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The Potential for Unprecedented Use of the Congressional Review Act to Roll Back Obama Administration Rules

Much attention has been focused of late on the impact that the incoming president will have on President Obama's executive orders and rulemaking relative to a great number of issues where the president determined that he could not work with the Republican Congress. President-elect Trump has repeatedly promised to 'roll back' virtually all of the rules and regulations promulgated by the current President. While the new president can rescind executive orders within minutes of the inaugural ceremony, any effort to roll back a final rule is ordinarily subject to the same process that those rules were subject to when created, which includes notice, a period for public comment and litigation. This process can take years. Examples of rules that may be ripe for scrutiny include virtually all rulemaking related to Clean Power, Waters of the U.S., Labor and Employment, and the Affordable Care Act.

But there's another option, and it has to do with a law that was passed in 1996, the Congressional Review Act (CRA), which gives the Congress the ability to roll back any rule for a period of 60 legislative days after it has been finalized and submitted to Congress. In the 20 years that the law has been in effect, it has been used only once successfully, and that was in 2001, when the Congress repealed a Clinton-era rule relating to ergonomic standards with the support of President Bush. The law has been utilized so infrequently because these rollback resolutions require a presidential signature; therefore, the process only works when a change of party control in the White House coincides with a House and Senate also controlled by the same party.

Today, the stars are in perfect alignment for both houses of Congress to initiate CRA resolutions for any Obama Administration rule that was finalized after May 30, 2016, and the CRA also provides Congress 60 legislative days in 2017 in which to complete action on these initiatives. There is an expedited procedure available in the House

whereby leadership could bundle CRA rule rollbacks into one bill, pass it, and send it to the Senate. The Senate rules, however, require up to 10 hours of debate on each resolution, which would significantly slow down this process. In the Senate, these resolutions require only a majority vote to pass and are not subject to cloture (filibuster).

Ultimately, House and Senate leadership will have to prioritize the lists of suggested rules to be reversed based on what they receive from each Committee, and that final number will likely be around 20. Understanding this reality, this Administration is rushing to finalize as many rules as possible so as to protect as many from the CRA axe as possible. Examples of this effort include two rules finalized in the last week by the Environmental Protection Agency on Corporate Average Fuel Economy (CAFE) standards and the Department of Education on evaluation of whether schools are succeeding or failing under the Every Student Succeeds Act (ESSA). Neither of these rules was expected to be finalized this year.

The Congressional Research Service [memorandum](#) on the subject that includes a list of major rules potentially eligible for CRA action in the next Congress is available [here](#). In addition, press reports indicate the Obama administration is working hard to finalize many more rules prior to the Jan. 20 change, and those new rules also would be eligible for CRA scrutiny.

For more information on the rules at risk for CRA action and how CRA action may affect your business, please contact Greenberg Traurig's [Government Law and Policy](#) group.

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