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March 10, 2015, 10:00 am

Put teeth in congressional review

By William O'Keefe, contributor

The Congressional Review Act (CRA) was enacted in 1996 to provide a measure of congressional control over regulations. The CRA requires federal agencies to provide Congress and the General Accountability Office (GAO) final regulations before they take effect. This allows any member of Congress to introduce a resolution of disapproval that if passed by both houses and signed by the president, revokes the regulation.

Between 1997 and 2011 about 3,600 regulations were submitted annually to the GAO. In 2011, the GAO reduced its efforts to monitor the Federal Register and notify the Office of Management and Budget (OMB) of rules not submitted. Since then, the number of rules submitted to GAO "fell sharply according to a report prepared for the Administrative Conference of the United States."

Although the CRA was intended to increase congressional authority, it is clear from various assessments that it has been a failure. Since passage in 1996, more than 1,200 regulations with an economic impact of $100 million or more have been issued and yet the CRA has resulted in only one rule being revoked. The reason is not a mystery. Congress must pass a joint resolution and the president must sign it. If he vetoes it, which is likely, Congress must have a two-thirds vote in each house to override.

There have been a steady stream of complaints about regulatory excess, especially by the Environmental Protection Agency (EPA) during the Obama administration. A recent working paper by the Washington Legal Foundation, "Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study," documents how the EPA and the National Oceanic and Atmospheric Administration (NOAA) have violated the Information Quality Act "to lower the scientific evidentiary thresholds" to support greenhouse gas regulations. There have been other analyses that conclude that EPA in particular routinely overstates benefits and understates costs.

The EPA now is in the process of issuing regulations on mercury and air toxics, a clean power plant rule and a revision to the ozone standard. Independent studies by well-respected organizations like IHS, CERA and NERA Economic Consulting have concluded that these regulations will be among, if not, the most expensive ever issued. And the

benefits are at best questionable. Litigation by affected parties is costly and time consuming and Congress is powerless to stop them from being implemented.

It is clear that the Congressional Review Act is in serious need of reform.

As a first step, Congress needs an improved capability for regulatory analysis and oversight. That capability could be housed in the GAO. This would provide an independent check on the reviews conducted by OMB's Office of Information and Regulatory Oversight. Susan Dudley, the director of George Washington University's Regulatory Studies Center, has offered a number of suggested reforms to bring this about.

Second, instead of a resolution of disapproval, the CRA should be amended to require an affirmative vote by both houses for all regulations that will have an economic impact exceeding specific thresholds. A proposal for a Regulatory Accountability Act would place proposed regulations into one of three categories that would define specific rulemaking. In addition, since the OMB publishes a Unified Regulatory Agenda and Regulatory Plan that are statements of regulatory and deregulatory policies and priorities under consideration, Congress could identify regulations that it will subject to specific oversight.

An amended CRA should include a requirement included in proposals, such as the Sound Regulation Act, compelling agencies to identify "the nature and significance of the market failure, regulatory failure, or other problem that necessitates regulatory action."

Third, an amended CRA should require that proposed regulations, as well as final ones as is now the case, be submitted to Congress and GAO. This would ensure that there is adequate time for review and early congressional action.

Finally, the current provisions of the CRA do not provide for judicial review. That should be changed.

Checks and balances are essential to good government. It is clear that adequate checks and balances on executive branch regulatory actions are not achieving the level of review required to protect the economy and ensure that regulations are not used as ideological tools.

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