

Alert | Government Law & Policy



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Will the New Congress Reverse Any ‘Midnight Rules?’

With the outcome of last week’s Georgia Senate runoff elections producing a 50-50 Senate ratio and giving Senate Democrats majority status, there is renewed interest in the Congressional Review Act (CRA) (5 U.S.C. 801 et seq.). Under the CRA, a new Congress can act within its first 75 days of legislative session to reverse “major rules” promulgated by federal agencies during the last 60 legislative days of the previous Congress.

In 2017, Congress used the CRA to pass “resolutions of disapproval” and nullify 16 different federal regulations promulgated in the last months of the Obama Administration. Under the statute, CRA resolutions are considered under expedited procedures and not subject to Senate filibuster rules. This means a simple majority – including all 50 Democratic (and left-leaning independent) senators plus incoming Vice President Kamala Harris breaking a tie if necessary – could pass such a resolution of disapproval in the new Senate.

The calculation of the 60-day lookback period has been a matter of speculation in recent months. Some thought that with the cancellation of so many congressional days in session due to the pandemic, the count of 60 days of session would stretch back to May. However, both the House and Senate scheduled semiweekly “pro forma” sessions throughout the year to keep President Trump from making recess appointments. (By contrast, in 2016 there was no House session at all for 42 straight days during the

August break and again for 46 straight days before and after the election.) Pro forma days count, making the lookback period much shorter.

Now that the 2020 session of Congress has concluded, it appears that the lookback period will extend to major rules issued on or after August 21, 2020. Therefore, the 117th Congress theoretically may consider overturning hundreds of federal agency actions. Practically, however, Congress will need to focus on a relatively small number of consequential and controversial agency actions. Here are 16 regulations that Congress might consider reversing:

- **Comptroller of the Currency Fair Access to Financial Services Rule:** Limits ability of banks to cut off lending services to fossil fuel companies, signed January 14, 2021 (to be published in the *Federal Register* on Feb. 1, 2021)
- **Department of Energy Efficiency Standards (2):** Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers, 85 Fed. Reg. 68723 (October 30, 2020); Energy Conservation Program: Definition of Showerheads, 85 Fed. Reg. 61653 (Sept. 30, 2020)
- **Environmental Protection Agency Methane Rule:** Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57018 (Sept. 14, 2020)
- **Environmental Protection Agency Scientific Transparency Rule:** Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021)
- **Environmental Protection Agency Cost-Benefit Analysis:** Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84130 (Dec. 23, 2020)
- **Environmental Protection Agency Ozone Standards:** Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87256 (Dec. 31, 2020)
- **Environmental Protection Agency Particulate Matter (Soot) Standards:** Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 82684 (Dec. 18, 2020)
- **Environmental Protection Agency Lead and Copper Rule:** Retains existing lead action level and relaxes schedule for replacing lead water lines, 86 Fed. Reg. 4198 (Jan. 15, 2021)
- **Department of Health and Human Services Sunset Rule:** Sunsets HHS regulations subject to the Regulatory Flexibility Act automatically after ten years unless specifically extended; Securing Updated and Necessary Statutory Evaluations Timely, Docket No. HHS-OS-2020-0012 (Jan. 8, 2021)
- **Department of Homeland Security H1-B Lottery Replacement:** Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, 86 Fed. Reg. 1676 (Jan. 8, 2021)
- **Department of Justice Asylum Eligibility Rules:** Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81698 (Dec. 16, 2020)
- **Department of Interior Endangered Species:** Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82376 (Dec. 18, 2020)
- **Department of Interior Migratory Bird Rule:** Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021)

- **Department of Labor Independent Contractor Definition:** Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021)
- **Department of Transportation Gas Pipeline Safety Standards:** Withdrawal of Enforcement Discretion, 86 Fed. Reg. 2210 (Jan. 11, 2021)

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