Insight

Potential Coronavirus Implications for the Congressional Review Act

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EXECUTIVE SUMMARY

- The spring of a presidential election year traditionally marks the cut-off point after which rules published in the Federal Register are vulnerable to repeal from a new administration and Congress under the Congressional Review Act.
- Since the Congressional Review Act window depends upon the number of days Congress is in session, this cut-off point can vary depending upon how often Congress is conducting business.
- The extraordinary circumstances of the coronavirus crisis – especially its impact on Congress's ability to conduct business – could push this deadline earlier or later in the year, thus potentially affecting the status of certain regulations.

INTRODUCTION

In the regulatory-policy world, the spring of a presidential year is normally a particularly important time. It represents a rough deadline that agencies must meet in order to avoid the potential reach of the Congressional Review Act's (CRA) "look-back provision" that allows a new administration and Congress to repeal certain rules issued under the previous administration. The Trump Administration – in concert with a fully Republican Congress – applied this power in historic fashion to repeal a cadre of Obama-era regulations, effectively wiping away billions of dollars in regulatory burdens.

While right now typically marks that deadline, these are not normal times. The ongoing coronavirus pandemic (and Congress's response to it) introduces a higher level of volatility to this year's CRA calculus that is worth further consideration.

THE CRA UNDER "NORMAL TIMES"

While the deadline is irrelevant if President Trump is re-elected or Republicans retain a Senate majority, there is evidence that this deadline looms large over the administration. Under the CRA, any rule finalized within the final 60 legislative days of either the House or Senate is potentially subject to an expedited "joint resolution of disapproval" by the following Congress that can rescind that rule. The expedited nature of the resolution means that it merely needs majorities in both chambers and a presidential signature to pass – thereby avoiding a possible filibuster.

During the last presidential election cycle, the American Action Forum projected that the cut-off date would be in late May 2016. Using this year's projected House calendar (since the Senate's expected deadline falls later in the year), one could expect the first day of this look-back period to be May 20. It is impossible to know the exact date in advance, however, as it wholly depends upon how many legislative days actually happen in a given session. In fact, during the last such cycle, the Congressional Research Service found that the inclusion of a series of pro forma days at the end of that session pushed the date back to June. Under these current extraordinary circumstances, there is a wide range of potential outcomes.

THE EARLY SCENARIO

Congress's ability to function in light of this pandemic will likely affect the exact math behind the CRA lookback period, but there are two likely scenarios. The first, and somewhat more intuitive, possibility is that the coronavirus disruption pushes the CRA deadline earlier in the calendar year, to either early May or even April. The logic behind this result is simply that, primarily due to the associated health risks of having lawmakers physically together right now, Congress is not physically convened outside of pro forma sessions to allow for the consideration of critical legislation. If such a pattern were to continue into at least the summer, the deadline would move to earlier in the year since, counting backward from whenever the session ends, it would take more legislative days to get to the 60-day threshold.

The primary impact of such a pattern would come in cutting the amount of days from June and July. These months have 16 and 13 currently planned House legislative days, respectively. The trend thus far in April has been two session days a week, which yields eight per month. Incidentally, May only had eight planned days in the projected schedule as well. Assuming June and July similarly also only have eight legislative days under the current circumstances, this would create a 13-day "gap" in *legislative days* that would then push the CRA deadline a month earlier in *calendar days* to April 20. Beginning the lookback window then would encompass such notable Trump-era rules as the updated Waters of the United States criteria (published April 21) and the Safer Affordable Fuel-Efficient Vehicles Rule (slated for publication on April 30).

THE LATER SCENARIO

Alternatively, the ongoing crisis could also push back the CRA deadline to a later date in the year. This scenario primarily hinges upon A) measures currently under consideration to allow for remote and/or proxy voting in the House, and B) the still-indefinite nature of how long it will take the country (and the world) to fully contain the disease. If procedures are implemented to produce full "sessions" without a physical quorum, one could expect the House to largely continue its business as planned. Furthermore, there are currently planned gaps in business that could easily be filled in this coronavirus era.

The main candidates for these otherwise-vacant days are the weeks surrounding the major parties' conventions and the traditional August recess. The Democratic National Convention has already been postponed a month, and there has been some consideration of a "virtual convention" in light of obvious public health concerns. While members of Congress traditionally disperse to take part in their respective party's festivities, the combination of the ability to convene Congress remotely and perhaps the lower profile of those weeks under current circumstances opens them up as unexpected "days" of business.

Even if the parties each decide that those last two weeks of August are off-limits, the first part of that month presents another possibility. Traditionally, Congress heads out of town for the month of August. This recess is, however, merely tradition. There is some recent precedent (on the Senate side, at least) for forgoing it. One can imagine that if the national coronavirus situation remains as serious as it is now, Congress will feel some compulsion to continue their work in addressing it via this remote arrangement. Additionally, as noted in this letter from House Republican Leader Kevin McCarthy, despite the understandable and necessary focus on addressing the pandemic, there remain numerous other important, complicated issues that Congress will likely need to work overtime to catch up on. A diminished August recess would be a prime candidate to that end.

CONCLUSION

The attention of Congress and the nation are justifiably focused on the current coronavirus crisis. The human and economic costs have already been staggering. While projecting the window for the CRA may seem relatively trivial, regulations with billions of dollars in economic impact do potentially hang in the balance under it. Even in normal times, it can be difficult to precisely divine the exact window for the CRA's potential "look-back" period. In these extraordinary times, the range of outcomes become even more varied and unpredictable.