

A “Regulatory Game Changer”

How Congress and the Administration can use the CRA to kill hundreds of rules that were never reported to Congress.

The Congressional Review Act’s potential to eliminate unreasonably costly or unauthorized regulations is not limited to “midnight” rules issued at the end of an administration. Pacific Legal Foundation’s Todd Gaziano and others have developed powerful “new ideas” to use the CRA more effectively. A [piece by Kimberley Strassel](#) in *The Wall Street Journal* praised these ideas as a “regulatory game changer.”

The CRA requires any federal agency issuing a rule to submit a short report on it, with the text of the rule and any cost-benefit analysis, to the House, Senate, and GAO before the rule can go into effect. Because many agencies failed, for whatever reason, to report rules to Congress as the CRA requires (especially policy memoranda and guidance documents, termed “[regulatory dark matter](#)” by one scholar), they are not lawfully in effect, even if agencies have been illegally enforcing them. As a consequence, the administration and Congress can still invoke the CRA to withdraw, modify, or disapprove those rules.

CRA 2.0

The Trump administration should direct agencies to conduct an orderly review for unreported rules and to consult with OMB about the next step. After consultation, the agency would have several options.

Any rule an agency failed to submit to Congress remains unenforceable, which is the CRA’s consequence for wrongly denying Congress its opportunity to review the rule using special CRA procedures. Congress’ “fast track” review clock doesn’t begin until the later of the dates when the rule is published (if publication is required) and when Congress receives the report on it. If the administration submits many of these old rules to Congress now, it should indicate which ones it intends to go into effect and which ones it hopes Congress will disapprove. Once these rules are reported, Congress’s expedited review period [would finally start](#) for those rules.

That’s what we call “CRA 2.0.” Congress would then have 60 legislative days in the House and 60 session days in the Senate to introduce and vote on resolutions of disapproval under the CRA’s streamlined procedures that eliminate a

Senate filibuster and take only a simple majority vote before they are sent to the president. No court could interfere with or ever second-guess the House and Senate’s interpretation of the law to its respective legislative procedures—both for constitutional reasons and because CRA section 805 also prohibits it.

If any rules are overturned with a resolution of disapproval, the CRA provides that they will be deemed to have never gone into effect. And the agency would also be prohibited from issuing any “substantially similar” rule again without a new law authorizing it.

CRA 3.0

What we call “CRA 3.0” is an even more important and productive means for the new administration to meet its aggressive regulatory reform goals. Pursuant to the first sentence of the CRA, rules not reported to Congress are not in effect. Thus, thousands of rules thought to be in effect are not legally so. The administration should direct agencies to consult with OMB before sending any such rules to Congress—so that Congress does not waste time reviewing rules that an agency might modify or withdraw.

For most rules, agencies would have four basic options, but they should not enforce unreported rules while they are considering these options. First, agencies would likely send many rules to Congress so that they can lawfully go into effect, though actions taken in reliance on them in the past should be reviewed.

Second, the agency could publish a notice declaring that a particular rule is being reevaluated, although that should eventually lead back to one of the other options.

Third, the agency could publish a notice stating that a particular rule is being modified or withdrawn. The procedural method to do so might vary depending on whether the rule at issue was a guidance document or one that received public comment. Most guidance documents could be modified or withdrawn easily without lengthy procedures. There is little reason for most guidance documents to be sent to Congress for review, unless the agency wants it to go into effect. However, some of the worst

guidance documents should be sent up for special reasons, including to allow Congress to disapprove them and block substantially similar rules in the future. With regard to a rule that had undergone public comment procedures, the agency would be prudent to issue an “interim final rule” and seek public comment on the proposed modification or withdrawal (see below).

Finally, the agency might submit certain rules to Congress with a request that it review and disapprove them, together with a statement of administration policy that the President would sign such disapproval. The agency necessarily would have to coordinate any submission of that type with OMB and likely others to secure the statement of administration policy on a presidential signature. Such officials may also wish to consult House and Senate leaders on any rule submitted with the intent that it be disapproved.

Some applications of CRA 3.0 may be challenged, including instances when another statute or court order required the old-but-never-final rule to be issued by a certain date. But for most discretionary rulemaking, especially for non-notice-and-comment rules, a CRA 3.0 withdraw notice would be easily justified, if not legally required by the CRA, and should be upheld by the courts.

Different Types of Covered Rules

Section 804(c) of the CRA [defines “rule” broadly](#) to sweep in almost every regulation, policy memorandum, enforcement manual or other guidance document an agency issues that has an impact on outside parties. Though the broad definition of a rule is surprising to some, the authors of the CRA consciously chose to include most agency guidance documents for good reason. As the chief sponsors explained in the Act’s [joint legislative history](#), they did so because the agencies were increasingly using guidance documents without notice-and-comment procedures for important matters, and they wanted Congress to have a record of them and to be able to disapprove those it didn’t like.

The CRA’s expedited review procedures for Congress in [section 802](#) of the Act do not differ at all depending on whether the rule submitted to Congress is a notice-

and-comment-type rule that was published in the Federal Register or a “Dear Colleague” Letter or other agency guidance document announcing the agency’s enforcement policy that was posted on its website. However, there may be some differences in how the administration handles rules that it chooses to modify or withdraw on its own, depending on the type of rule and the process used to formulate it.

If a final rule issued pursuant to notice-and-comment procedures (which allows the public to send comments to the regulatory agency) has lawfully gone into effect, including that it was sent to Congress, the Administrative Procedure Act (APA) normally requires the issuing agency to go through notice-and-comment procedures to repeal or modify it. But if a proposed rule was never finalized (either because it was stopped during the OMB or inter-agency review phase, because it was never published in the Federal Register, or because it was never sent to Congress under the CRA), its abandonment or modification might not always require notice-and-comment procedures. If so, that would be the result of the agency’s failure to complete the rulemaking process as the APA required. Even so, it would usually be helpful (and more legally defensible) for the agency to issue a new “interim final rule” for this type of rule that would announce it is not currently “in effect” or enforceable against third parties, as the CRA’s

plain language requires, and that notice-and-comment is being sought as to the rule’s modification, withdrawal or revocation. That notice-and-comment period would be particularly useful as a referendum on the costs and benefits of the agency’s (unlawful) implementation of the rule up to that point.

Early research on rules not sent to Congress under the CRA suggests that most of the significant (economically and socially) rules were not notice-and-comment rules. The law is clear that such agency documents, which include significant agency policy manuals and other guidance documents, can be modified or withdrawn without lengthy procedures. That is also true even if they were sent to Congress, but the difference is that the administration should drop pending enforcement actions that are based on the rules not sent to Congress because they were

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not lawfully “in effect.” And if it wants many guidance documents to go into effect in the future, it would have to submit them to Congress. Any other interpretation of the CRA, including reading the failure to submit rules to Congress as a “harmless error” or an unenforceable technicality, would render the CRA unworkable. Thus, the administration would be enforcing the clear text and public meaning of the CRA by treating rules not sent to Congress as not in effect and subject to its determination whether to finalize the rule or not.

Number of Important Rules Impacted

Independent scholars have counted thousands of rules from the Obama administration alone that were not sent to Congress as required by the CRA. (See [one recent study](#) from the Administrative Conference of the United States that found approximately 1000 rules per year that were published in the Federal Register and not sent to Congress, and there were hundreds or thousands more per year that were neither published in the Federal Register nor sent to Congress.) Most were inconsequential or create little harm, but Red Tape Rollback partners and others are discovering many extremely problematic rules with significant negative effects on Americans that were not sent to Congress.

Recently, Brookings Institute scholars identified 348 “significant” rules that were published in the Federal Register and not sent to both Houses of Congress and GAO as required under the CRA. Although that total

is certainly newsworthy, the Brookings Institute study excludes many categories of rules. The first are those which were published in the Federal Register but were not scored as “economically” significant—but may still be socially, culturally, or otherwise harmful for many Americans. Second, and most importantly, the Brookings team did not even attempt to count the number of significant agency guidance documents, enforcement manuals, “Dear Colleague” letters, and the like that were not published in the Federal Register. They mistakenly believe this last category is unimportant because they fail to understand some legal implications of the CRA (the Brookings scholars disavowed any legal expertise). Most importantly, they fail to understand or acknowledge that past agency actions relying on them were improper. That impact on prior actions is a “game changer” in itself.

President Trump could direct agencies to send hundreds of these regulations to Congress in an orderly process over the next several years. Many would be sent to Congress so that they could finally go into lawful effect. But for some others, the administration should ask our democratic representatives to disallow the rule because it wants to block any substantially similar rule in the future. And the administration could take care of many more burdensome and illegal rules on its own without bothering Congress. That’s the power of CRA 2.0 and CRA 3.0, to reach even further back and permanently kill harmful and abusive rules so they can never be issued again.