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Presidential Transitions: The Congressional Review Act

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*This alert is the second in a series on what to expect during the transition between administrations with respect to education policy. See the first alert, **Presidential Transitions: A Primer on Rulemakings**.*

Lately, there have been many questions as to whether Congress might employ the Congressional Review Act (CRA) as a tool to roll back certain Obama Administration rules promulgated over the last few months, such as the Department of Education's Borrower Defense to Repayment (BDTR) final rule. There is elevated interest in the CRA because the amount and significance of policy making through agency rulemaking has increased in recent years. Congress may now sense an opportunity to re-assert its authority. But decisions to use the CRA procedures, and on which final rule or rules, are fundamentally political questions as much as procedural ones.

The CRA[1] was enacted in 1996 as a way for Congress to have oversight and control over agency rulemaking. The CRA requires federal agencies to submit all final regulations to the House of Representatives and Senate as well as the Government Accountability Office (GAO) before they can take effect. The CRA also creates a set of expedited procedures, primarily in the Senate, through which Congress may enact joint resolutions disapproving agency final rules submitted within 60 days of congressional adjournment.[2] If a rule is disapproved through the CRA, the legislation specifies that the rule "shall not take effect" (or shall not continue, if it has already taken effect). Importantly, the CRA also states that a disapproved rule may not be reissued in a "substantially" similar form without subsequent statutory authorization. While there has been legislation passed by the House of Representatives to change the review process, at present, the procedures under the CRA must be applied on a rule-by-rule basis.[3]

Currently, the BDTR final rule and State Authorization rule – if finalized – would be eligible for disapproval under the CRA. Moreover, the recently announced "procedural rule" for BDTR could also be eligible for disapproval if issued as a final rule or interim final rule. The Gainful Employment final rule is *not* subject to CRA disapproval as it was issued in October 2014. It would therefore need to be the subject of separate Congressional action, or a further rulemaking, if the next Administration decides to repeal or amend the rule.

As mentioned above, the mechanism for Congress to reject a final rule is passage of a joint resolution of disapproval. This joint resolution must also be signed into law by the President. This fact has historically limited the use of CRA to overturn rulemakings. In fact, of the approximately 72,000 final rules that have been submitted to Congress since the legislation was enacted in 1996, the CRA has been used to disapprove only one rule: the Occupational Safety and Health Administration's November 2000 final rule on ergonomics, which was overturned in March 2001. However, under a specific set of circumstances, such as the turnover in party control of the White House where the incoming President shares a party affiliation with a majority in both houses of Congress as will be the case in January 2017, using the CRA has a greater likelihood of success. The March 2001 rejection of the ergonomics rule was the result of a similar set of circumstances.

Any final rule that is reported within 60 legislative working days of adjournment of the Senate or 60 legislative days of adjournment of the House (whichever comes first), is subject to a joint resolution of disapproval in the succeeding session of Congress under the CRA. The Congressional Research Service currently estimates that rules submitted to Congress after May 30, 2016 are subject

to review in 2017 by the 115th Congress and Trump Administration. This estimation can change if Congress adjourns *sine die*[4] before the scheduled date of December 16, 2016. This does not change the CRA analysis for BDTR or GE.

As the current administration draws to a close and the pace of final rulemakings increases, expect these questions to be asked and answered.

Notes

1. 5 USC §§801-808.
2. Simple majority votes are required in both chambers of Congress to proceed to consideration and pass a joint resolution of disapproval.
3. The House of Representatives passed the Midnight Rules Relief Act on November 17, which would allow consideration of more than a single rule in a joint resolution of disapproval. However, there is little likelihood it will be signed into law.
4. The final adjournment of an annual or the two-year session of a Congress.

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