

MEMORANDUM

November 17, 2016

Subject: “Major” Obama Administration Rules Potentially Eligible to be Overturned under the Congressional Review Act in the 115th Congress

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This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum lists “major” rules issued by federal agencies under the Obama Administration that are potentially subject to consideration under the procedures of the Congressional Review Act (CRA) in the 115th Congress.

Background on the Congressional Review Act

The CRA is a tool that Congress may use to overturn a rule issued by a federal agency, including, in some cases, rules issued in a previous session of Congress and by a previous President.¹ The CRA requires agencies to report on their rulemaking activities to Congress and provides Congress with a special set of procedures under which to consider legislation to overturn those rules. The CRA, which was enacted in 1996, was largely intended to assert control over agency rulemaking by establishing a special set of expedited or “fast track” legislative procedures for this purpose, primarily in the Senate.²

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 one rule: the Occupational Safety and Health Administration’s November 2000 final rule on ergonomics, which was overturned using the CRA in March 2001.³ The primary reason the CRA has overturned one rule in the 20 years since its enactment is that under most circumstances, it is likely that a President would veto such a resolution in order 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. However, under a specific set of circumstances—a

¹ For more information about the CRA, see CRS Report R43992, *The Congressional Review Act: Frequently Asked Questions*, by Maeve P. Carey, Alissa M. Dolan, and Christopher M. Davis.

² For a detailed discussion of the CRA’s disapproval procedures, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth. For a discussion of the “carryover” procedures, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth.

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).

turnover in party control of the White House, particularly a turnover in which the incoming President shares a party affiliation with a majority in both houses of Congress—the CRA is more likely to be used successfully. The March 2001 rejection of the ergonomics rule was the result of that set of circumstances. Similar circumstances will take place in 2017 after the start of the 115th Congress and after President-elect Donald J. Trump is sworn into office.

CRA “Reset” Mechanism

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 periods to submit and act on a disapproval resolution “reset” in their entirety in the next session of Congress.⁴ 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.”⁵ This provision applies in every session of Congress, but it is of particular relevance in sessions of Congress that coincide with presidential transitions. This provision allows, for a limited time period, a new Congress to consider a joint resolution disapproving a rule issued late in the previous administration. If introduced and considered at the proper time, such a joint resolution cannot be filibustered in the Senate.

The projected second-session meeting schedules of the House and Senate issued by each chamber’s majority leader may be used to estimate the date in 2016 after which final rules submitted to Congress will be subject to the renewed review periods in 2017 described above. The estimated start of the reset period for all rules was determined by counting back from the projected sine die adjournment in the respective chambers—60 days of session in the Senate and 60 legislative days in the House—then taking the earlier of the two dates.

Under this calculation, CRS estimates that agency final rules submitted to Congress after May 30, 2016, will be subject to renewed review periods in 2017 by a new President and a new Congress.⁶ Importantly, however, if the chambers deviate from the schedule projected by the party leaders, these estimates will necessarily change. Furthermore, CRS day count estimates are unofficial and non-binding; the House and Senate Parliamentarians are the sole definitive arbiters of the operation of the CRA mechanism and should be consulted if a formal opinion is desired.

“Major” Obama Administration Rules Potentially Eligible for Consideration under the CRA in 2017

Using this estimated reset date of May 30, 2016, CRS compiled a list of major rules that would fall under this reset period—i.e., rules that could be overturned in the 115th Congress using the CRA.

Table 1 lists the major rules CRS has identified as of November 16, 2016, that could be eligible for the reset mechanism.⁷ To identify these rules, CRS used a two-step process. First, CRS consulted the

⁴ “Legislative days” end each time a chamber adjourns and begin each time it convenes after an adjournment. A “session day” is any calendar day on which a chamber meets, regardless of the length of the session. A pro forma meeting qualifies as a day of session.

⁵ In the following session, the renewed periods for review begin on the 15th day of session in the Senate and the 15th legislative day in the House.

⁶ For a more detailed discussion of the “reset” mechanism and this estimate, see CRS Insight IN10437, *Agency Final Rules Submitted After May 30, 2016, May Be Subject to Disapproval in 2017 Under the Congressional Review Act*, by Christopher M. Davis and Richard S. Beth.

⁷ Importantly, the CRA can be used to overturn both major and non-major rules. This list is limited to major rules because they (continued...)

Government Accountability Office's (GAO's) federal rules database to identify major rules that were issued during calendar year 2016 as of November 16, 2016.⁸ Second, CRS used LIS's "Executive Communications" database to identify when these rules were received in Congress.⁹ As explained above, rules received in Congress after May 30, 2016, could be eligible for consideration under the CRA, but the precise date could fall slightly earlier or later than that depending on the schedules in each chamber for the remainder of the 114th Congress. If the date falls earlier than May 30, there may be additional rules subject to the reset mechanism that are not included on this list.

(...continued)

are of the greatest economic effect and therefore may be of the most interest to Congress, and because of the high volume of non-major rules submitted to Congress.

The CRA defines a major rule as "any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget [OMB] finds has resulted in or is likely to result in— (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets."

⁸ GAO's federal rules database is available at <http://gao.gov/legal/congressional-review-act/overview>. Under the CRA, agencies are required to submit their rules to GAO; GAO is then required to prepare and submit to Congress a report on each major rule within 15 calendar days of its submission or publication date. This report is to contain "an assessment of the agency's compliance with procedural steps" required for the rule, including any cost-benefit analysis or other analysis under certain statutes such as the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.

⁹ When final rules are submitted to Congress pursuant to the CRA, notice of each chamber's receipt and referral appears in the respective House and Senate sections of the daily *Congressional Record* devoted to "Executive Communications." They are also entered into a database which can be searched using LIS. House communications can be accessed at <https://www.congress.gov/execomh/search.html> and Senate communications at <https://www.congress.gov/execcoms/search.html>.

Table I. Major Rules Issued by the Obama Administration that are Potentially Eligible for Disapproval under the Congressional Review Act in the 115th Congress

As of November 16, 2016

| Title of Rule (As Published in Federal Register) | RIN Number | Agency | Date Rule was Published in Federal Register and Citation | Date Received in Senate and EC Number | Date Received in House and EC Number |
|---|-------------------|---|---|--|---|
| Establishment of the Electronic Visa Update System (EVUS) | 1651-AB08 | Department of Homeland Security, U.S. Customs and Border Protection | Oct. 20, 2016 81 FR 72481 | No record identified | Oct. 18, 2016 7326 |
| ONC Health IT Certification Program: Enhanced Oversight and Accountability | 0955-AA00 | Department of Health and Human Services, Office of the Secretary | Oct. 19, 2016 81 FR 72404 | Nov. 15, 2016 7313 | Oct. 14, 2016 7191 |
| Clearing Requirement Determination Under Section 2(H) Of The Commodity Exchange Act For Interest Rate Swaps | 3038-AE20 | Commodity Futures Trading Commission | Oct. 14, 2016 81 FR 71202 | No record identified | Oct. 12, 2016 7052 |
| Standards For Covered Clearing Agencies | 3235-AL48 | Securities And Exchange Commission | Oct. 13, 2016 81 FR 70786 | No record identified | Sept. 30, 2016 7089 |
| Medicare And Medicaid Programs; Reform Of Requirements For Long-Term Care Facilities | 0938-AR61 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services | Oct. 4, 2016 81 FR 68688 | No record identified | Sept. 29, 2016 7458 |
| Child Care And Development Fund (CCDF) Program | 0970-AC67 | Department Of Health And Human Services, Administration For Children And Families | Sept. 30, 2016 81 FR 67438 | No record identified | Sept. 23, 2016 6984 |
| Establishing Paid Sick Leave For Federal Contractors | 1235-AA13 | Department Of Labor, Office Of The Secretary | Sept. 30, 2016 81 FR 67598 | No record identified | Sept. 30, 2016 7277 |
| OCC Guidelines Establishing Standards For Recovery Planning By Certain Large Insured National Banks, Insured Federal Savings Associations, And Insured Federal Branches; Technical Amendments | 1557-AD96 | Department Of The Treasury, Office Of The Comptroller Of The Currency | Sept. 29, 2016 81 FR 66791 | No record identified | Sept. 29, 2016 7093 |
| Emergency Preparedness Requirements For Medicare And Medicaid Participating Providers And Suppliers | 0938-AO91 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services: Medicare And Medicaid Programs | Sept. 16, 2016 81 FR 63860 | Sept. 19, 2016 6909 | Sept. 13, 2016 6850 |
| Migratory Bird Hunting Regulations On Certain Federal Indian Reservations And Ceded Lands For The 2016-17 Season | 1018-BA70 | Department Of The Interior, Fish And Wildlife Service | Sept. 9, 2016 81 FR 62404 | Nov. 15, 2016 7246 | Oct. 5, 2016 7310 |
| Safety And Effectiveness Of Consumer Antiseptics; Topical Antimicrobial Drug Products For Over-The-Counter-Human Use | 0910-AF69 | Department Of Health And Human Services, Food And Drug Administration | Sept. 6, 2016 81 FR 61106 | Sept. 28, 2016 7033 | Sept. 22, 2016 6971 |

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|---|---------------------------------------|---|---|--|---|
| Head Start Performance Standards | 0970-AC63 | Department Of Health And Human Services, Administration For Children And Families | Sept. 6, 2016 81 FR 61294 | Sept. 8, 2016 6797 | Sept. 2, 2016 6734 |
| Standards Of Performance For Municipal Solid Waste Landfills | 2060-AM08 | Environmental Protection Agency | Aug. 29, 2016 81 FR 59332 | Sept. 6, 2016 6322 | July 22, 2016 6278 |
| Emission Guidelines And Compliance Times For Municipal Solid Waste Landfills | 2060-AS23 | Environmental Protection Agency | Aug. 29, 2016 81 FR 59276 | Sept. 6, 2016 6321 | July 22, 2016 6279 |
| Federal Acquisition Regulation; Fair Pay And Safe Workplaces | 9000-AM81 | Department Of Defense, General Services Administration, And National Aeronautics And Space Administration | Aug. 25, 2016 81 FR 58562 | Sept. 6, 2016 6725 | Aug. 23, 2016 6711 |
| Medicare Program; Hospital Inpatient Prospective Payment Systems For Acute Care Hospitals And The Long-Term Care Hospital Prospective Payment System & Policy Changes & Fiscal Year 2017 Rates; Quality Reporting Requirements For Specific Providers; Graduate Medical Education; Hospital Notification Procedures Applicable To Beneficiaries Receiving Observation Services; Technical Changes Relating To Costs To Organizations & Medicare Cost Reports; Finalization Of Interim Final Rules With Comment Period On LTCH PPS Payments For Severe Wounds, Modifications Of Limitations On Redesignation By The Medicare Geographic Classification Review Board, & Extensions Of Payments To MDHS And Low-Volume Hospitals | 0938-AS77, 0938-AS88, 0938-AS41 | Department Of Health & Human Services, Centers For Medicare & Medicaid Services | Aug. 22, 2016 81 FR 56762 | Sept. 6, 2016 6378 | Aug. 4, 2016 6682 |
| Workforce Innovation And Opportunity Act; Joint Rule For Unified And Combined State Plans, Performance Accountability, And The One-Stop System Joint Provisions; Final Rule | 1205-AB74 | Department Of Labor, Employment And Training Administration, And Department Of Education | Aug. 19, 2016 81 FR 55792 | Sept. 6, 2016 6648 | Aug. 19, 2016 6385 |
| Workforce Innovation And Opportunity Act | 1205-AB73 | Department Of Labor, Employment And Training Administration | Aug. 19, 2016 81 FR 56072 | Sept. 6, 2016 6649 | Aug. 19, 2016 6384 |

| Title of Rule (As Published in Federal Register) | RIN Number | Agency | Date Rule was Published in Federal Register and Citation | Date Received in Senate and EC Number | Date Received in House and EC Number |
|--|-------------------|--|---|--|---|
| Medicare Program; Prospective Payment System And Consolidated Billing For Skilled Nursing Facilities For FY 2017, SNF Value-Based Purchasing Program, SNF Quality Reporting Program, And SNF Payment Models Research | 0938-AS75 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services | Aug. 5, 2016 81 FR 51970 | Sept. 6, 2016 6381 | Aug. 4, 2016 6687 |
| Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System For Federal Fiscal Year 2017 | 0938-AS78 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services | Aug. 5, 2016 81 FR 52056 | Sept. 6, 2016 6379 | Aug. 4, 2016 6680 |
| Medicare Program; FF 2017 Hospice Wage Index And Payment Rate Update And Hospice Quality Reporting Requirements | 0938-AS79 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services | Aug. 5, 2016 81 FR 52144 | Sept. 6, 2016 6377 | Aug. 4, 2016 6679 |
| Margin And Capital Requirements For Covered Swap Entities | 3052-AC69 | Department Of The Treasury, Office Of The Comptroller Of The Currency; Federal Reserve System; Federal Deposit Insurance Corporation; Farm Credit Administration; Federal Housing Finance Agency | Aug. 2, 2016 81 FR 50605 | Sept. 6, 2016 6211 | July 28, 2016 6347 |
| Medicare Program; FY 2017 Inpatient Psychiatric Facilities Prospective Payment System--Rate Update | 0938-AS76 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services | Aug. 1, 2016 81 FR 50502 | Sept. 6, 2016 6380 | Aug. 10, 2016 6678 |
| National School Lunch Program And School Breakfast Program: Nutrition Standards For All Foods Sold In School As Required By The Healthy, Hunger-Free Kids Act Of 2010 | 0584-AE09 | Department Of Agriculture, Food And Nutrition Service | July 29, 2016 81 FR 50132 | Sept. 6, 2016 6226 | Aug. 5, 2016 6389 |
| Revised Critical Infrastructure Protection Reliability Standards | No RIN provided | Department Of Energy, Federal Energy Regulatory Commission | July 29, 2016 81 FR 49878 | Sept. 6, 2016 6273 | Aug. 5, 2016 6489 |
| Amendments To The Commission's Rules Of Practice | 3235-AL87 | Securities And Exchange Commission | July 29, 2016 81 FR 50212 | Sept. 6, 2016 6258 | July 19, 2016 6195 |
| Disclosure Of Payments By Resource Extraction Issuers | 3235-AL53 | Securities And Exchange Commission | July 27, 2016 81 FR 49360 | July 7, 2016 6059 | June 30, 2016 5917 |
| Migratory Bird Hunting; Seasons And Bag And Possession Limits For Certain Migratory Game Birds | 1018-BA70 | Department Of The Interior, Fish And Wildlife Service | July 25, 2016 81 FR 48648 | No record identified | No record identified |

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|---|-------------------|---|---|--|---|
| Oil And Gas And Sulfur Operations On The Outer Continental Shelf--Requirements For Exploratory Drilling On The Arctic Outer Continental Shelf | 1082-AA00 | Department Of The Interior, Bureau Of Safety And Environmental Enforcement, Bureau Of Ocean Energy Management | July 15, 2016 81 FR 46478 | July 14, 2016 6163 | July 7, 2016 6014 |
| Medication Assisted Treatment For Opioid Use Disorders | 0930-AA22 | Department Of Health And Human Services | July 8, 2016 81 FR 44712 | July 12, 2016 6127 | July 7, 2016 5996 |
| Department Of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments | 1290-AA31 | Department Of Labor, Employment And Training Administration, Office Of Workers' Compensation Programs, Office Of The Secretary, Wage And Hour Division, Occupational Safety And Health Administration, Employee Benefits Security Administration, Mine Safety And Health Administration | July 1, 2016 81 FR 43430 | July 12, 2016 6126 | July 5, 2106 6169 |
| General Administrative Regulations; Catastrophic Risk Protection Endorsement; Area Risk Protection Insurance Regulations; And The Common Crop Insurance Regulations, Basic Provisions | 0563-AC49 | Department Of Agriculture, Federal Crop Insurance Corporation | June 30, 2016 81 FR 42453 | No record identified | No record identified |
| Transition Assistance Program (TAP) For Military Personnel | 0790-AJ17 | Department Of Defense, Office Of The Secretary | June 28, 2016 81 FR 41803 | July 7, 2016 6056 | July 11, 2016 5992 |
| Operation And Certification Of Small Unmanned Aircraft Systems | 2120-AJ60 | Department Of Transportation, Federal Aviation Administration | June 28, 2016 81 FR 42064 | July 6, 2016 6052 | June 30, 2016 6063 |
| Transit Asset Management; National Transit Database; FTA-2014-0020 | 2132-AB07 | Department Of Transportation, Federal Transit Administration | June 26, 2016 81 FR 48890 | Sept. 6, 2016 6453 | July 29, 2016 6638 |
| Revision Of Fee Schedules; Fee Recovery For Fiscal Year 2016 | 3150-AJ66 | Nuclear Regulatory Commission | June 24, 2016 81 FR 41171 | June 23, 2016 5895 | June 22, 2016 5828 |
| Medicare Program; Medicare Clinical Diagnostic Laboratory Tests Payment System | 0938-AS33 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services | June 23, 2016 81 FR 41036 | June 28, 2016 5928 | June 24, 2016 5848 |
| James Zadroga 9/11 Victim Compensation Fund Reauthorization Act | 1105-AB49 | Department of Justice | June 15, 2016 81 FR 38936 | July 7, 2016 6081 | June 28, 2016 5856 |

| Title of Rule (As Published in Federal Register) | RIN Number | Agency | Date Rule was Published in Federal Register and Citation | Date Received in Senate and EC Number | Date Received in House and EC Number |
|---|-------------------|---|---|--|---|
| Energy Conservation Program: Energy Conservation Standards For Battery Chargers | 1904-AB57 | Department of Energy | June 13, 2016 81 FR 38266 | June 28, 2016 5927 | June 27, 2016 5853 |
| Energy Conservation Program: Energy Conservation Standards For Dehumidifiers | 1904-AC81 | Department of Energy | June 13, 2016 81 FR 38338 | June 29, 2016 5959 | June 28, 2016 5852 |
| Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations--Revised Benchmark Rebased Methodology, Facilitating Transition To Performance-Based Risk, And Administrative Finality Of Financial Calculations | 0938-AS67 | Department Of Health And Human Services, Centers For Medicare & Medicaid Services | June 10, 2016 81 FR 37950 | June 8, 2016 5648 | June 7, 2016 5642 |
| Oil And Natural Gas Sector: Emission Standards For New, Reconstructed, And Modified Sources | 2060-AS30 | Environmental Protection Agency | June 3, 2016 81 FR 35824 | No record identified | May 20, 2016 5484 |
| Margin Requirements For Uncleared Swaps For Swap Dealers And Major Swap Participants--Cross-Border Application Of The Margin Requirements | 3038-AC97 | Commodity Futures Trading Commission | May 31, 2016 81 FR 34818 | June 10, 2016 5711 | June 8, 2016 5658 |
| Food Labeling: Revision Of The Nutrition And Supplement Facts Labels | 0910-AF22 | Department Of Health And Human Services, Food And Drug Administration | May 27, 2016 81 FR 33742 | June 8, 2016 5650 | June 7, 2016 5631 |
| Mitigation Strategies To Protect Food Against Intentional Adulteration | 0910-AG63 | Department Of Health And Human Services, Food And Drug Administration | May 27, 2016 81 FR 34166 | June 8, 2016 5651 | June 7, 2016 5646 |
| Food Labeling: Serving Sizes Of Foods That Can Reasonably Be Consumed At One Eating Occasion; Dual-Column Labeling; Updating, Modifying, And Establishing Certain Reference Amounts Customarily Consumed; Serving Size For Breath Mints; And Technical Amendments | 0910-AF23 | Department Of Health And Human Services, Food And Drug Administration | May 27, 2016 81 FR 34000 | June 8, 2016 5652 | June 7, 2016 5647 |
| Member Business Loans; Commercial Lending | 3133-AE37 | National Credit Union Administration | March 14, 2016 81 FR 13530 | June 8, 2016 5676 | June 8, 2016 5667 |
| Removal Of Mandatory Country Of Origin Labeling Requirements For Beef And Pork Muscle Cuts, Ground Beef, And Ground Pork | 0581-AD29 | Department Of Agriculture, Agricultural Marketing Service | March 2, 2016 81 FR 10755 | April 5, 2016 4757 | No record identified |

Source: Government Accountability Office Federal Rules Database, at <http://gao.gov/legal/congressional-review-act/overview>; and the Legislative Information System’s “Executive Communications” database, at <https://www.congress.gov/execomh/search.html> (House communications) and <https://www.congress.gov/execcoms/search.html> (Senate communications).

Notes: The date of receipt in Congress is the later of the two dates that the rule was received in each chamber. Dates in the final three columns vary because an agency may send a rule to the Office of the Federal Register at any time for publication, while dates of receipt in Congress can depend upon when the agency sends the rule to Congress and the congressional schedule.

Rules included in the table were listed in GAO’s federal rules database as of November 16, 2016. CRS checked the “Executive Communications” database for dates of receipt in each chamber on November 16, 2016.

The citation “No record identified” indicates that CRS was unable to locate any record in the House or Senate Executive Communications Databases indicating that the final rule in question had been received in that chamber.