Published on *Center for Effective Government* (http://www.foreffectivegov.org)

Attempts to Use Congressional Review Act for Proposed Rules Threaten All Public Safeguards

by Katie Weatherford, 3/11/2014

Senate Minority Leader Mitch McConnell (R-KY) has recently taken an unprecedented action by introducing a joint resolution to disapprove of the U.S. Environmental Protection Agency's (EPA) proposed greenhouse gas emissions limits for new power plants. Through the resolution, McConnell is attempting to utilize the accelerated legislative procedures provided in the Congressional Review Act, even though the law was designed only for reviewing final agency rules.

This expansive application of the Congressional Review Act to challenge proposed rules, if allowed, would set a dangerous precedent: any member of Congress could challenge a rule before it has even been written. This not only circumvents traditional legislative procedures, it also forecloses the ability of an agency to issue important rules before the agency has even had an opportunity to solicit and respond to comments from the public. As a result, this political stunt has broad implications for all agency rules under development, including tobacco standards, motor vehicle safety, energy efficiency, child nutrition, and more.

Background: The Congressional Review Act

The Congressional Review Act (CRA) was enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA), included in the Contract with America. Under the act, before a final rule can take effect, the issuing agency must submit to Congress and the Comptroller General a copy of the rule and a statement describing the rule, its purpose, and its proposed effective date. If the rule is "major" – defined as having an annual economic impact of $100 million or more; increases costs or prices for consumers, industries, or state and local governments; or has an adverse effect on the economy – then the rule is delayed from going into effect for 60 days, starting from the date the agency publishes the final rule in the *Federal Register* or the date the rule is submitted to Congress, whichever is later.

The CRA also established accelerated legislative procedures for Congress to review and disapprove of final rules issued by federal agencies. Upon receiving the final rule and report from an agency, any member of Congress may introduce a joint resolution of disapproval for the rule within 60

days. In the Senate, resolutions are considered according to special procedural rules spelled out in the CRA that provide a mechanism for moving a rule out of committee after 20 days, prohibit filibusters or amendments, and limit floor debate.

For resolutions introduced in the House, there is no petition procedure to move a resolution out of committee. When either the House or Senate has adopted the resolution, it sends it to the other chamber for consideration without the possibility of amendments.

If Congress adopts a joint resolution of disapproval, the resolution is sent to the president for his signature. If the president chooses to veto the resolution, Congress still has 30 days in which it can override the veto. If a rule is invalidated under the Congressional Review Act, the rule is retrospectively invalidated and has "no force or effect." For rules subject to statutorily or judicially imposed deadlines, passage of a joint resolution of disapproval results in a one-year extension. Once a disapproval resolution is passed, the agency cannot issue the same or substantially similar rule in the future unless Congress passes a bill that gives the agency such authority.

For more detailed information on the CRA, check out our Regulatory Resource Center.

Resolutions of Disapproval on the Rise, Along with Congressional Overreach

Since the Congressional Review Act was enacted, 97 joint resolutions of disapproval have been introduced to invalidate 60 different agency actions. But only one rule – the Occupational Safety and Health Administration's (OSHA) ergonomics rule – has ever been invalidated under a resolution of disapproval filed under the CRA process. On Nov. 14, 2000, OSHA finalized a workplace ergonomics standard that had been under development for over a decade. The following January, President George W. Bush took office, succeeding former President Bill Clinton. In March 2001, a joint resolution of disapproval was introduced in the Senate. After passage in both the Senate and House, President Bush signed the resolution into law, thereby invalidating the standard. Thus, OSHA's ergonomics rule had "no force or effect," and the agency was barred from promulgating a "substantially similar" rule in the future without an express act of Congress authorizing the agency to issue such a rule.

60 Agency Actions Challenged By CRA Resolutions, 1996-2014	
U.S. Environmental Protection Agency (EPA)	12
Department of Health and Human Services (HHS)	12
Department of Agriculture (USDA)	3
Department of Energy (DOE)	3
Department of the Treasury (Treasury)	5

Department of Labor (DOL)	4
Federal Communications Commission (FCC)	4
Department of Homeland Security (DHS)	2
Federal Election Commission (FEC)	2
Office of Comptroller of the Currency (OCC)	2
Federal Energy Regulatory Commission (FERC)	1
Department of the Interior (DOI)	1
Department of Commerce (DOC)/Department of the Interior	1
United States Postal Service (USPS)	1
Office of Personnel Management (OPM)	1
National Labor Relations Board (NLRB)	1
National Mediation Board (NMB)	1
U.S. Agency for International Development (USAID)	1
Department of Veterans Affairs	1
Presidential Memoranda*	1
Proposed Rules*	1

**Presidential Memoranda and Proposed Rules are not "covered rules" under the CRA*

Until recently, only one resolution had ever been filed that sought to disapprove of a rule not covered under the act. During the 107th Congress, S.J. Res. 17 sought to disapprove of a presidential memorandum, which is not a "covered rule" for purposes of the CRA, rendering the resolution ineffective.

The use of the CRA procedures to object to rules is growing. During the 112th Congress, more joint resolutions of disapproval were introduced than ever before, representing 27 percent of all the resolutions of disapproval ever filed.

Number of Resolutions of Disapproval Filed by Each Party, 104th-113th Congress					
Congress	**House**		**Senate**		**Total**
	Repubs	**Dems**	**Repubs**	**Dems**	
104th	2	0	0	0	2
105th	4	0	2	0	6
106th	3	1	1	0	5
107th	5	1	2	5	13
108th	2	4	0	3	9
109th	0	2	0	2	4
110th	0	7	0	6	13
111th	5	3	4	1	13
112th	16	0	10	0	26
113th (through 3/6/14)	2	0	4	0	6

In the current Congress, two joint resolutions have been introduced to disapprove EPA's *proposed* greenhouse gas emissions rule for new power plants, even though logically the CRA only applies to final agency actions. H.J. Res. 64 was introduced in the House by Rep. David McKinley (R-WV) on Sept. 25, 2013, before EPA's proposed rule was even officially published in the *Federal Register*. The second resolution, filed by McConnell on Jan. 16, 2014, targets the same EPA proposal, but it was not introduced until the agency published the proposal.

Attacking Proposed Rules with CRA Sets a Dangerous Precedent

Regardless of the specific content of the rule at issue, allowing these joint resolutions of disapproval attacking EPA's *proposed* rule will set a dangerous precedent for ***all*** agency rules under development, not just EPA's. Any member of Congress who dislikes any action an agency is planning to take, no matter how far into the future, could challenge the rule before the agency has even finished writing it.

The Coalition for Sensible Safeguards, which the Center for Effective Government co-chairs, recently sent a letter opposing McConnell's joint resolution. In the letter, the coalition writes, "If this effort were successful, every agency's standard-setting and enforcement capabilities would be on the chopping block." The coalition added that what is perhaps most troubling with this recent stunt is that "allowing these types of CRA resolutions of disapproval to go forward would not only void the proposed rule, but would also poison an agency's ability to re-issue *any* similar rule or proposal."

With resolutions of disapproval already on the rise, the consequences of setting this precedent are disturbing. By way of example, the Food and Drug Administration's (FDA) rulemaking defining "tobacco product" to include not only cigarettes, but other tobacco products like e-cigarettes, could be targeted. Congress expressly authorized FDA to issue this rule in the Family Smoking Prevention and Tobacco Control Act. Yet if a precedent is set that allows members of Congress to introduce a joint resolution to disapprove of rules under development, FDA's rule could be invalidated before the agency has even finished writing it. Not only would this outcome be contrary to what Congress intended, but millions of Americans would remain unprotected from the harmful health effects associated with tobacco products.

The use of the CRA process to block proposed rules could even extend to motor vehicle safety, such as the National Highway Traffic Safety Administration's (NHTSA) rule to require improved rearview mirrors or other technology to prevent children from being hurt or even killed in back-over accidents. Congress passed the Cameron Gulbransen Kids Transportation Safety Act in 2009, which required NHTSA to finalize the rule by February 2011. But after a series of delays, the rule is currently pending review at the Office of Information and Regulatory Affairs (OIRA) and is not expected to be completed until January 2015. If any member of Congress could attack the rule before it is even finalized, the statutory deadline would be delayed for yet another year, leaving thousands of children at risk of being injured and possibly killed in tragic back-over collisions.

The results would be the same for any rule an agency plans to develop, now or in the future. This includes energy efficiency standards currently under development by the Department of Energy (DOE), agency efforts to provide flu shots to Medicare and Medicaid recipients, and even rules intended to improve the integrity of child nutrition programs.

Conclusion

Efforts to circumvent the legislative process by using the Congressional Review Act to attack proposed rules should not be allowed to continue. Members of Congress should not be permitted to bypass the traditional legislative procedures to invalidate important public safeguards before the agency has even finished writing the rule. Setting such a dangerous precedent would allow anti-regulatory members of Congress to undermine agencies' efforts to issue much-needed health, safety, and environmental protections.
