under the new standard, however, were not to begin until October, 2001.

As soon as the rule was issued two industry groups filed suit in the Court of Appeal for the District of Columbia Circuit challenging OSHA's authority to issue the rule, its failure to follow proper procedures, the rationality of its provisions, and the adequacy of its scientific and economics analyses. The intervening 2000 elections also altered the political situation with the election of a president and effective control of both Houses of Congress in the same political party. Opponents of the standard introduced a resolution of disapproval under the CRA, S.J.Res. 16, on March 1, 2001. A discharge petition was filed on March 5, and debate on and passage of the resolution occurred on March 6 by a vote of 56-44. That evening the House Rules Committee issued a rule for floor action the next day, and after an hour of debate H.J.Res. 35 was passed on March 7 by a vote of 223-206. The President signed the nullifying measure into law on March 20, 2002.[15] In late March 2000

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[12] The history of the turbulent development of the ergonomics standard is recounted in CRS Report 97-724, *Ergonomics in the Workplace: Is It Time for an OSHA Standard?*

[13] In a close floor vote, the rider proposed for FY 1997 was deleted.

[14] 65 Fed. Reg. 68261 (2000).

[15] Pub. L. 107-5.

Senator Jeffords announced he was changing his party affiliation and in June 2000 the Democrats took control of the Senate.

In sum, the veto of the ergonomics standards may be seen as the product of an unusual, and possibly irreplicable, confluence of factors and events: control of both Houses of Congress and the presidency by the same party, the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards, and the willingness and encouragement of a president seeking to undo a contentious, end-of-term rule from a previous administration.

In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of members, which in some instances was successful. For example, H.J.Res. 67 (1997) was aimed at disapproving an Occupational Health and Safety Administration (OSHA) rule setting exposure limits on methylene chloride, a paint stripper used in the furniture and airplane industries. Its sponsor, Rep. Roger Wicker, contended that the rule would harm small businesses without increasing protections for workers. The disapproval resolution never received a floor vote. But the Congressman succeeded in effecting a compromise through the inclusion of provisions in the FY 1998 Labor, HHS and Education appropriations measure[16] which required OSHA to provide on-site assistance for companies to comply with the new rules without fear of penalty. Mr. Wicker is reported to have stated that he used the disapproval resolution as a vehicle to gather support from influential members, including the chairs of the House Appropriations and Commerce Committees.[17]

The disapproval resolution mechanism was effectively utilized to accomplish the suspension of a highly controversial rulemaking by the then-Health Care Financing Administration (HCFA). In January 1998, HCFA issued a rule requiring that home health agencies (HHAs) participating in the Medicare program must obtain a surety bond that is the greater of $50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program. In addition, a new HHA entering the Medicare or Medicaid program after January 1, 1998, had to meet a capitalization requirement by showing it actually had available sufficient capital to start and operate the HHA for the first three months. The rule was issued without the usual public participation through notice and comment and was made immediately effective. Substantial opposition to the rule quickly surfaced from both surety and HHA industry representatives. HCFA attempted to remedy the complaints by twice amending the rule, in March and in June, but was unsuccessful in quelling the industry-wide concerns. On June 10, Senator Bond, for himself and 13 other co-sponsors, introduced S.J.Res. 50 to disapprove the June 1 HCFA rule. Within a short period, the disapproval resolution had garnered 52 sponsors. On June 17, a companion bill, H.J.Res. 123, was introduced in the House. Thereafter, members of the staffs of Senators Bond, Baucus, and Grassley (all members of the Senate Finance Committee with jurisdiction over the agency) met with HCFA officials and

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[16] Pub.L. 105-78.

[17] See Allan Freedman, "GOP's Secret Weapon Against Regulations: Finesse," CQ Weekly, September 5, 1998, at 2318-19 (Freedman).

concluded an agreement that (1) the agency would suspend its June 1, 1998 rule indefinitely; (2) a General Accounting Office report would be requested by the committee that would study the issues surrounding the surety bond requirement; (3) on completion and issuance of the GAO report, HCFA would work in consultation with the Congress about the surety bond requirement; and (4) any new rule would not be effective earlier than February 15, 1999, and would be preceded by at least 60 days prior notice. The agreement was memorialized in a June 26 letter to HCFA signed by Senators Bond, Baucus and Grassley.[18] The GAO report was issued on January 29, 1999, but the rule suspension was never lifted. No floor vote on the disapproval resolutions occurred in either House.

Another illustration of the manner in which the review mechanism has been utilized is shown by S.J.Res. 60 (1996), concerning another HCFA rule, this one dealing with the agency's annual revision of the rates for reimbursement of Medicare providers (doctors and hospitals), which normally would have been effective on October 1, 1996. HCFA, however, submitted the rule to Congress on August 30, 1996, and since it was a major rule, it could not go into effect for 60 days, or until October 29, which meant there would be a significant loss of revenues because the differential rate increases could not be imposed for most of the month of October. Section 801(a)(5), however, provides that if a joint resolution of disapproval is rejected by one House, "the effective date of a rule shall not be delayed by operation of this chapter..." On the morning of September 17, 1996, Senator Lott introduced S.J.Res. 60 and that afternoon, by unanimous consent, the resolution "was deemed not passed."[19] The HCFA rule went into effect on October 1 as scheduled.

A final interesting utilization of the CRA process that had an impact and resulted in an unusual outcome, involved President George W. Bush's restoration, on February 15, 2001, of President Reagan's so-called Mexico City Policy, which limited the use of federal and non-federal monies by non-governmental organizations (NGOs) to directly fund foreign population planning programs which support abortion or abortion-related activities. President Clinton had rescinded the 1984 Reagan policy when he took office in January 1993.[20] A president's authority to determine the terms and conditions on which such NGOs may engage in foreign population planning programs derives from the Foreign Assistance Act of 1961.[21] The provision vests the authority to make these determinations exclusively in the Chief Executive. President Reagan delegated his authority to make the determinations to the Administrator of the U.S. Agency for International Development (AID), who issued regulations that specified the conditions upon which grants would be given to NGOs. Thus, when the Mexico City Policy was rescinded in 1993, it was the AID Administrator that did it, at the direction of President Clinton. When President Bush restored it in 2001, he did it in a directive to the AID

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[18] Freedman, *supra* note 16, at 2319-20.

[19] *See* 142 Cong. Rec. S 10723 (daily ed. Sept. 17, 1996).

[20] 29 Weekly Comp. Pres. Doc. 88 (1993).

[21] 22 U.S.C. 2151b(b) and b(f)(1) (2000).

Administrator[22] who simply revived the old conditions by internal agency administrative action.

A number of Senate opponents of the policy filed a disapproval resolution on March 20, 2001, S.J.Res. 9, to nullify the Administrator's action, reasoning that it was a covered rule under the CRA since the implementing action was taken by an executive agency official and not by the President himself, and thus was reviewable by Congress.[23] The President responded by rescinding his earlier directive to the AID Administrator and thereafter issuing an executive directive under his statutory authority personally implementing the necessary conditions and limitations for NGO grants.[24] The presidential action mooted the disapproval resolution, and rendered a subsequent attempt to veto by S.J.Res. 17 ineffective because the CRA does not reach such actions by the President.

Discussion

In the eight years since its passage, the CRA process has been used sparingly. Several salient issues have emerged in that period, including the scope of the law's coverage; the judicial enforceability of its key requirements, whether a disapproval resolution may be directed at part of a rule, and the effect of a rule nullification on future agency rulemaking in the same area, have introduced uncertainties and impediments to confident use of the process.

1. Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review.

The lack of a screening mechanism that will alert committees to rules that may raise important or sensitive substantive issues arguably prevents busy committees from prioritizing such issues. As indicated above, the Comptroller General's reports on major rules serve as check lists as to whether legally required agency tasks have been done and not as substantive assessments of whether they were done properly or whether the rules accord with congressional intent. Indeed, lack of knowledge of the *existence* of such sensitive rules by jurisdictional committees or interested Members is rarely the case. What appears to be absent is in-depth scrutiny and analysis of individual rules by an authoritative and presumably neutral source that may provide the basis for triggering meaningful congressional review.

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[22] 37 Weekly Comp. Pres. Doc. 216 (2001).

[23] Compare *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton v. Specter*, 511 U.S. 462, 469 (1994), holding that the President is not subject to APA procedures since he is not expressly covered by its definition of agency, with *Chamber of Commerce v. Reich*, 74 F.3d 1311 (D.C. Cir. 1998) and *National Family Planning Council v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992), allowing challenges to agency rules that were issued pursuant to presidential directive.

[24] See, Restoration of the Mexico City Policy: Memorandum for the Administrator of the U.S. Agency for International Development, March 28, 2001, 66 Fed. Reg. 17303-17313 (March 29, 2001).

The need for an independent substantive screening body was signaled by the introduction by Rep. Sue Kelly of H.R. 1704 in the 105th Congress, a bill that would have established a Congressional Office of Regulatory Analysis.[25] The bill was referred to the House Judiciary and Governmental Reform and Oversight Committees both of which favorably reported differing versions of the legislation.[26] Both versions would have established an independent Congressional Office of Regulatory Analysis (CORA) to be headed by a director appointed by the House Speaker and the Senate Majority Leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the Comptroller General under the CRA and the Congressional Budget Office under the Unfunded Mandates Act of 1995 would be transferred to the proposed CORA. The Judiciary Committee's version, in addition to having the Office make "an assessment of an agency's compliance with the procedural steps for 'major rules'" required by CRA, directs the proposed CORA to "conduct its own regulatory impact of these 'major rules.'"[27] The bill as reported by the Government Reform Committee would have allowed the CORA director to use "any data and analyses generated by the Federal agency and any data of the Office" in analyzing the submitted rule. Both bills provided that a similar analysis of non-major rules was to be conducted when requested to do so by a House or Senate Committee or by individual members of either House. First priority for the conduct of such analyses was given to all major rules. Secondary priority was assigned to committee requests. Tertiary priority was given individual member requests. Finally, under the Judiciary Committee version, the report was to be furnished within 45 days after Congress receives notification of the rule; the Governmental Reform bill would have allowed 30 days. H.R. 1704 received no floor action during the 105th Congress.

Some argue that an independent office of regulatory analysis would serve the congressional need for objective information necessary to evaluate agency regulations. It might also provide credibility and impetus to utilize the review mechanism. Further, by providing intensive review of certain non-major rules, the possibility of OIRA "hiding" significant rules by not designating them as "major" is forestalled. Objections may be heard that creation of a new congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done as well as extraordinarily expensive. The requirement of the Judiciary Committee's version that a CORA do its own cost-benefit analysis from scratch could be pointed to as an unknown cost factor, as well as a task that may not be possible to perform adequately within the allotted 45 days.

Congress agreed upon a limited test of the CORA concept, late in the 106th Congress, with the passage of the Truth in Regulating Act of 2000.[28] That legislation established a three year pilot project for the General Accounting Office to report to Congress on economically significant rules. Under this pilot program, whenever an

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[25] A companion bill, S. 1675, was introduced in the Senate by Senators Shelby and Bond. 143 Cong. Rec. S1007 (daily ed. Feb. 25, 1998).

[26] See H.Rept. 105-441, Parts 1 and 2 (105th Cong., 2d Sess.) (1998).

[27] Section 4 (a)(3)(A).

[28] Pub.L. 106-312, 114 Stat. 1248-50, 5 U.S.C. 801 note.

agency published an economically significant proposed or final rule a chairman or ranking minority member of a committee of jurisdiction of either House of Congress may request the Comptroller General (CG) to review the rule. The CG was to report on each rule within 180 calendar days. The report had to contain an "independent evaluation" by the CG of the agency's cost-benefit analysis. We are aware of only one request ever made pursuant to the provision. That was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate with respect to the Department of Agriculture's forest planning and roadless area rule. GAO advised the requesters that although Act authorized $5.2 million per year for the program, no monies had been appropriated and it could not proceed with the request. No further action was taken on the request and Congress never enacted an appropriation, thereby forestalling implementation of the project. It may be noted that the 180-day reporting period did not mesh exactly with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of *proposed* rules might coincide with such reviews. In any event, the pilot program established by the Act expired in January 2004.

In an apparent attempt to avoid the criticisms of the CORA model and to remedy some of the perceived impediments to the effectiveness of the CRA, Rep. Ginny Brown-Waite introduced H.R. 3356, the Joint Administrative Procedures Committee Act of 2003, in the 108th Congress which would amend the CRA by establishing a joint congressional committee with broad authority to investigate, evaluate and recommend actions with respect to the development of proposed rules, the amendment or repeal of existing rules, and disapproval of final rules submitted for review under the CRA.[29] The proposed Joint Administrative Procedures Committee (JAPC) would be composed of 12 members from each House with no more than 7 from one political party, selected by the Senate Majority Leader and the Speaker of the House. The JAPC would receive all agency submissions of covered rules and provide copies to all jurisdictional committees. The JACP has sixty days to consider the rule. The agency could be required to submit such reports as is required by the joint committee such as a cost-benefit analysis or risk assessment. If no action is taken by JACP, the rule may go into effect. If a majority determines that rule is inconsistent with congressional intent in the area, JACP may recommend a disapproval resolution to the House and Senate jurisdictional committees. In its report to the jurisdictional committees JACP is to pinpoint the objectionable provisions of the rule. On the third legislative day after a joint resolution is recommended by JACP, it is in order for any member of the House to move to proceed to consideration of the disapproval resolution. It is a privileged, non-debatable motion and once agreed to must be considered before any other business under expedited procedures. Only one hour of debate would be allowed. Section 801(b)(2) of the CRA is amended to provide that an agency may promulgate a new rule without new statutory authorization if it carries out the recommendation set forth in the report submitted by the JACP to the jurisdictional committees. The bill was referred to the House Committees on Rules and Judiciary. The Judiciary Committee referred it to its Subcommittee on Commercial and Administrative Law. No action has been taken by either Committee.

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[29] See introductory remarks on the measure at 147 Cong. Rec. H 2454 (daily ed. Oct. 21, 2003).

2. Lack of an Expedited House Procedure.

The current absence of an expedited consideration procedure in the House of Representatives may well be a factor discouraging use of the process in that body since, as a practical matter, it will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of Members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of the leadership, perhaps only the most well situated in the body will be able to gain access within the limited period of review.[30] Also, a perception that no action will be taken in the House might deter Senate action.

3. The Deterrent Effect of the Ultimate Need for a Supermajority to Veto a Rule.

A consideration behind any serious effort to use the full CRA review mechanism likely has been the realization that any joint resolution disapproving a rule that does not have the support of the administration would be vetoed and require a two-thirds vote in each House to override. The deterrent potential of the need for a supermajority in each House to overcome a presidential veto is significant, unless the object of the exercise is simply to provide the impetus for informal accommodations, such as occurred in the HCFA surety bond matter, or to influence Members to support remedial legislation. But the ready realization by agencies over time that passage of a disapproval resolution is highly unlikely could substantially reduce the efficacy of such a threat. Additionally, a possible consequence of such an assumption is that agencies will not factor in congressional disapproval as part of the rule development process.[31] The validity of this assumption may be seen to have been borne out in the aftermath of the ergonomics standard veto. Since that action, 19 resolutions of disapproval with respect to 14 rules have been introduced, only one of which has been acted upon (by one House),[32] an apparent return to the prior practice of using the mechanism to facilitate bargaining.

Thus, even with the successful disapproval of the ergonomics standard, the supermajority hurdle still remains. One possible solution is to establish a multi-tiered disapproval mechanism. That is, instead of all rules, major or non-major, being treated equally in that they can only be overturned by a joint resolution of

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[30] The experience with respect to the repeal of the ergonomics standard, discussed *supra* at 6-7, would appear to bear this out.

[31] See, Mark Seidenfeld, The Psychology of Accountability and Political Review of Agency Rules, 51 Duke L.J. 1059, 1089 (2001) ("The paucity of motions for disapproval resolutions indicates that agencies are not apt to focus on fast-track review as a check on their rulemaking discretion at least until late in the rulemaking process. Agencies might be likely to focus on such review when they adopt rules that they know will be unpopular in Congress, but even then they need not fear the ramifications of fast-track review unless they also believe that the president opposes the rule or is willing to compromise it to win other political battles. Fast-track review may have greater significance for midnight rules that are subject to review when a different president is in office.")(Seidenfeld).

[32] S.J.Res. 17, dealing with the FCC's media ownership rule, which passed in the Senate but was not acted upon in the House.

disapproval, a process in which the entire burden of action is on the Congress, some rules might be designated for more selective, special review. For example, major or significant rules might be subject to a joint resolution of *approval*. Under such a scheme a major or significant rule would not become effective unless a joint resolution approving it passed both Houses within a specified period of time.[33] To make such a scheme effective someone or some body, other than the OIRA Administrator or a congressional agency, such as the proposed CORA, might be vested with the authority to designate which rules are "major" or "significant" and thereby subject to the affirmative approval requirement. A benefit from the congressional standpoint is that the burden for supporting and justifying such rules falls on the promulgating agencies. All other rules would be subject to disapproval resolutions. Another option would be to subject all covered rules to congressional approval and establish an expedited procedure whereby non-controversial rules may be sped through leaving only a few for close consideration.[34]

4. The Reluctance to Disapprove an Omnibus Rule Where Only One Part of the Rule Raises Objection.

Section 808 of the review provision sets forth the mandatory text of any joint resolution of disapproval: "That Congress disapproves the rule submitted by the _____ relating _____, and such rule shall have no force or effect. (The blank spaces being appropriately filled in)." The quoted text refers to "the rule" and "such rule," indicating a rule in its entirety. The experience of 33 joint resolutions of disapproval thus far introduced is that the first blank is filled with the name of the promulgating agency and the second with a generic title or description of the rule.[35] Similarly, the text of the review provision refers to "such rule," "a rule," or "the rule," with no language a expressly referring to a part of any rule under review. The procedure leading to a vote on the proposed disapproval resolution allows for no amendments, and the final vote is up or down on the joint resolution as introduced.

The legislative history of the provision is similarly uniform in using language that would ordinarily indicate a reference to a submitted rule in its entirety, except in one instance. During a discussion of the Section 802 procedure that would obtain when one House completes its action on a joint resolution and sends to it to the other

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[33] See *e.g.*, Reorganization Act Amendments of 1984, providing that both Houses of Congress had to pass a joint resolution approving a reorganization plan within 90 days of continuous session after the date of presidential submission or else it is deemed disapproved. 5 U.S.C. 906 (a) (1994).

[34] Two bills introduced in the 106th Congress to revise the CRA utilized the joint resolution of approval approach. See S. 1348, 106th Cong., 1st Sess. (1999)(Sen. Brownback) S. 2670, 106th Cong., 2nd Sess. (2000)(Sen. Thomas). A similar approach is reflected in H.R. 110 introduced by Rep. Hayworth (with 25 co-sponsors) in the 108th Congress. All agency rules must be reported to Congress and may become effective only on passage, by means of a fast-track procedure applicable to both Houses, of an approval law, which is not subject to judicial review.

[35] S.J.Res. 50 and H.J.Res. 123, "relating to surety bond requirements for home health agencies under the medicare and medicaid programs...."

House before the second House has yet to complete any action, the following comment is made:

> . . .Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). *If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.*[36] (Emphasis supplied).

The last two sentences seem to raise some uncertainty. The next to last sentence would appear to contemplate the possibility of a conference to resolve differences in resolutions. The last sentence minimizes what those differences could be. Some have suggested that the explanation contemplates that parts of rules may be the subject of disapproval resolutions, arguing that the framers of the provision would have known that many rules are complex and contain a variety of provisions, only one or a few of which may be objectionable, and would not have required a whole rulemaking to be brought down simply because of one offending portion out of many. It might also be argued that in light of the Section 801(b)(2) prohibition against agency issuance of a rule "in substantially the same form" after passage of a disapproval resolution unless Congress by subsequent law authorizes it, not allowing rejection of part of a rule would have a draconian result.

In fact, an up or down vote on the entire rule would appear to have been the intent of the framers of the review provision. The language and structure of the provision, and the supporting explanation of the legislative history, contemplates a speedy, definitive and limited process. It is not unlike the legislative processes created for congressional actions dealing with military base closings,[37] international trade agreements,[38] and presidential reorganization plans,[39] among others. Each dealt with complex, politically sensitive decisions which allowed only an up or down vote by the Congress on the entire package presented. It was understood that piecemeal

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[36] Joint Explanatory Statement of House and Senate Sponsors, 143 Cong. Rec. E 571, at E 577 (daily ed. April 19, 1996); 143 Cong. Rec. S 3683, at S 3686 (daily ed. April 18, 1996)(Legislative History)(emphasis added).

[37] Defense Base Closure and Realignment Act of 1990, P.L. 101-510, sec. 2908 (b) 104 Stat. 1808, in note following 10 U.S.C. 2687 (2000).

[38] See, 19 U.S.C. 2191-2193 (2000).

[39] See, *e.g.*, Reorganization Act of 1984, 5 U.S.C. 909-912 (2000).

consideration would delay and perhaps obstruct legislative resolution of the issues before it. For similar reasons, the statutory structure and legislative history of the review provision strongly indicate that Congress intended the process to focus on submitted rules as a whole and not to allow veto of individual parts. Perhaps a proper reading of the quoted portion of the legislative history is that it was contemplating the possibility that the blank to be filled in after "relating to" might have different generic descriptions of the rule subject to disapproval. A broader reading of these sentences would not otherwise appear warranted by either the legislative language itself or the rest of the explanatory legislative history.

As a practical matter, if this reading is correct it may be a factor in the limited use of the mechanism. As indicated, nullifying a rule means disabling an agency from regulating in the area covered by the rule unless Congress passes further authorization legislation, a significant consequence of any disapproval action. On the other hand, expressly authorizing nullification of portions of a rule might allow competing disapproval resolutions within each House and the certainty of a long, drawn out conference with the possibility of no agreement.

5. The Uncertainty of Which Rules Are Covered By the CRA.

The framers of the congressional review provision intentionally adopted the broadest possible definition of the term "rule" when they incorporated Section 551(4) of the APA. As indicated previously,[40] the legislative history of Section 551(4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents – such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like – which as a legal or practical matter an agency wishes to make binding on the affected public.

The legislative history of the CRA emphasizes that by adoption of the Section 551 (4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variation of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: "The committee's intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties."[41] The framers of the legislation indicated their awareness of the now widespread practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the

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[40] See footnotes 1-4, *supra*, and accompanying text.

[41] Legislative History, *supra* n. 37, at E 579, S 3687.

public, either legally or practically,[42] and noted that it was the intent of the legislation to subject just such documents to congressional scrutiny:

> . . . The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.[43]

It is likely that virtually all the 35,490 non-major rules thus far reported to the Comptroller General have been either notice and comment rules or agency documents required to be published in the Federal Register. This would mean that perhaps thousands of covered rules have not been submitted for review.[44] Pinning down a concrete number is difficult since such covered documents are rarely if ever published in the Federal Register and thus will come to the attention of committees or Members only serendipitously.

Eight such agency actions have come to the attention of committee chairmen and Members and were referred to the Comptroller General for determinations whether they were covered rules. In five of the eight cases the CG determined the action documents to be covered rules. See letter to Honorable Lane Evans, Ranking Minority Member, House Committee on Veterans' Affairs, B-292045 (May 19, 2003) (Department of Veterans Affairs memorandum terminating the Department's Vendee Loan Program is not a rule that must be submitted to Congress because it is exempt under Section 804(3)(B) and (C) as a rule relating to "agency management" or "agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."); letter to Honorable Ted Strickland, B-291906 (February 28, 2003) (Department of Veterans Affairs memorandum instructing all directors of health care networks to cease any marketing activities to enroll new veterans in such networks is excluded from CRA coverage by Section 804(3)(C) which excludes "any agency rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."); letter to Honorable Doug Ose, Chairman, House Subcommittee on Energy

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[42] This practice has been long recognized and criticized in administrative law commentaries. See, *e.g.*, Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like– Should Federal Agencies Use Them To Bind The Public?, 41 Duke L.J. 1311 (1992). Cf. also, General Accounting Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules, GAO/GGD-98-126 (August 1998).

[43] Legislative History, *supra* n. 37, at E 578, S 3687.

[44] An indication of the vast number of unreported covered rules came as a result of an investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (Government Reform) which revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, and the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. See "Non-Binding Legal Effect of Agency Guidance Documents," [http://www.congress.gov/cgi-lis/cpquery/T?&report=hr1009&dbname=cp106&] H.Rept. 106-1009, 106th Cong., 2nd Sess. (2000).

Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, B-287557 (May 14, 2001)(Department of Interior's Fish and Wildlife Service's Trinity River "Record of Decision" is a rule covered by the CRA because it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy and is an "agency action[] that substantially affect[s] the rights and obligations of outside parties."); letter to the Hon. James A. Leach, Chairman, House Banking Committee, B-286338 (October 17, 2000)(Farm Credit Administration's national charter initiative held to be a rule under the CRA); letter to Honorable David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, B-281575 (January 20, 1999) (EPA "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" held to be covered because it created new, mandatory steps in the procedure for handling disparate impact assessments which gave recipients new rights they did not previously possess for obtaining complaint dismissals, a substantive alteration of the previous regulation.); letter to Senator Conrad Burns, B-278224 (November 10, 1997) (the American Heritage River Initiative announced by the Council on Environmental Quality was not a covered rule because it was established by presidential executive order and direction and the President is not an "agency" under the APA and is not subject to the provisions of the APA); letter to Honorable Ted Stevens, Chairman, Senate Appropriations Committee, et al, B-275178 (July 3, 1997) (Tongass National Forest Land and Resources Management Plan held an agency statement of general applicability and future effect that implements, interprets, and prescribes law and policy); letter to Honorable Larry Craig, Chairman, Senate Committee on Energy and Resources, B-274505 (September 16, 1996) (memorandum of Secretary of Agriculture concerning the Emergency Salvage Timber Sale Program held to be a covered rule because it is of general applicability and interprets and implements the statutory program.).

The GAO opinion on the American Heritage River Initiative rests its rationale that a presidential directive to an agency that results in substantive action by that agency is not thereby covered by the CRA based on the Supreme Court's rulings in *Franklin* v. *Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton* v. *Spector*, 511 U.S. 462, 469 (1994). In light of *Chamber of Commerce* v. *Reich*, 74 F. 3d 1322 (D.C. Cir. 1996) and *National Family Planning* v. *Sullivan*, 979 F. 2d 227 (1992), which successfully challenged substantive changes in rules that were directed by a presidential directive, the GAO General Counsel's conclusions may be problematic. Also questionable is the General Counsel's analysis in its February 28, 2003 opinion concluding that a Department of Veterans Affairs (DVA) memo terminating a long-time veterans health outreach program was an exempt agency practice that had no substantial effect on the rights of non-agency parties. In contrast with its May 19, 2004, opinion dealing with a termination of a DVA vendee loan program, where it closely examined the statutory basis of the loan program and found that it was established on the basis of *discretionary* authority of the Secretary and provided no direct benefits to veterans, the General Counsel made no mention that the Congress had charged the Secretary of DVA "with the affirmative duty of seeking out eligible veterans and eligible dependants and providing them" with federal benefits and services. Rep. Strickland joined with the Vietnam Veterans of American in a suit seeking declaratory and injunctive relief to restore the program. *Vietnam Veterans*

of America v. Principi, No. 1:04 CVOO103, D.D.C., April 2, 2004. A ruling in the case is still pending.

Believing such instances to be only a small portion of unreported agency actions, GAO, at the behest of the House Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, engaged in discussions with the Office of Management (OMB) during 1998 for the creation of a uniform reporting form for use by agencies in reporting covered rules to the CG, and for the promulgation of an OMB guidance document covering such matters under the review provision as the definition of a covered rule, reporting requirements, the good cause exemption, and the consequences of failing to report a rule, among others. The failure to issue such guidance prompted insertion of the following directive in the FY 1999 appropriation for OMB: "OMB is directed to submit a report by March 31, 1999, to the Committees on Appropriations, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform and Oversight that . . . issues guidance on the requirements of 5 U.S.C. Sec. 801 (a) (1) and (3); sections 804 (3), and 808 (2), including a standard new rule reporting form for use under section 801 (a)(1)(A)-(B)."[45] OMB, in the view of the Subcommittee, has failed to substantially comply with that statutory directive.[46]

If the guidance issued in compliance with the statutory direction is not consonant with the congressional understanding of the intent, meaning and scope of the congressional review provision, it might be considered as a vehicle for oversight hearings and possible remedial legislation.

6. The Uncertainty of the Effect of An Agency's Failure to Report a Covered Rule to Congress.

Section 801(a)(1)(A) of the CRA provides that "[b]efore a rule can take effect," the Federal agency promulgating such rule shall submit to each House of Congress and the Comptroller General a report containing the text of the rule, a description of the rule, including whether it is a major rule, and its proposed effective date. Section 805 states that "no determination, finding, action or omission under this chapter shall be subject to judicial review." The Department of Justice (DOJ) has broadly hinted that the language of Section 805 "precluding judicial review is unusually sweeping" so that it would presumably prevent judicial scrutiny and sanction of an agency's failure to report a covered rule.[47] DOJ has succeeded with its preclusion argument in two federal district court rulings. More recently the rationale of those opinions has been rejected by a third district court.

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[45] P.L. 105-277, Division A, title III.

[46] See [http://www.congress.gov/cgi-lis/cpquery/T?&report=hr1009&dbname=cp106&] H.Rept. 106-1009, *supra* n. 44 at 4-5.

[47] See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at pp 9-11 (DOJ Memorandum).

In *Texas Savings and Community Bankers Assoc. v. Federal Housing Finance Board*,[48] three thrift associations and two of their trade associations sued the Federal Housing Finance Board challenging one of its policies regarding the home mortgage lending industry. The plaintiff's argued, *inter alia*, that the policy was a rule required to be reported to Congress under the CRA and the failure to report it precluded its enforcement. The government argued that Section 805 was a blanket preclusion of judicial review. In response to plaintiff's contention that Section 805 only precluded review of any "determination, finding, or omission" by Congress, the court held that "the statute provides for no judicial review of any 'any determination, finding, action or omission under this chapter,' not 'by Congress under this chapter.' The court must follow the plain English. Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts."[49] The court made no reference to the scheme of the Act or its legislative history.

The Texas district court's "plain meaning" rationale was cited with approval by an Ohio district in *United States v. American Electric Power Service Corp*.[50] That case was one of many involving an extensive litigation campaign by the Environmental Protection Agency (EPA), begun in the mid-1990's to establish the extent to which a power plant or factory may alter its facilities or operations without bringing about a "modification" of that emission source so as to trigger the Clean Air Act's New Source Performance Standards and pre-construction "new source review."[51] Among the issues common in these cases, and raised in this case, was whether EPA's determination to begin a campaign of litigation enforcement after many years of no enforcement was a substantive change that had to be reported to Congress under the CRA. It was among 123 affirmative defenses raised by defendants, nine coal-fired power plants in Ohio, Virginia, and West Virginia, which the Government moved to dismiss. Citing the *Texas Savings* case approvingly, the district court agreed "that the language of Section 805 is plain" and that "[d]eparture from the plain language is appropriate in the 'rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intention of its drafters ... or when the statutory language is ambiguous.'... In all other cases, the plain meaning of the statute controls."[52] The court did not indicate whether it had attempted to discern whether there was any evidence of congressional intent at odds with the court's plain meaning reading. It did, however, provide an alternative rationale: "Furthermore, this Court is not convinced that the instant

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[48] 1998 U.S. Dist. LEXIS 13470, 1998 WL842 181 (W. Texas), aff'd 201 F.3d 551 (5th Cir. 2000).

[49] Id. at note 15.

[50] 218 F.Supp. 3d 931 (S.D. Ohio 2002).

[51] For background on the legal development of the issue, see Robert Meltz, "Air Pollution: Legal Perspective on the 'Routine Maintenance' Exception to New Source Review," CRS Report RS21424 (February 20 ,2004).

[52] 218 F.Supp. 2d at 949.

enforcement action amounts to rulemaking which would be covered by 5 U.S.C. 801 *et. seq*., in the first instance," without elaboration.[53]

In *United States v. Southern Indian Gas and Electric Co*.,[54] the court faced the same issue in a motion for summary judgment by the power company defendant. Rejecting the *Texas Savings* and *American Electric Power* precedents, it found that Section 805 is ambiguous and susceptible to two possible meanigs: that Congress did not intend for any court review of an agency's compliance with the CRA or that Congress only intended to preclude judicial review of its own determination, findings, actions or omissions made under the CRA *after* a rule had been submitted to it for review. Adopting the first alternative, argued for by the Government and adopted by the *Texas Savings* and *American Electric Power* courts, would, according to the court, allow agencies "to evade the structures of the CRA by simply not reporting new rules and courts would be barred from reviewing their lack of compliance. This result would be at odds with the purpose of the CRA, which is to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual."[55] The court found that the post enactment legislative history "buttresses the 'limited scope' of the CRA's judicial review provision" but was careful to acknowledge that "the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome." However, the court made it clear that "this court reached its conclusion about the limited scope of the judicial review provision of the CRA based on the text of the statute and overall purpose of the Act. The legislative history only serves to further reinforce the Court's conclusion."[56]

It is certainly arguable that the *Southern Indiana* court's view of the limited preclusiveness of Section 805 is plausible and persuasive. Indeed, an even stronger case can be made from a closer analysis of the text and structure of the Act taken as a whole. Moreover, although the court was correct as a general matter that post enactment legislative history normally is given less weight, there are a number of Supreme Court rulings that recognize that under certain circumstances, arguably applicable here, contemporaneous explanations of key provisions' intent have been found to be an "authoritative guide" to a statute's construction. In one instance the Court relied on an explanation given eight years after the passage of the legislation.

The plain, overarching purpose of the review provision of the CRA was to assure that all covered final rulemaking actions of agencies would come before Congress for scrutiny and possible nullification through joint resolutions of

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[53] *Id*.

[54] 2002 U.S. Dist. LEXIS 20936; 55 ERC (BNA) 1597 (D.C. S.D. Ind. 2002).

[55] 2002 U.S. Dist. LEXIS 20936 at 13-14.

[56] *Id*. at 15-16 and note 3.

disapproval.[57] The scheme provides for the delayed effectiveness of some rules deemed innately important ("major rules"), Section 801(a)(3), and temporarily waives the submission requirement of Section 801 for rules establishing, modifying, opening, closing or conducting a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or for a rule an agency "for good cause" finds that notice and public procedure are impractical, unnecessary, or contrary to the public interest. Section 808. Rules promulgated pursuant to the Telecommunications Act of 1996 are excluded from the definition of "major rule". But all such rules must ultimately be submitted for review. And while the scheme anticipates that some (or even most) rules will go into effect before a joint resolution of disapproval is passed, the law provides that enactment of a joint resolution terminates the effectiveness of the rule and that the rule will be treated as though it had never taken effect. Sections 801(b)(1), 801(f). Further, a rule that has been nullified cannot be reissued by an agency in substantially the same form unless it is specifically authorized to do so by law after the date of the disapproval. Section 801(b)(2).

The review scheme also requires a variety of actions by persons or agencies in support of the review process, and time for such actions to be scrutinized by both Houses to implement the scheme. Thus, the Comptroller General must submit a report to Congress on each major rule submitted within 15 calendar days after its submission or publication of the rule (Section 801(a)(2)(A)); the Administrator of OIRA determines whether a rule is a "major rule" (Section 804(2)); and after a rule is reported the Senate has 60 session days, and the House 60 legislative days, to pass a disapproval resolution under expedited procedures. Section 802. But Congress has preserved for itself a period of review of at least 60 session or legislative days. Therefore, if a rule is reported within 60 session days of the Senate (or 60 legislative days of the House) prior to the date Congress adjourns a session of the Congress, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1).

Thus the statutory scheme is geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance defeats that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to "determination[s], finding[s], action[s], or omission[s] *under this chapter,*" a plain reference to the range of actions authorized or required as part of the review process. Thus Congress arguably did not intend, as is more fully described below, to subject to judicial scrutiny, its own internal procedures, the validity of Presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his

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[57] "This legislation establishes a government-wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects." Legislative History, *supra* note 37, at E 575 and S 3683.

reporting function. These are matters that Congress can remedy by itself. However, without the potential of court invalidation of enforcement actions based on the failure to submit covered rules, agencies are not likely to comply with submission requirements. If Section 805 is read so broadly, it would arguably render ineffective as well the Section 801(b)(2) prohibition against an agency promulgating a new rule that is "substantially the same" as a disapproved rule unless it "is specifically reauthorized by a law enacted after" the passage of a disapproval resolution. It is more than likely that a determination whether a new or reissued rule is "substantially the same" as a disapproved rule is one that a court will be asked to make.[58] Congress appears to have contemplated (and approved) judicial review in this and other situations when it provided in Section 801(g) that "[i]f Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any interest of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval."

The legislative history of the review provision confirms this view of the limited reach of the judicial review preclusion language. A key sponsor (Representative Hyde) of the legislation, Rep. McIntosh, explained during the floor debate on H.R. 3136 that "Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress."[59]

Shortly thereafter, the principal Senate and House sponsors of H.R. 3136 published a Joint Explanatory Statement in the Congressional Record providing a detailed explanation of the provisions of the congressional review provision of the CRA and its legislative history. Senator Nickles explained:

> Mr. NICKLES. Mr. President, I will submit for the RECORD a statement which serves to provide a detailed explanation and a legislative history for the congressional review title of H.R. 3136, the Small Business Regulatory Enforcement Fairness Act of 1996. H.R. 3136 was passed by the Senate on March 28, 1996, and was signed by the President the next day . . . Because title III of H.R. 3136 was the product of negotiation with the Senate and did not go through the committee process, no other expression of its legislative history exists other than the joint statement made by Senator REID and myself immediately before passage of H.R. 3136 on March 28. I am submitting a joint statement to be printed in the RECORD on behalf of myself, as the sponsor of the S. 219, Senator REID, the prime co-sponsor of S. 219, and Senator STEVENS, the chairman of the Committee on Governmental Affairs. This joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms. The same statement has been

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[58] The disapproval of the ergonomics rule underlines a possible need for judicial review in certain instances where enforcement is necessary and appropriate to support the statutory scheme. That rule, which was broad and encompassing in its regulatory scope, raises the question as to how far can the agency go before it reaches the point of substantial similarity in its promulgation of a substitute. This issue is addressed in the next section.

[59] 143 Cong. Rec. H3005 (daily ed. March 28, 1996).

> submitted today in the House by the chairmen of the committees of jurisdiction over the congressional review legislation.[60]

The Joint Explanatory Statement is clear as to the scope and limitation of the judicial review provision:

> Limitation on judicial review of congressional or administrative actions
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> Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter". Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings". U.S. Const. art. I, §5, cl. 2, which includes each house being the final arbiter of compliance with such Rules.
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> The limitation on a court's review of subsidiary determinations or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval", or by implication, when it has not yet done so. 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. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).[61]

The Justice Department has suggested that such post-enactment legislative history should not carry any weight, particularly in view of the unambiguous nature of the preclusion language at issue.[62] However, as discussed below, the courts appear to have taken a contrary view in analogous interpretive situations.

The Joint Explanatory Statement is a contemporaneous explanation of the congressional review provision by the legislative sponsors of the legislation which is consonant with the text and structure of the legislation. Such statements by legislative sponsors have been described by the Supreme Court as an "authoritative guide to the statute's construction." *North Haven Bd. of Education v. Bell*, 456 U.S.

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[60] Legislative History, *supra* note 37, at 143 Cong. Rec. S 3683.

[61] *Id.*, at E 577 and S 3686.

[62] See DOJ memorandum, *supra* n. 48, at 10 n.14.

512, 526-27 (1982)(citing a bill summary placed in the Congressional Record by the bill's sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983)(relying on a 1965 explanation by "an important figure in the drafting of the 1957 [Atomic Energy Act"]); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984)(remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).

Finally it may be noted that analogous preclusion of judicial review provisions in the original Paperwork Reduction Act of 1980, P.L. 96-511 and in the 1995 revision of the Act, P.L. 104-13, have been uniformly construed by the courts to allow enforcement of its public protection provision. Thus 44 U.S.C. 3504 (1994), which authorized the Director of OMB to review and approve or disapprove information collection requirements in agency rules, and to assign control numbers to such forms, provided that "there shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule." 44 U.S.C. 3504(h)(9). A similar provision appears in the 1995 revision of the Paperwork Reduction Act.[63] The 1980 legislation also contained a "public protection" provision which absolved a person from any penalty for not complying with an information collection request if the form did not display an OMB control number or failed to state that the request was not subject to the Act.[64] The public protection provision, Section 3512, has been the subject of numerous court actions, some finding it applicable and providing a complete defense to noncompliance, others finding it inapplicable. But no court has ever raised a question with respect to preclusion of judicial review.[65]

A reviewing court construing the language of the congressional review provision, the structure of the legislation, and its legislative history, including post-enactment statements, is therefore likely to hold that a court is not precluded from preventing an agency from enforcing a covered rule that was not reported to Congress in compliance with Section 801(a)(1)(A).

7. The Uncertainty of the Breadth of the Prohibition Against An Agency's Promulgation of a "Substantially Similar" Rule After the Original Rule Has Been Vetoed.

Enactment into law of a disapproval resolution has several important consequences. First, a disapproved rule is deemed not to have had any effect at any time. Thus, even a rule that has become effective for any period of time is

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[63] 44 U.S.C. 3507(d)(6)(2000).

[64] See 44 U.S.C. 3512 (1994).

[65] Compare *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1980)(failure of Forest Service to file a plan of operations with OMB control number precluded conviction for failure to file) and *Cameron v. IRS*, 593 F.Supp. 1540, *aff'd* 773 F.2d 126 (6th Cir. 1984)(failure of IRS forms to have OMB control numbers did not violate section since it was a collection of information during the investigation of a specific individual or entity which is exempt under the provision).

retroactively negated.[66] Second, a rule that does not take effect, or is not continued because of the passage of a disapproval resolution, cannot be "reissued in the same form" nor can a "new rule" that is "substantially the same" as the disapproved rule be issued unless such action is specifically authorized by a law enacted subsequent to the disapproval of the original rule.[67] The full text of this provision states:

> (2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

Finally, if a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the disapproval resolution.[68]

It can be anticipated that opponents of a disapproval resolution will argue that successful passage of a resolution may disable an agency from ever promulgating rules in the "area" covered by the resolution without future legislative reauthorization since a successful disapproval resolution must necessarily bring down the entire rule. Or, at the very least, it may be contended that any future attempt by the agency to promulgate new rules with respect to the subject matter will be subject to judicial challenge by regulated persons who may claim that either the new rules are substantially the same as those disapproved or that the statute provides no meaningful standard to discern whether a new rule is substantially the same and that the agency must await congressional guidance in the form of a statute before it can engage in further rulemaking in the area. The practical effect of these arguments, then, may be to dissuade an agency from taking any action until Congress provides clear authorization.

A review of the CRA's statutory scheme and structure, the contemporaneous congressional explanation of the legislative intent with respect to the provisions in question, the lessons learned from the experience of the March 2001 disapproval of the OSHA ergonomics rule, and the application of pertinent case law and statutory construction principles suggests that: (1) It is doubtful that Congress intended that all disapproved rules would require statutory reauthorization before further agency action could take place. For example, it appears that Congress anticipated further rulemaking, without new authorization, where the statute in question established a deadline for promulgating implementing rules in a particular area. In such instances, the CRA extends the deadline for promulgation for one year from the date of disapproval. (2) A close reading of the statute, together with its contemporaneous congressional explication, arguably provides workable standards for agencies to reform disapproved regulations that are likely to be taken into account by reviewing courts. Those standards would require a reviewing court to assess both the nature of

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[66] 5 U.S.C. 801(f).

[67] 5 U.S.C. 801(b)(2).

[68] 5 U.S.C. 803.

the rulemaking authority vested in the agency that promulgated the disapproved rule and the specificity with which the Congress identified the objectionable portions of a rule during the floor debates on disapproval. An important factor in a judicial assessment may be the CRA's recognition of the continued efficacy of statutory deadlines for promulgating specified rules by extending such deadlines for one year after disapproval. (3) The novelty of the issue, the uncertainty of the weight a court will accord the post enactment congressional explanation, and the current judicial inclination to give deference to the "plain meaning" of legislative language, make it difficult to reliably anticipate what a court is likely to hold.

A blanket contention that enactment of a joint resolution disapproving an agency's rules would disable that agency from promulgating future rules in the "area" of concern until Congress passes new legislation authorizing it to issue rules on that subject would not appear to have a substantial basis in the CRA. Such argumentation would apparently be based on the notion that the "plain meaning" of the CRA's disapproval mechanism forecloses further rulemaking with respect to that subject matter unless Congress specifically reauthorizes such action in subsequent legislation. That is, since Congress can apparently only disapprove a rule as a whole, rather than pinpointing any particular portions, there is no sound basis for the agency to act without further legislative guidance where a rule deals exclusively with an integrated subject matter. The statute gives no indication as to how an agency is to discern what actions would be "substantially the same" and it would run the risk of a successful court challenge if it guessed wrong. It might be further argued that even if the agency promulgates new rules, which of course would be subject to CRA scrutiny, and Congress did not act to disapprove the new rules, that would not provide the necessary reauthorization since Section 801(g) of the Act provides as a rule of construction that in the event of the failure of Congress to disapprove a rule "no court ... may infer any intent of Congress from any action or inaction of the Congress with regard to such, related statute, or joint resolution of disapproval."

It is, of course, fundamental that statutory language is the starting point in any case of statutory construction. In recent years, the Supreme Court has shown a strong disposition to hold Congress to the letter of the language it uses in its enactments. In its ruling in *Barnhart v. Sigmon Coal Co.*[69] the Court advised that the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[70] "The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'"[71] In such cases, the Court has held, resort to "legislative history is irrelevant to the interpretation of an unambiguous statute."[72] In *Barnhardt* the Court

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[69] 122 S.Ct. 941 (2002).

[70] *Id.* at 950.

[71] *Id.*

[72] *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09 n.3. *Accord Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v.Daas*, 198 F.2d 1167, 1175 (9th Cir. 1999), *cert. denied* 531 U.S. 999 (2000).

warned, "parties should not seek to amend [a] statute by appeal to the Judicial Branch."[73]

The plain meaning rule, however, is not an unalterable, rigid rule of construction and has been held inapplicable where it would "lead to an absurd result,"[74] or "would bring about an end completely at variance with the purpose of the statute."[75] "It is 'a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme' ... Thus it is a more faithful construction of [a statute] to read it as a whole, rather than as containing two unrelated parts. It is the classic judicial task of construing related statutory provisions to make sense in combination."[76] In the instant situation, it is arguably not likely that a court would hold that the "substantially the same" language of Section 801(b)(2) is unambiguous, either on its face or in the context of the statutory scheme. The direction of the provision is not a self-enforcing mandate; it clearly requires a further determination whether rules have been reissued in "substantially the same form" or whether a new rule is "substantially the same" as the one disapproved. The ambiguity raised is who makes those determinations and on what basis.

The language of the provision, however, does not naturally or ineluctably lead to the conclusion that no further remedial rulemaking can take place unless Congress passes a new law. This reasoning is buttressed by Section 803(a) which contemplates that agency rulemaking must take place after a disapproval action if the authorizing legislation of the agency mandates that rules disapproved had to have been promulgated by a date certain. That provision extends the deadline for promulgation for one year "after the date of enactment of the joint resolution," not one year after Congress reauthorizes action in the area. The reasonable conclusion is that Congress understood that after disapproval, an agency, if it was under a mandate to produce a particular rule, had to try again. The question then is, how was it to perform this task. The answer lies in the legislative history of the Act.

The Congressional Review Act was part of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996. That Title was a product of negotiation between the Senate and House and did not go through the committee process. Thus there is no detailed expression of its legislative history, apart from floor statements by key House and Senate sponsors, before its passage by the Congress on March 28, 1996 and its signing into law by the President on March 29. Thereafter, the principal sponsors of the legislation in the Senate (Senators Nickles, Reid and Stevens) and House (Representative Hyde) submitted identical joint explanatory statements for publication in the Congressional Record "intended to provide guidance to the agencies, the courts, and other interested parties when

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[73] 122 S.Ct. at 956.

[74] *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

[75] *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1978).

[76] *United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002) (holding, *inter alia*, that it is appropriate for a court to look at the history and background against which Congress was legislating).

interpreting the act's terms."[77] Although it is a post-enactment explanation of the legislation, it is likely to be accorded some weight as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law.[78]

The Joint Explanatory Statement directly addresses a number of issues that may arise upon enactment of a disapproval resolution and attempts to provide guidance for both Congress and agencies faced with repromulgation questions. At the outset, the Statement notes that disapprovals may have differing impacts on promulgating agencies depending on the nature and scope the rulemaking authority that was utilized. For example, if an agency's authorizing legislation did not mandate the promulgation of the disapproved rule, and the legislation gives the agency broad discretion, the authors deem it likely that it has the discretion whether or not to promulgate a new rule. On the other hand, the Statement explains that "if an agency is mandated to promulgate a particular rule and its discretion is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule."[79] By implication, a congressional mandate to issue regulations that is not circumscribed would still be operative. But how would the agency be guided in that circumstance? The Statement addresses that very question: it is the obligation of Congress during the debate on the disapproval resolution "to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after the enactment of a joint resolution of disapproval."[80] Thereafter, "the agency must give effect to the resolution of disapproval."[81] The full statement on the issue is as follows:

> *Effect of enactment of a joint resolution of disapproval*
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> Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproval rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.
>
> If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing

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[77] Legislative History, *supra*, n. 37.

[78] See *e.g.*, *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 530-31 (1982); *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 n.23 (1983); *Grove City College* v. *Bell* , 465 U.S. 555, 567 (1984).

[79] Legislative History *supra* note 37 at S 3686.

[80] *Id.*

[81] *Id.*

> agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

The congressional experience with the disapproval of the OSHA ergonomics standard provides a useful lesson.[82] This rule became the first, and only, rule to be disapproved thus far under the CRA. The principal sponsor of the resolution, Senator Jeffords, at the outset of the debate addressed the issue whether disapproval would disable OSHA from promulgating a new rule. Senator Jeffords referred to the above-discussed Joint Statement and noted that OSHA "has enormously broad regulatory authority," citing pertinent sections of the OSH Act providing expansive rulemaking authority. The Senator concluded that "I am convinced that the CRA will not act as an impediment to OSHA *should* the agency decide to engage in ergonomics rulemaking."[83] What Senator Jeffords apparently understood was that while the agency had broad authority to promulgate rules, there was no congressional mandate to issue an ergonomics rule in the underlying law. As a consequence it was possible that no further rulemaking would occur, as implied by a letter to Senator Jeffords from Secretary Chao which indicated that a new rulemaking was only one of many options available to the Department should the rule be disapproved.[84] In fact, OSHA made it clear on April 5, 2002, that no rulemaking was in the offing.[85] On April 17, 2002, Senator Breaux and 26 co-sponsors, many of whom had voted in favor of the disapproval resolution, introduced S. 2184, which would direct the Secretary of Labor to promulgate a new ergonomics rule and specifies in detail what should be included, what should not be included, and what evidence should be considered. Section 1 (b)(4) of the bill deems the direction to issue the rule "a specific authorization by Congress in accordance with Section 801 (b)(2)" of the CRA.[86]

An interesting contrast with the ergonomics situation is the consideration now being given by the key Senate sponsors of the Bipartisan Campaign Reform Act 2002 (BCRA),[87] which requires that the Federal Election Commission (FEC) promulgate rules implementing the soft money limitations and prohibitions of Title I of the Act

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[82] See CRS Ergonomics Report, *supra* note 11.

[83] 147 Cong. Rec. S 1832-33 (daily ed. March 6, 2001) (emphasis added).

[84] 147 Cong. Rec. at S 1832.

[85] CRS Ergonomics Report, *supra* note 11.

[86] *Id.*

[87] Pub. L. 107-55, 116 Stat. 81 (March 27, 2002).

no later than 90 days after its date of enactment,[88] whether to introduce a CRA disapproval resolution with respect to the rules issued by the FEC on July 17, 2002.[89] The Senate sponsors believed that the new rules, which became effective on November 6, 2002, undermine the BCRA's ban on the raising and spending of soft money by federal candidates and officeholders and on national party use of soft money. Since the FEC is mandated to promulgate rules to implement the BCRA by a date certain, it may be argued that, in contrast with the general discretion OSHA has with respect to whether to issue any ergonomics standard, if Congress disapproves the FEC's soft money rule, the agency would be obligated to undertake a new rulemaking (to be completed within a year after the disapproval resolution is signed into law) that would reflect congressional objections to the rule. At the same time, in accordance with the understanding of the Joint Statement, it will arguably be incumbent on Congress in its debates on any such resolution to clearly identify those provisions of the rule that are objectionable as well as those that are not.

Whether this will be sufficient to withstand a challenge in the courts cannot be answered with any degree of certainty. Foreseeable obstacles may be the novelty of the issue, the amount of weight, if any, that a court will accord the post-enactment congressional explanation of the CRA, and the current inclination of the courts to give deference to the plain meaning of statutory language and to eschew legislative history. A new rule may be challenged on grounds of lack of authority as a consequence of the disapproval resolution either because Congress failed to articulate its objections to the rule, thereby providing no standards for the agency to apply in its rulemaking, or that the new rules were "substantially the same" as the old, disapproved rules and therefore invalid under the CRA.

Since it appears that the FEC would be required to engage in new rulemaking that must be completed within a year after disapproval, Congress, if it considers a disapproval resolution, may desire to be mindful of the guidance provided by the Joint Statement. The Joint Statement declares congressional intent to make clear and specific identification of the options available to the agency, including identification of objectionable provisions in the proposed rule during the floor debates. In this way Congress provides an agency clear and direct guidance as to what it expects in the repromulgation process as well as a possible defense to a challenge based on the "substantially the same" language of the CRA.

Conclusion

This report identifies structural and interpretive issues affecting use of the CRA. While there have been some instances of the law apparently influencing the implementation of certain rules, the limited utilization of the formal disapproval

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[88] Section 402 (c)(2).

[89] Kenneth P. Doyle, Wertheimer, Bauer Debate Move to Void Soft Money Rule Before Senate Democrats, Bureau of National Affairs, July 19, 2002. A disapproval resolution of the FEC rules was introduced in the Senate, S.J.Res. 48, on October 8, 2002. Since Congress adjourned *sine die* before the expiration of the CRA's 60 session day consideration period, it may still receive consideration in the 108th Congress. See discussion, *supra* at 4.

process in the eight and a half years since enactment has arguably reduced the threat of possible congressional scrutiny and disapproval as a factor in agency rule development. The one instance in which an agency rule was successfully negated is likely a singular event not soon to be repeated. Presently, the Congress and the White House are no longer in the hands of the same political party, the rules of the previous administration are no longer subject to the CRA, and the current administration appears to be establishing firm control of the agency rulemaking process through its administration of Executive Order 12,866.[90] One commentator has observed that if the perception of a rulemaking agency is that the possibility of congressional review is remote "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support its rule."[91] Indeed, there is growing evidence that a significant number of covered rules are not being submitted for review at all. Also, a potentially effective support mechanism, the in-depth, individualized scrutiny of selected agency cost-benefit and risk assessment analyses by GAO authorized under the Truth in Regulating Act of 2000, was never implemented for lack of appropriated funds.

The CRA reflects a recognition of the need to restore the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court's most recent rejection of an attempted revival of the nondelegation doctrine[92] adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, intrusive judicial review, and increasing presidential control over the rulemaking process will likely continue.

Selected Source Readings

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[90] See, *e.g.*, Stephen Power and Jacob M. Schlesinger, Redrawing the Lines: Bush's Rule Czar Brings Long Knife to New Regulations, Wall St. Journal, 6/12/02 at Al; Rebecca Adams, Regulating the Rulemakers: John Graham at OIRA, CQ Weekly, 2/23/02 at 520-526.

[91] Seidenfeld, *supra* note 29, at 1090.

[92] *Whitman* v. *American Trucking Assn's*, 531 U.S. 457 (2001).

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