

# White House, Congress Seek To Reverse Trump-Era Regulations

Skadden

04 / 30 / 21

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

## **Boris Bershteyn**

Partner / New York  
212.735.3834  
boris.bershteyn@skadden.com

## **Paul M. Kerlin**

Counsel / Washington, D.C.  
202.371.7380  
paul.kerlin@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

The first 100 days of many new administrations include a fast-tracked review of the federal regulatory landscape. This is especially true when the presidency changes political parties, and even more so when, as today, the party of the new executive also has majorities (however slim) in both chambers of Congress. Under these circumstances, the Congressional Review Act (CRA), which allows for legislative disapproval of regulatory actions, can yield meaningful regulatory changes at the federal level.

## **Regulatory Triage Under the Congressional Review Act**

The CRA is an innovation of the modern administrative state — a tool that can quickly erase parts of the previous administration’s regulatory agenda. Prior to the Trump administration, this 1996 law was used sparingly — in fact, only once, when then-President George W. Bush and the 2001 Republican Congress expunged a Clinton administration worker safety rule. More recently, however, the CRA was enthusiastically put to use during the Trump era to roll back more than a dozen Obama administration regulations. Some advocates have called for the Biden administration to likewise aggressively wield the CRA to eliminate key Trump regulations.

The CRA arms Congress with an expedited process to annul recently promulgated regulations by passing a simple resolution, which goes into effect when signed by the president. The CRA can be deployed within 60 legislative days (those in which either the House or Senate is working) of the issuance of a final regulation or, if a new Congress has convened in that span, within the first 60 legislative days of a new Congress. Once a resolution is enacted, the regulation reverts to its prior form (under present circumstances, most likely to Obama-era rules).

This legislative mechanism for repealing rules is usually much faster than repeal through traditional administrative rulemaking and offers fewer opportunities for litigation by the regulation’s defenders. Moreover, unlike much ordinary legislation, a CRA resolution cannot be filibustered, though it can be subject to up to 10 hours of debate on the Senate floor.

Two limitations of the CRA process should be noted. In general, a CRA resolution bars future promulgation of a rule that is “substantially the same” as a disapproved rule. The scope and effect of this prohibition remains unexamined by the courts, and even some opponents of Trump-era rules are wary of unexpected consequences for future rulemakings. In addition, the CRA does not permit the disapproval of only part of a rule, so wide-ranging regulations encompassing policies supported by Democrats are poor candidates for disapproval.

Finally, there is a legislative complication: The CRA requires that each rule be disapproved in a standalone resolution, preventing the bundling of disfavored rules in an omnibus rejection package.

Toward the end of the just-concluded 60-day period in the House, members submitted resolutions to reverse Trump-era rules in areas ranging from an Equal Employment Opportunity Commission rule on settlement of employee claims to a Department of Health and Human Services rule requiring “sunset” reviews of certain health care regulations every decade. Other CRA resolutions addressed rules governing methane emissions for the oil and gas industry, financial lending conditions and shareholder participation at corporate meetings. The Senate has passed its own resolution to revert

# White House, Congress Seek To Reverse Trump-Era Regulations

---

to regulations imposing limits on methane gas emissions, and stakeholders will be watching to see whether senators bring forward corresponding CRA resolutions on other rules before their own 60-day CRA deadline.

## Other Avenues for Regulatory Reform

Although the CRA is tailor-made for new administrations, other regulatory reform tools remain available, and some changes have already been set in motion. On the first day of the Biden administration, the White House chief of staff issued a “freeze memo” preventing any pending regulations from proceeding until a review period set by the new administration had passed. Members of the cabinet have also taken steps to unwind rules from their predecessors. For example, Transportation Secretary Pete Buttigieg recently revoked department rules and policies viewed as impeding federal regulatory efforts, and Interior Secretary Deb Haaland revoked orders promoting fossil fuel development on public lands.

The Biden administration also has been reconsidering positions taken by the federal government in Trump-era court cases. But to make substantive progress on its regulatory agenda, it will need to rely on traditional notice and comment rulemaking under the Administrative Procedure Act, despite its lengthy duration — and the litigation it almost inevitably prompts.

## Conclusion

The Biden administration’s attention to regulatory matters in the first 100 days has been notable, and is expected to continue as leadership teams are appointed at federal agencies, including a new head of the Office of Information and Regulatory Affairs. In the meantime, the CRA and other transitional regulatory measures continue to occupy center stage.