Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress

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Summary

The Congressional Review Act ("CRA," 5 U.S.C. §§801-808) established a special set of expedited or "fast track" legislative procedures, primarily in the Senate, through which Congress may enact joint resolutions disapproving agencies' final rules. Members of Congress have 60 "days of continuous session" to introduce a resolution of disapproval after a rule has been submitted to Congress or published in the *Federal Register*, and the Senate has 60 "session days" to use CRA expedited procedures. Although the CRA was considered a reassertion of congressional authority over rulemaking agencies, only one rule has been disapproved using its procedures, and that reversal was the result of a specific set of circumstances created by a transition in party control of the presidency.

The CRA also indicates that if a rule is submitted to Congress less than 60 session days in the Senate or 60 legislative days in the House of Representatives before Congress adjourns a session *sine die*, then the rule is carried over to the next session of Congress and treated as if it had been submitted to Congress or published in the *Federal Register* on the 15th legislative day (House) or session day (Senate). This restart of the CRA process in a new session of Congress occurs even if no joint resolution of disapproval had been introduced regarding the rule during the preceding session of Congress.

A review of the House and Senate calendars from the first session of the 100th Congress to the first session of the 110th Congress indicates that the date triggering the carryover provisions of the CRA (i.e., the date after which less than 60 legislative or session days remained in a session) has usually been determined by the House of Representatives, and that the date was almost always earlier in second sessions of Congress (during which congressional elections are held) than in first sessions. The median date after which the "carryover periods" began for all sessions during this period was June 25, and the median for all second sessions was June 9. Since the CRA was enacted in March 1996, the median starting point for these carryover periods during second sessions of Congress has been somewhat earlier—June 7.

At the conclusion of most recent presidential administrations, the volume of agency rulemaking has increased noticeably. In May 2008, the White House Chief of Staff generally required federal agencies to finalize all regulations to be issued during the Bush Administration by November 1, 2008. According to press accounts and other sources, federal agencies are planning to issue a number of significant final rules by the end of 2008. If any of these "midnight rules" are submitted within the "carryover period" of the second session of the 110th Congress, then they will be subject to the carryover provisions of the CRA.

This report will be updated to reflect changes in factual material or other developments.

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Introduction

The Congressional Review Act ("CRA," 5 U.S.C. §§801-808) requires federal agencies to submit all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect. The act also establishes a special set of expedited or "fast track" legislative procedures, primarily in the Senate, through which Congress may enact joint resolutions disapproving agencies' final rules. Although the general powers of Congress permit it to overturn agency rules by legislation, the CRA is unique in permitting the use of expedited procedures for this purpose. If a rule is disapproved through the CRA procedures, the act specifies not only that the rule "shall not take effect" (or shall not continue, if it has already taken effect), but also that the rule may not be reissued in a "substantially" similar form without subsequent statutory authorization.[1]

The CRA was initially considered a reassertion of congressional authority over rulemaking agencies, but thus far it has had little direct effect on agency rules.[2] After enactment, a CRA joint resolution of disapproval must be presented to the President for signature or veto. Under most circumstances, it is likely that the President would veto the resolution to protect rules developed under his own administration, and it may also be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto. Of the nearly 50,000 final rules that have been submitted to Congress since the legislation was enacted in March 1996, the CRA has been used to disapprove only one rule—the Occupational Safety and Health Administration's November 2000 final rule on ergonomics.[3]

The March 2001 rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.[4]

[1] It is unclear how "substantially" similar a rule must be to be covered by this prohibition. For as discussion of this issue, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by (name redacted).

[2] See CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by (name redacted), for a discussion of how the CRA has been implemented.

[3] U.S. Department of Labor, Occupational Safety and Health Administration, "Ergonomics Program," 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

[4] See, for example, Susan E. Dudley, "Reversing Midnight Regulations," *Regulation*, vol. 24 (Spring 2001), p. 9, who noted that the "veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office." See also testimony of (name redacted), in U.S. Congress, House Committee on Government Reform, Subcommittee on Regulatory Affairs, *The Effectiveness of Federal Regulatory Reform Initiatives*, 109th Cong., 1st sess., July 27, 2005, p. 13. See CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by (name redacted), for a description of this and several other possible factors affecting the law's use.

This report addresses some of the implications of the CRA with regard to agency rulemaking in the final months of a presidential administration. It first notes the practice of increased rulemaking activity during this period, and describes how this practice has been addressed by two White House memoranda issued during the current Bush Administration. The report then briefly identifies key elements of the complex set of time periods established by the CRA—elements that define points during the disapproval process at which various actions may occur. This discussion focuses on the CRA provisions for carrying over the disapproval process into a subsequent session of Congress, and indicates how rules submitted at the end of a Congress may be affected by these provisions. Then, the report identifies the dates in previous sessions of Congress after which rules have (since the enactment of the CRA) been subject to these carryover provisions, and identifies some of the rules that may be issued in the final months of the current Bush Administration.

Bush Administration Memoranda Regarding "Midnight" Rules

At the conclusion of most recent presidential administrations, the volume of agency rulemaking has increased noticeably—a phenomenon that has been characterized as "midnight rulemaking."[5] As one observer stated, putting rules into effect before the end of a presidency is "a way for an administration to have life after death,"[6] for the only way that a subsequent administration can change or eliminate the rule is by going back through the often lengthy rulemaking processes that are required by the Administrative Procedure Act (5 U.S.C. §551 *et seq.*) and various other statutes and executive orders.[7] The current Bush Administration has responded to this situation by delaying and ultimately reducing the volume of effective rules issued in the last months of the Clinton Administration, and by protecting rules issued in its own last months from the possibility of similarly being rendered ineffective.

Card Memorandum

During the final months of the Clinton Administration, federal agencies issued hundreds of final rules—a number of which were considered "major" under the CRA.[8] In response to this action,

[5] See, for example, Jay Cochran, III, "The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters," Mercatus Center, George Mason University, March 8, 2001. Cochran determined that, in election years since 1948 with complete executive branch turnover, the volume of rulemaking during the post-election quarter (measured by the number of pages in the *Federal Register*) increased by an average of 27% when compared to the same periods in non-election years. See also Jason M. Loring and Liam R. Roth, "After Midnight: The Durability of the 'Midnight' Regulations Passed by the Two Previous Outgoing Administrations," *Wake Forest Law Review*, vol. 40 (2005), pp. 1441-1465, which indicated that the George H.W. Bush and William J. Clinton Administrations issued numerous "midnight rules."

[6] John M. Broder, "A Legacy Bush Can Control," *New York Times*, September 9, 2007, p. 4.1, quoting Phillip Clapp, president of the National Environmental Trust.

[7] For more information on these statutes and executive orders, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by (name redacted).

[8] The CRA defines a rule as "major" if, among other things, it has a $100 million impact on the economy. According to GAO, federal agencies issue an average of about 60 major rules each year. Major rules issued by federal agencies in January 2001 included those (1) prohibiting road construction and harvesting in certain roadless areas of National Forest Service land, (2) establishing energy conservation standards for clothes washers and central air conditioners, (3) (continued...)

on January 20, 2001, the Chief of Staff and Assistant to the new President, Andrew H. Card, Jr., sent a memorandum to the heads of all executive departments and agencies generally directing them to (1) not send proposed or final regulations to the Office of the Federal Register (OFR), (2) withdraw regulations that had been sent to the OFR but not published in the *Federal Register*, and (3) postpone for 60 days the effective date of regulations that had been published in the *Federal Register* but had not yet taken effect.[9] The memorandum cited the desire to "ensure that the President's appointees have the opportunity to review any new or pending regulations." In 2002, GAO reported that 90 final rules had their effective dates delayed as a result of the Card memorandum, and 15 rules still had not taken effect one year after the memorandum was issued.[10]

Bolten Memorandum

The Bush Administration has also taken action in anticipation of possible "midnight rules" at the end of the current President's term. On May 9, 2008, White House Chief of Staff Joshua B. Bolten issued a memorandum to the heads of executive departments and agencies stating that the Administration needed to "resist the historical tendency of administrations to increase regulatory activity in their final months." Therefore, Bolten said that, except in "extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008."[11] He also said that the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget would "coordinate an effort to complete Administration priorities in this final year," and the OIRA Administrator would "report on a regular basis regarding agency compliance with this memorandum."[12]

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implementing requirements for the State Children's Health Insurance Program, (4) restricting the use of snowmobiles in Yellowstone and Grand Teton National Parks, and (5) setting maximum contaminant levels for arsenic in community water systems.

[9] See http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf for a copy of this memorandum. Federal courts have generally considered any delay in a rule's effective date to require notice and comment rulemaking. See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982); and *Council of the Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981). Although some agencies used notice and comment rulemaking to delay effective dates pursuant to the Card memorandum, most agencies simply published the changes and invoked the Administrative Procedure Act's "good cause" exception. One such action was rejected by the court. See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 204-05 (2d Cir 2004).

[10] U.S. General Accounting Office, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's January 20, 2001, Memorandum*, GAO-02-370R, February 15, 2002.

[11] Between June 1 and August 8, 2008, however, federal agencies sent more than 40 proposed rules to the Office of Management and Budget for review prior to publication in the *Federal Register*. Ralph Lindeman, "Agencies Continue to Proposed New Rules After White House-Imposed June Deadline," *BNA Daily Report for Executives*, August 11, 2008, p. A-9.

[12] OIRA reviews all significant rules before they are published in the *Federal Register*, and is the President's chief representative in the rulemaking process. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by (name redacted).

CRA Time Periods and Their Potential Effect on Rules Proposed Late in a Session

The CRA is a complex statute, and among the act's chief complexities is its use of at least four different ways to measure the passage of time, each for different purposes:

- *calendar days*;
- *days of continuous session*, which excludes all days when either the House of Representatives or the Senate is adjourned for more than three days;
- *session days*, which include only calendar days on which a chamber is in session; and
- *legislative days*, which end each time a chamber adjourns and begin each time it convenes after an adjournment.

The following sections describe how the CRA uses each of these measures of time, focusing especially on the way in which they affect Congress's ability to use the CRA disapproval process for rules submitted toward the end of a session of Congress, and especially toward the end of a presidential term.

Effective Dates

Section 801(a)(3) of the CRA generally requires that the effective dates of all "major" rules be delayed for 60 *calendar* days after the date they are provided to Congress or published in the *Federal Register*, whichever is later. This delay in the effective dates helps to ensure that Congress has an opportunity to review and, if necessary, disapprove these major rules before they take effect. All non-major rules are allowed to take effect as stipulated in the rules themselves.[13] Nevertheless, even if a rule has already taken effect, the CRA can still be used to disapprove it if time remains in the periods established for congressional proceedings.

Initiation and Action Periods

Section 802(a) of the CRA states that a joint resolution of disapproval may be introduced as soon as a rule is received by Congress, but the resolution must be introduced no later than 60 days after that date, "excluding days either House of Congress is adjourned for more than 3 days during a session of Congress." This 60 *days of continuous session* defines the "initiation period" for CRA resolutions of disapproval. For example, if the House of Representatives and the Senate adjourn on a Friday and both reconvene on the following Monday or Tuesday, the 60-day "clock" for the

[13] The Administrative Procedure Act (5 U.S.C. §553(d)) generally requires agencies to publish their rules 30 days before their effective dates, but exempts certain categories of rules from this requirement (e.g., interpretative rules and statements of policy), and allows agencies to make rules effective in less than 30 days for "good cause." Also, the CRA (5 U.S.C. §808) states that "(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or (2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines."

introduction of resolutions of disapproval continues to run throughout the weekend because neither house was out of session for more than three days. On the other hand, if the House is in recess for a month but the Senate continues in session, then the 60-day "clock" for this "initiation period" stops until the House comes back into session.

Once introduced, resolutions of disapproval are referred to the committees of jurisdiction in each house of Congress. The House of Representatives would consider the resolution under its general procedures, very likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, however, if the committee has not reported a disapproval resolution within 20 *calendar* days after the regulation has been submitted and published, then the committee may be discharged of its responsibilities and the resolution placed on the Senate calendar if 30 Senators submit a petition to do so.

Once the Senate committee has reported or been discharged, the CRA makes consideration of the measure privileged, prohibits various other dilatory actions, disallows amendment, and limits floor debate to 10 hours. Section 802(e) of the CRA states that the Senate has 60 *session days* from the date a rule is submitted to Congress or published in the *Federal Register* to use these expedited procedures and act on a joint resolution of disapproval.[14] This "action period" for the Senate includes only the calendar days on which the Senate is actually in session, in contrast to the "days of continuous session" for the initiation period, which includes all days other than those when either house is in adjournment lasting more than three days. Because of this difference in which days are counted, the "action period" will normally last longer than the "initiation period."

Carryover Period

Section 801(d) of the CRA provides that, if Congress adjourns its annual session *sine die* less than 60 *legislative days* in the House of Representatives or 60 *session days* in the Senate after a rule is submitted to it, then the rule is subject, during the following session of Congress, to (1) a new initiation period in *both* chambers and (2) a new action period in the Senate.[15] The purpose of this provision is to ensure that *both* houses of Congress have sufficient time to consider disapproving rules submitted during this end-of-session "carryover period." In any given year, the carryover period begins after the 60th legislative day in the House or session day in the Senate before the *sine die* adjournment, whichever date is *earlier*. The renewal of the CRA process in the following session occurs even if no resolution to disapprove the rule had been introduced during the session when the rule was submitted.

For purposes of this new initiation period and Senate action period, a rule originally submitted during the carryover period of the previous session is treated as if it had published in the *Federal Register* on the 15th legislative day (House) or session day (Senate) after Congress reconvenes for the next session. In each chamber, resolutions of disapproval may be introduced at any point in

[14] The action period applies only to initial consideration in the Senate because the CRA establishes no expedited procedures for initial House consideration.

[15] It is typically appropriate that the House component of the carryover period is measured in legislative days, because the House usually adjourns at the end of each daily session, so that its legislative days and session days generally coincide. The Senate, on the other hand, sometimes continues a single *legislative day* through several actual *days of session* by using daily recesses rather than adjourning. For this reason , it is generally appropriate that the Senate component of the "carryover period" is measured directly by days of session.

the 60 days of continuous session of Congress that follow this date, and the Senate may act on the resolution during the 60 days of session that follow the same date.

Starting Points for CRA Carryover Periods

In light of the CRA's requirement that major rules be delayed for 60 calendar days, the May 2008 Bolten memorandum's requirement that final rules be published in the *Federal Register* by November 1, 2008, indicates that these rules will have taken effect before the 111th Congress begins and the next President takes office in January 2009. As a result, the Bolten memorandum may also have the effect of preventing the next presidential administration from doing what was done via the Card memorandum—directing federal agencies to extend the effective dates of any rules that had been published during the Bush Administration but had not taken effect (since the rules would have already taken effect by the time the next President takes office). However, many rules submitted before the Bolten memorandum deadline will *remain* subject to congressional disapproval in the 111th Congress because they will not have been submitted before the starting point of the carryover period, and because the CRA permits Congress to enact resolutions of disapproval regarding rules that have already taken effect.

Although the exact starting point for the CRA carryover period in the second session of the 110th Congress can be determined only after *sine die* adjournment has taken place, the likely date or range of dates may be illuminated by examining congressional activity in prior years. To identify these earlier starting points, CRS examined the calendars of the House and the Senate for all sessions of Congress during the previous 20 years (i.e., from the 100th Congress, which began in 1987, through the first session of the 110th Congress in 2007). Counting backwards from the end of each session, we determined the date after which there were either less than 60 days of session in the Senate or less than 60 legislative days in the House. Although some of these sessions of Congress predate the enactment of the CRA, the starting points for those sessions were included to better understand the trends in these dates.

Table 1 below presents these data. For each session of Congress, the earlier of the House or Senate starting point dates is shown in the table in **bold face**. Since the CRA was enacted in March 1996, any rule submitted after the specified date in that session was available for disapproval under the CRA process during the following session of Congress. As the table indicates, the starting points for the CRA carryover periods varied between the two houses of Congress in each session, and across the sessions within each chamber. The data also show the following:

- In all but two sessions of Congress during this period (i.e., the first and second sessions of the 101st Congress), the starting point date for the House of Representatives occurred earlier than the starting point date for the Senate. In every session since the CRA was enacted in March 1996, the House starting point has determined the relevant date for CRA carryovers to the next session of Congress.
- Across all of these sessions of Congress, the earliest starting point for the carryover period was May 12 (second session of the 108th Congress), and the latest date was September 9 (first session, 100th Congress). However, it has been unusual for the starting point to be before June or after July. The median relevant starting point (i.e., half occurring before, half after) for all of these sessions of Congress was June 25.

- The starting points for the CRA carryover periods were almost always earlier during the second sessions of Congress (i.e., during election years) than the starting points in the first sessions.[16] The median starting point during all second sessions was June 9; the median during first sessions was July 19. This difference in median starting points is explained by the fact that both houses often adjourn or recess just prior to and/or after congressional elections.
- Since the CRA was enacted in March 1996, the starting points for the carryover periods during second sessions of Congress have been even earlier than for the full period, ranging from May 12 to June 23, with the median starting point being June 7.

Any rule that was submitted to Congress after the relevant starting point date in any session since the CRA was enacted in March 1996 would not have had 60 days of session in both houses, and Congress' ability to introduce and act on CRA resolutions of disapproval regarding the rule carried over to the next session of Congress. A new initiation period and a new action period for the rule began on the 15th session (Senate) or legislative (House) day of that new session of Congress.

Table 1. Starting Points for "Carryover Periods" During the 100th Congress Through the First Session of the 110th Congress

Congress	Session	House of Representatives—60th legislative day from the end of the session	Senate —60th session day from the end of the session
100th	1st	**September 9, 1987**	September 10, 1987
	2nd	**June 9, 1988**	June 20, 1988
101st	1st	July 25, 1989	**July 24, 1989**
	2nd	July 11, 1990	**June 27, 1990**
102nd	1st	**July 17, 1991**	July 25, 1991
	2nd	**June 4, 1992**	June 10, 1992
103rd	1st	**July 19, 1993**	July 27, 1993
	2nd	**June 16, 1994**	June 30, 1994
104th	1st	**August 2, 1995**	September 25, 1995
	2nd	**May 28, 1996**	June 4, 1996
105th	1st	**June 25, 1997**	July 11, 1997
	2nd	**June 18, 1998**	June 26, 1998
106th	1st	**July 15, 1999**	July 21, 1999
	2nd	**June 22, 2000**	July 12, 2000
107th	1st	**July 30, 2001**	September 6, 2001
	2nd	**June 18, 2002**	July 10, 2002

[16] The starting points for carryover periods in second sessions most commonly occurred in June, with the dates ranging from May 12 to June 27. The starting points in first sessions most commonly occurred in July, with the dates ranging from June 25 to September 9.

Congress	Session	House of Representatives—60th legislative day from the end of the session	Senate —60th session day from the end of the session
108th	1st	**June 26, 2003**	July 28, 2003
	2nd	**May 12, 2004**	June 8, 2004
109th	1st	**July 19, 2005**	July 27, 2005
	2nd	**May 23, 2006**	June 15, 2006
110th	1st	**July 25, 2007**	September 10, 2007

Source: CRS analysis of House of Representatives and Senate *Calendars*.

Note: The earlier of the House or Senate dates within each session, set in **boldface**, determines the date after which submitted rules would be carried over to the next session of Congress under the CRA. Dates prior to the enactment of the CRA in March 1996 (i.e., prior to the second session of the 104th Congress) are included for illustration only.

Second Session of the 110th Congress

Whether the patterns discussed above will hold true in the second session of the 110th Congress is currently unclear. The targeted adjournment date in the House of Representatives is September 26, 2008, but no targeted adjournment has been set in the Senate. It is possible that the House and the Senate could have so many days in session late in the year that the starting point for the carryover period (determining which rules would be eligible for new CRA initiation and action periods in the 111th Congress) would fall later than any of the above dates. However, doing so would require both houses of Congress to be in session for more days at the end of the session than has occurred during the past 20 years.

Final Rules That May Be Issued Late in the Second Session of the 110th Congress

Another way to understand the significance of the starting point dates for CRA carryover periods is to identify some of the rules that may be issued late in the second session of the 110th Congress (and that therefore may be subject to disapproval during the first session of the 111th Congress). According to press accounts and other sources, federal agencies are reportedly planning to make a number of controversial proposed rules final by the end of calendar year 2008,[17] including:

- an Environmental Protection Agency (EPA) revision of the definition of "solid waste" that, if consistent with the October 2003 proposed rule, would exclude certain types of sludge and byproducts (referred to in the proposed rule as "hazardous secondary waste") from regulation under the Resource Conservation and Recovery Act.[18]

[17] A number of these rules were identified in Ralph Lindeman, "White House Deadline on Agency Rulemaking May See Significant Slippage, Experts Say," *BNA Daily Report for Executives*, June 6, 2008, p. C-1; and Cindy Skrzycki, "Bush Wants Sun to Set on Midnight Regulations," *Washington Post*, June 3, 2008, p. D-3.

[18] For the proposed rule, see U.S. Environmental Protection Agency, "Revisions to the Definition of Solid Waste," 68 *Federal Register* 61557, October 28, 2003. The final rule has been under review at OIRA since April 2008. For more (continued...)

- a Department of Transportation (DOT) rule updating existing standards for roof-crush resistance in passenger vehicles. Several Members of Congress have criticized the August 2005 proposed rule, and after a June 4, 2008, Senate oversight hearing and a bipartisan letter from several Senators, DOT asked Congress to extend the statutory deadline for the issuance of the final rule until October 2008.[19]
- an EPA "new source review" rule that, if made final, would alter current requirements for when upgrades at older power plants would require the installation of modern anti-pollution equipment.[20] EPA said that the change would balance environmental protection with the "economic need of sources to use existing physical and operating capacity." However, environmental groups contend that the change would weaken existing protections and is counter to a recent decision of the Supreme Court related to this issue.[21]
- an EPA rule that is expected to change how pollution levels are measured under certain parts of the Clean Air Act, and that some contend will change emissions standards for industrial facilities operating near national parks.[22]
- a National Park Service rule that, if consistent with the April 2008 proposal, would change the agency's current policy and permit state laws to determine whether concealed firearms could be carried in national parks.[23]
- a Department of Justice (DOJ) proposed rule that would "clarify and update" the policies governing criminal intelligence systems that receive federal funding, but that some contend would make it easier for state and local police to collect, share, and retain sensitive information about Americans, even when no underlying crime is suspected.[24]

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information on this rule and the perspectives of various parties, see Charlotte E. Tucker, "EPA Completing Last Steps for Regulation to Redefine Waste to Encourage Recycling," *BNA Daily Report for Executives*, July 17, 2008, p. C-1.

[19] "DOT Secretary Peters Seeks Extension to Oct. 1 of Roof Crush Final Rule Deadline," *BNA Daily Report for Executives*, July 2, 2008, p. A-12.

[20] For the proposed rule, see U.S. Environmental Protection Agency, "Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units," 72 *Federal Register* 26201, May 8, 2007.

[21] American Lung Association, EarthJustice, Environmental Defense, Natural Resources Defense Council, and Sierra Club; "Comments on EPA's Proposed 'Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units,'" available at http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480273d62.

[22] Juliet Eilperin, "Clean-Air Rules Protecting Parks Set to Be Eased," *Washington Post*, May 16, 2008, p. A-1; and Mark Clayton, "Why National Parks, Coal-Fired Power Plants May Be Neighbors," *Christian Science Monitor*, April 24, 2008, p. 13. For the proposed rule, see U.S. Environmental Protection Agency, "Prevention of Significant Deterioration New Source Review: Refinement of Increment Modeling Procedures," 72 *Federal Register* 31371, June 6, 2007. In an April 2008 letter responding to questions posed by the Chairman of the House Committee on Oversight and Government Reform, EPA said it was "unable to conclusively confirm or deny" suggestions from the National Park Service that the proposed rule would make it easier to build power plants near national parks. See http://oversight.house.gov/documents/20080514180808.pdf.

[23] U.S. Department of the Interior, National Park Service, "General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service," 73 *Federal Register* 2338, April 30, 2008.

[24] For the proposed rule, see U.S. Department of Justice, Office of Justice Programs, "Criminal Intelligence Systems Operating Procedures," 73 *Federal Register* 44673, July 31, 2008. For a characterization of the rule, see Spencer S. (continued...)

- a National Highway Traffic Safety Administration rule on how automakers are to meet stricter fuel economy standards for cars and light trucks pursuant to the Energy Independence and Security Act of 2007, which requires the agency to raise fuel economy standards to a fleet wide average of at least 35 miles per gallon by 2020.[25]
- a Food and Drug Administration (FDA) rule that, if consistent with the proposal, would prohibit pharmaceutical companies and manufacturers of medical devices from changing the labeling of an approved drug, biologic, or medical device unless there is "evidence of a causal association" between the product and a safety concern.[26] Several committee and subcommittee chairmen in the House and Senate have written to FDA expressing concern that this standard, if made final, would "inevitably result in fewer company-initiated warnings."[27]
- an Employment Standards Administration (ESA) rule that, if made final, would change the implementation of the Family and Medical Leave Act of 1993.[28] ESA and others defended the rule at an April 2008 congressional hearing, while other participants in the hearing (including the chairwoman of the subcommittee) said it would make it more difficult for workers to exercise their rights under the act.[29] The proposed rule is expected to be made final in November 2008.
- a Department of the Interior (DOI) rule that, in the words of the proposal, requires that surface coal mining operations "minimize the creation of excess spoil and the adverse environmental impacts of fills," but that some observers have said would allow deposits of waste mountaintop material within 100 feet of certain streams.[30]
- a proposed amendment to the Federal Acquisition Regulation to require certain contractors and subcontractors to use the E-Verify system to confirm that certain of their employees are eligible to work in the United States, but which the U.S. Chamber of Commerce and others said contravenes the intent of Congress and raises numerous practical difficulties.[31]

(...continued)

Hsu and Carrie Johnson, "U.S. May Ease Police Spy Rules," *Washington Post*, August 16, 2008, p. A-1.

[25] For the proposed rule, see U.S. Department of Transportation, National Highway Traffic Safety Administration, "Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011-2015," 73 *Federal Register* 24351, May 2, 2008.

[26] U.S. Department of Health and Human Services, Food and Drug Administration, "Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices," 73 *Federal Register* 2848, January 16, 2008.

[27] See http://www.speaker.gov/blog/?p=1068 for a copy of this letter and related materials.

[28] For the proposed rule, see U.S. Department of Labor, Employment Standards Administration, "The Family and Medical Leave Act of 1993," 73 *Federal Register* 7875, February 11, 2008.

[29] Derrick Cain, "Witnesses Say DOL Should Scrap FMLA Rule, Call on Congress to Expand Leave Benefits," *BNA Daily Labor Report*, April 11, 2008, p. A-1.

[30] For the proposed rule, see U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, "Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States," 72 *Federal Register* 48889, August 24, 2007. For characterizations of the rule, see John M. Broder, "Rule to Expand Mountaintop Coal Mining," *New York Times*, August 23, 2007, p. A-1.

[31] For the proposed rule, see U.S. Department of Defense, General Services Administration, and National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility (continued...)

- a Housing and Urban Development (HUD) rule that would amend disclosure regulations under the Real Estate Settlement and Procedures Act (RESPA), and that some Members of Congress have requested that HUD withdraw.[32]
- a Department of Health and Human Services proposed rule that would protect medical providers' right to choose whether they would help perform abortions and other medical procedures, but that some have said could affect the ability of women to obtain certain forms of contraception and other health services.[33]
- a Department of Labor proposed rule that would change the way that occupational health risk assessments are conducted within the department. Legislation has been introduced in the 110th Congress (H.R. 6660) that would prohibit the issuance or enforcement of this rule.[34]
- a DOI proposed rule that would, among other things, give federal agencies greater responsibility in determining when and how their actions may affect species under the Endangered Species Act.[35] Several Members of Congress have expressed concerns about the draft rule, and congressional hearings are expected.[36]

(...continued)

Verification," 73 *Federal Register* 33374, June 12, 2008. See http://www.uschamber.com/assets/labor/080811_fed_Ks.pdf for the views of the U.S. Chamber of Commerce. The day after this proposed rule was published, the Department of Homeland Security announced it was requiring its contractors to use the E-verify program. U.S. Department of Homeland Security, Office of the Secretary, "Designation of the Electronic Employment Eligibility Verification System Under Executive Order 12989, as Amended by the Executive Order Entitled 'Amending Executive Order 12989, as Amended' of June 6, 2008," 73 *Federal Register* 33837, June 13, 2008.

[32] Mike Ferullo, "House Members Circulate Letter to HUD Urging Withdrawal of Proposed RESPA Rule," *BNA Daily Report for Executives*, July 22, 2008, p. A-28. For the proposed rule, see U.S. Department of Housing and Urban Development, "Real Estate Settlement Procedures Act (RESPA): Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs," 73 *Federal Register* 14029, March 14, 2008.

[33] See http://www.hhs.gov/news/press/2008pres/08/20080821reg.pdf for a copy of the proposed rule. For characterizations of the rule, see Rob Stein, "Protections Set for Antiabortion Health Workers," *Washington Post*, August 22, 2008, p. A-1; and Robert Pear, "Abortion Proposal Sets Condition on Aid," *New York Times*, July 15, 2008, p. A-1.

[34] For the proposed rule, see U.S. Department of Labor, Office of the Secretary, "Requirements for DOL Agencies' Assessment of Occupational Health Risks," 73 *Federal Register* 50909, August 29, 2008. For characterizations of the rule, see Carol D. Leonnig, "U.S. Rushes to Change Workplace Toxin Rules," *Washington Post*, July 23, 2008, p. A-1; and Gayle Cinquegrani, "Miller Introduces House Bill to Prohibit DOL 'Secret Rule' on Workplace Toxin Exposure," *BNA Daily Report for Executives*, August 1, 2008, p. A-7. On August 18, 2008, a *Washington Post* editorial recommended that the Department of Labor withdraw its proposed rule ("A Toxic Proposal: The Labor Department Politicizes a Regulation of Workplace Health," *Washington Post*, August 18, 2008, p. A-10).

[35] For the proposed rule, see U.S. Department of the Interior, Fish and Wildlife Service, and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, "Interagency Cooperation Under the Endangered Species Act," 73 *Federal Register* 47868, August 15, 2008. See also Juliet Eilperin, "Endangered Species Act Changes Give Agencies More Say," *Washington Post*, August 12, 2008, p. A-1.

[36] For in-depth information about this rule, see CRS Report RL34641, *Changes to Consultation Regulations of the Endangered Species Act (ESA)*, by (name redacted) and (name redacted).

Potential Effect of Carryover Period on Rules Issued Late in the Second Session of the 110th Congress

The foregoing information suggests the following observations:

- Federal departments and agencies are likely to issue a number of significant final rules during the last months of the current Bush Administration, as has been done at the conclusion of most recent presidential administrations. Some Members of Congress have already expressed concerns about several of those Bush Administration "midnight" rules, should they be issued.
- All of the final rules that are submitted to Congress during the second session of the 110th Congress with less than 60 session days left in the Senate or less than 60 legislative days left in the House will be automatically be carried over to the 111th Congress. Starting on the 15th legislative day (House) or session day (Senate) of the new session, each rule will have a new CRA initiation period (60 days of continuous session of Congress) and a new action period in the Senate (60 days of session) for resolutions of disapproval.
- House and Senate calendars from previous sessions of Congress, particularly sessions that occurred during election years (second sessions), suggest that any final rule submitted to Congress after June 2008 may be carried over to the first session of the 111th Congress, and may be subject to a resolution of disapproval during that session. However, the starting point for the carryover period could slip to late September or early October if an unprecedented level of congressional activity occurs late the session.
- Expedited procedures in the Senate and special rules in the House can help ensure that such resolutions are acted upon in each chamber. However, the enactment of any resolution of disapproval will still depend heavily on the action of the new President. If the resolution of disapproval is vetoed, it will require a two-thirds vote in both houses of Congress for the targeted rule to be rejected.

The memorandum issued by White House Chief of Staff Bolten directing agencies to issue most final rules by November 1, 2008, would, if fully implemented, ensure that most of the rules—even those considered "major" under the CRA and whose effective dates must be delayed for 60 days—would take effect before the 111th Congress begins and the next President takes office in January 2009. As noted earlier in this report, the Bolten memorandum may also have the effect of preventing the next presidential administration from doing what was done via the Card memorandum—directing federal agencies to extend the effective dates of any rules that had been published during the Bush Administration but had not taken effect (since the rules would have already taken effect by the time the next President takes office). In addition, some believe that the memorandum may be cited as a reason why certain rules will not be issued before the end of the Bush Administration.[37]

[37] Charlie Savage and Robert Pear, "Administration Moves to Avert a Late Rules Rush," *New York Times*, May 31, 2008, p. A-1.

However, as also pointed out earlier, the Bolten memorandum will have no impact on the next Congress's ability to overturn agency rules that are submitted within the last 60 legislative or session days in each house of Congress, since the CRA permits Congress to enact resolutions of disapproval regarding rules that have already taken effect. Also, once a rule is disapproved, the CRA prevents the agency from proposing a substantially similar rule without subsequent statutory authorization.

Even without the CRA, though, Congress can stop rulemaking in other ways. For example, each year, Congress includes provisions in appropriations legislation prohibiting rulemaking within particular policy areas, preventing particular proposed rules from becoming final, and prohibiting or affecting the implementation or enforcement of rules.[38] However, unlike disapprovals under the CRA, the regulatory requirements that have been put into effect are not rescinded, and the agency is not prohibited from issuing a substantially similar regulation in the future.

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[38] CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by (name redacted).