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Congressional Review Act – Too Many Priorities, Too Little Time

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A unified Congress has the opportunity to reverse “midnight rules”– those regulations finalized in the waning days of the Trump administration - through use of its review powers under the 1996 Congressional Review Act, 5 U.S.C. § 801 (CRA). The CRA provides Congress with a 60-day period to pass a Joint Notice of Resolution of Disapproval to reverse regulations that went into effect during a designated look-back period (here, any regulation issued after August 21, 2020). One of the primary benefits of the CRA is that passage is on a simple majority vote – no filibuster. In addition, judicial review of a CRA determination is expressly barred under the CRA. However, there are risks to using the CRA to invalidate a regulation. First, a notice of disapproval not only invalidates the regulation but also prevents the issuing agency from issuing a regulation that is “substantially the same” as the reversed regulation unless Congress authorizes the agency to do so in a later law. Congress would need to tread carefully to ensure it is not cutting off its nose to spite its face – i.e., once a regulation is disapproved, it is dead forever and retroactively negated. Second, a failure to pass allows the rule to go into effect immediately. Further, the CRA requires 10 hours of Senate floor time for debate split jointly between the parties with voting on individual resolutions (resolutions cannot be combined), taking up significant amounts of time that may be better spent on higher priorities of the administration. President Biden, based on his years of experience, is unlikely to be rash in his approach to reversing regulations. He will likely decide to conduct the necessary evaluation of required changes rather than a knee-jerk reaction to reverse the regulation.

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