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Congressional Review of Agency Rulemaking: A Brief Overview and Assessment After Five Years

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Summary

On March 29, 1996, the President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBRFA), P.L. 104-121, 110 Stat. 857-874, Subtitle E of which for the first time established a mechanism by which Congress can review and disapprove virtually all federal agency rules (hereinafter Congressional Review Act or CRA). In its current form, however, the efficacy of the review scheme as a vehicle to control agency lawmaking through the exercise of responsible, effective and expeditious legislative oversight may appear to some observers to be problematic. On the other hand, several rules have been affected by the presence of the review mechanism, suggesting that the review scheme has had some influence. Among potential impediments to the law's full use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands as was the case between April 1996 and January 2001. Moreover, a number of critical interpretive issues, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto part or parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule, remain to be resolved. Some might argue that these potential impediments and uncertainties have contributed to the fact that a total of seven joint resolutions of disapproval have been introduced since April 1996, none of which was passed by either House. During that period over 21,500 major and non-major rules have been reported and become effective. However, on March 1, 2001, a joint resolution to disapprove the Clinton Administration's controversial ergonomics rule was introduced in the Senate and may provide a definitive test of the review mechanism's efficacy and utility.

This report will provide a brief explanation of how the review scheme was expected to operate and describe how it has in fact been utilized. The possible reasons for the limited use of the review scheme thus far are assessed and congressional remedial proposals and other options are discussed.

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Introduction

On March 29, 1996, the President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBRFA), P.L. 104-121, 110 Stat. 857-874, Subtitle E of which for the first time established a mechanism by which Congress can review and disapprove virtually all federal agency rules. In its current form, however, the efficacy of the review scheme as a vehicle to control agency lawmaking through the exercise of responsible, effective and expeditious legislative oversight may appear to some observers to be problematic. On the other hand, several rules have been affected by the presence of the review scheme, suggesting that the review scheme has had some influence. Among potential impediments to the law's full use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and Congress are in different political hands, as was the case between April 1, 1996 and January, 2001. Moreover, a number of critical interpretive issues, including the scope of the provisions' coverage of rules, whether an agency failure to report a covered rule is subject to court review and sanction, and whether a joint resolution of disapproval may be utilized to veto part or parts of a rule or only may be directed at the rule in its entirety, remain to be resolved. Some might argue that these potential impediments and uncertainties have contributed to the fact that a total of nine joint resolutions of disapproval have been introduced since April 1996, none of which was passed by either House. During that period over 21,500 major and non-major rules have been reported and become effective. However, on March 1, 2001, a joint resolution to disapprove the Clinton Administration's controversial ergonomics rule was introduced in the Senate and may provide a definitive test of the review mechanism efficacy and utility.

This report will provide a brief explanation of how the review scheme was expected to operate and describe how it has in fact been utilized. The possible reasons for the limited use of the formal review mechanism thus far are assessed and congressional remedial proposals and other options are discussed.

Review of Agency Rules

The congressional review mechanism, codified at 5 U.S.C. 801-808, requires that all agencies promulgating a covered rule must submit a report to each House of Congress and to the Comptroller General (CG) that contains a copy of the rule, a

concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted. Section 801(a)(1)(A). Each House must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee. Section 801(a)(1)(C). In addition, the promulgating agency must submit to the CG (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made "available" to each House. Section 801(a)(1)(B).

Section 804(3) adopts the definition of "rule" found at 5 U.S.C. 551(4) which provides that the term rule "means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy."¹ The legislative history of Section 551 (4) indicates that the term is to be broadly construed: "The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well."² The courts have recognized the breadth of the term, indicating that it encompasses "virtually every statement an agency may make,"³ including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus a broad range of agency action is potentially subject to congressional review.

The Comptroller General and the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a "major rule," defined as a rule that will likely have an annual effect on the economy of \$100 million or more, increase costs or process for consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to the Administrator of OIRA. Section 804(2). If a rule is deemed major by the OIRA Administrator, the CG must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801 (a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the CG's report "shall include an assessment of the agency's compliance with the procedural steps required by Section 801(a)(1)(B)."⁴ Section

¹Section 804(3) excludes from the definition "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties."

²Attorney General's Manual on the Administrative Procedure Act 13 (1948).

³*Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

⁴See, e.g., *Chem Service, Inc. v. EPA*, 12 F.3d 1256 (3d Cir. 1993)(memorandum of (continued...))

801(a)(2)(A). However, the CG has interpreted his duty under this provision narrowly as requiring that he simply determine whether the prescribed action has been taken, *i.e.*, whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, not whether the action was properly done.

The designation of a rule as major also affects its effective date. A major rule may become effective on the latest of the following scenarios: (1) 60 calendar days after Congress receives the report submitted pursuant to Section 801(a)(1) or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one House votes and fails to override the veto, or 30 calendar days after Congress receives the veto message; or (3) the date the rules would otherwise have taken effect (unless a joint resolution is enacted). Section 801(a)(3).

Thus the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by Section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under Section 808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds “good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁵ Second, the President may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement. Section 801(c). Finally, a third route is available under Section 801(a)(5) which provides that “the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under Section 802.”

All other rules take effect “as otherwise allowed by law” after having been submitted to Congress under Section 801(a)(1). Section 801(a)(4). Under the Administrative Procedure Act a final rule may go into effect 30 days after it is published in the Federal Register in final form. 5 U.S.C. 553(d). An agency, in its

⁴(...continued)

understanding); *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993)(interpretative rules); *National Treasury Employees Union v. Reagan*, 685 F.Supp 1346 (E.D. La 1988)(federal personnel manual letter issued by OPM); *New York City Employment Retirement Board v. SEC*, 45 F.3d 7 (2d Cir. 1995)(affirming lower court’s ruling that SEC “no action” letter was a rule within section 551(4)).

⁵Reviewing courts have generally applied the Administrative Procedure Act’s good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. See, *e.g.*, *Action on Smoking and Health v. CAS*, 713 F.2d 795, 800 (D.C. Cir. 1987). However, since Section 805 precludes judicial review for any “determination, finding, action or omission under this chapter”, there could be no court condemnation of a good cause determination. But the rule would still be subject to congressional vacation and retroactive nullification.

discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

All covered rules are subject to disapproval even if they have gone into effect. Congress has preserved for itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1). Such held over rules are treated as if they were published on the 15th session day of the Senate and the 15th legislative day of the House in the succeeding session and as though a report under Section 801(a)(1) was submitted on that date. Section 801(d)(2)(A), (e)(2). But a held over rule takes effect as otherwise provided. 801(d)(3). The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session.

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time. Section 801(f). If a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. Section 803. A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, before any reissued or new rule that is “substantially the same” as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule. Section 801(b)(2).

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval. A joint resolution of disapproval must be introduced within 60 calendar days (excluding days either House or Congress is adjourned for more than 3 days during a session of Congress) after the agency reports the rule to the Congress in compliance with Section 901(a)(1). Timely introduction of a disapproval resolution allows each House 60 session or legislative days to pass it and thereby get the benefit of expedited consideration procedures, retroactive nullification of an effective rule, and the limitation on an agency from promulgating a “substantially similar” rule without subsequent congressional authorization to do so by law.

The law provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 Members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of. Section 802(d)(1). Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other

business are not in order. Section 802(d)(2). At the conclusion of debate an up or down vote on the joint resolution is to be taken. Section 802(d)(3).⁶

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one House passes a joint resolution before the other House acts, the measure of the other House is not referred to a committee. The procedure of the House receiving a joint resolution “shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House.” Section 802(f)(1)(2).

Section 805 precludes judicial review of any “determination, finding, action or omission under this chapter.” This would insulate from court review, for example, a determination by the OIRA Administrator that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency determination that “good cause” requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General’s assessment of an agency’s report.

Finally, the law provides a rule of construction providing that a reviewing court shall not draw any inference from a congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute. Section 801(g).

Utilization of the Review Mechanism since 1996

As of February 28, 2001, the Comptroller General had submitted reports pursuant to section 801 (a) (2) (A) to Congress on 336 major rules.⁷ In addition, GAO had cataloged the submission of 21,249 non-major rules as required by Section 801 (a) (1) (A). To date, nine (9) joint resolutions of disapproval have been introduced relating to five rules.⁸ None has been passed by either House. If there is

⁶There is some question whether a motion to proceed is nondebateable because of the absence of language so stating. Arguably, the nondebateability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall efficacy of the CRA’s statutory scheme and thus may be implied. Alternatively, debate on such a motion may be limited by Section 803(d)(2) which limits debate on joint resolutions, as well as “all debateable motions,” to 10 hours. Ultimately, a resolution of this question by the Senate Parliamentarian, or the Senate itself, may be necessary. At least one precedent exists in which it was ruled that a motion to proceed to a budget resolution under the Budget Act was nondebateable despite the silence of the Act on the matter. *See*, 127 Cong. Rec. S 4871 (May 12, 1981).

⁷General Accounting Office, Reports on Federal Agency Major Rules, which may be found at <http://www.gao.gov/decisions/majrule/majrule.htm>

⁸Identical joint resolutions were introduced in both Houses with respect to two rules. The disapproval resolutions introduced include: S.J.Res. 60 (104th Cong., 2d sess.) (HCFA rule relating to hospital reimbursement under the Medicare program); H.J.Res. 59 (105th Cong., 1st Sess.) H.J.Res. 123 (105th Cong., 2d Sess.) (same).(Department of Interior rule relating to polar bear trophies from Canada); H.J.Res. 81 (105th Cong., 1st Sess.) (FCC rule relating agency’s revision of its cable-tv leased commercial access rules); H.J.Res. 67 (105th Cong., 1st Sess.) (OSHA rule relating to occupational exposure to methylene chloride); S.J.Res. 25 (105th Cong., 1st Sess.) (same); S.J.Res. 50 (105th Cong., 2^d Sess.) (HCFA rule relating to
(continued...)

any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of members, which in some instances was successful. For example, H.J.Res. 67 (1997) was aimed at disapproving an Occupational Health and Safety Administration (OSHA) rule setting exposure limits on methylene chloride, a paint stripper used in the furniture and airplane industries. Its sponsor, Rep. Roger Wicker, contended that the rule would harm small businesses without increasing protections for workers. The disapproval resolution never received a floor vote. But the Congressman succeeded in effecting a compromise through the inclusion of provisions in the FY 1998 Labor, HHS and Education appropriations measure⁹ which required OSHA to provide on-site assistance for companies to comply with the new rules without fear of penalty. Mr. Wicker is reported to have stated that he used the disapproval resolution as a vehicle to gather support from influential members, including the chairs of the House Appropriations and Commerce Committees.¹⁰

The disapproval resolution mechanism was effectively utilized to accomplish the suspension of a highly controversial rulemaking by the Health Care Financing Administration (HCFA). In January 1998, HCFA issued a rule requiring that home health agencies (HHA's) participating in the Medicare program must obtain a surety bond that is the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program. In addition, a new HHA entering the Medicare or Medicaid program after January 1, 1998, had to meet a capitalization requirement by showing it actually had available sufficient capital to start and operate the HHA for the first three months. The rule was issued without the usual public participation through notice and comment and was made immediately effective. Substantial opposition to the rule quickly surfaced from both surety and HHA industry representatives. HCFA attempted to remedy the complaints by twice amending the rule, in March and in June, but were unsuccessful in quelling the industry-wide concerns. On June 10, Senator Bond, for himself and 13 other co-sponsors, introduced S.J.Res. 50 to disapprove the June 1 HCFA rule. Within a short period, the disapproval resolution had garnered 52 sponsors. On June 17, a companion bill, H.J.Res. 123, was introduced in the House. Thereafter, members of the staffs of Senators Bond, Baucus, and Grassley (all members of the Senate Finance Committee with jurisdiction over the agency) met with HCFA officials and concluded an agreement that (1) the agency would suspend its June 1, 1998 rule indefinitely; (2) a General Accounting Office report would be requested by the committee that would study the issues surrounding the surety bond requirement; (3) on completion and issuance of the GAO report, HCFA would work in consultation with the Congress about the surety bond requirement; and (4) any new rule would not be effective earlier than February 15, 1999, and would be preceded by at least 60 days prior notice. The agreement was memorialized in a June 26 letter to HCFA signed by Senators Bond,

⁸(...continued)

surety bond requirements for home health agencies); H.J.Res. 55, 106th Cong. (1999)(concerning Postal Service rule relating to delivery of mail to a commercial mail receiving agency).

⁹P.L. 105-78.

¹⁰See Allan Freedman, "GOP's Secret Weapon Against Regulations: Finesse," CQ Weekly, September 5, 1998, at 2318-19 (Freedman).

Baucus and Grassley.¹¹ The GAO report was issued on January 29, 1999, but as yet the rule remains suspended. No floor vote on the disapproval resolutions occurred in either House.

A final interesting illustration of the manner in which the review mechanism has been utilized is shown by S.J.Res. 60 (1996), concerning another HCFA rule, this one dealing with the agency's annual revision of the rates for reimbursement of Medicare providers (doctors and hospitals), which normally would have been effective on October 1, 1996. HCFA, however, submitted the rule to Congress on August 30, 1996, and since it was a major rule, it could not go into effect for 60 days, or until October 29, which meant there would be a significant loss of revenues because the differential rate increases could not be imposed for most of the month of October. Section 801 (a) (5), however, provides that if a joint resolution of disapproval is rejected by one House, "the effective date of a rule shall not be delayed by operation of this chapter..." On the morning of September 17, 1996, Senator Lott introduced S.J.Res. 60 and that afternoon, by unanimous consent, the resolution "was deemed not passed." See 142 Cong. Rec. S 10723 (daily ed. Sept. 17, 1996). The HCFA rule went into effect on October 1 as scheduled.

Discussion

After five years, the limited use to which the formal rulemaking review mechanism has been put does not appear to be solely, or in any significant measure attributable to, a lack of familiarity with the law, but rather points to the recognition that aspects of the review process may be serving as deterrents to its full use. Additionally, several significant emerging interpretive issues concerning the scope of the law's coverage, the judicial enforceability of its key requirements, and whether a disapproval resolution may be directed at part of a rule, may introduce further uncertainties and impediments to confident use of the process, and the potential breadth of the prohibition against promulgation by an agency or a "substantially similar" rule after the original rule has been vetoed.

1. Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review. The lack of a screening mechanism that will alert committees to rules that may raise important or sensitive substantive issues arguably prevents busy committees from prioritizing such issues. As indicated above, the Comptroller General's reports on major rules are essentially check lists as to whether legally required agency tasks have been done and not substantive assessments of whether they were done properly or whether the rules accord with congressional intent. Indeed, lack of knowledge of the *existence* of such sensitive rules by jurisdictional committees or interested members is rarely the case. What appears to be absent is in-depth scrutiny and analysis of individual rules by an authoritative and presumably neutral source that may provide the basis for triggering meaningful congressional review.

Recognition of the need for an independent substantive screening body apparently motivated the introduction by Rep. Sue Kelly of H.R. 1704 in the 105th

¹¹Freedman, *supra* note 10, at 2319-20.

Congress, a bill that would establish a Congressional Office of Regulatory Analysis.¹² The bill was referred to the House Judiciary and Governmental Reform and Oversight Committees both of which favorably reported differing versions of the legislation.¹³ Both versions would establish an independent Congressional Office of Regulatory Analysis (CORA) to be headed by a director appointed by the House Speaker and the Senate Majority Leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the Comptroller General under SBRFA and the Congressional Budget Office under the Unfunded Mandates Act of 1995 would be transferred to CORA. The Judiciary Committee's version, in addition to having the Office make "an assessment of an agency's compliance with the procedural steps for 'major rules'" required by SBRFA, directs CORA to "conduct its own regulatory impact of these 'major rules.'"¹⁴ The bill as reported by the Government Reform Committee allows the CORA director to use "any data and analyses generated by the Federal agency and any data of the Office" in analyzing the submitted rule. Both bills provide that a similar analysis of non-major rules is to be conducted when requested to do so by a House or Senate Committee or by individual members of either House. First priority for the conduct of such analyses is given to all major rules. Secondary priority is assigned to committee requests. Tertiary priority is given individual member requests. Finally, under the Judiciary Committee version, the report must be furnished within 45 days after Congress receives notification of the rule; the Governmental Reform bill would allow 30 days. H.R. 1704 received no floor action during the 105th Congress.

Some argue that an independent office of regulatory analysis would serve the congressional need for objective information necessary to evaluate agency regulations. It might also provide credibility and impetus to utilize the review mechanism. Further, by providing intensive review of certain non-major rules, the possibility of OIRA "hiding" significant rules by not designating them as "major" is forestalled. Objections may be heard that creation of a new congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done as well as extraordinarily expensive. The requirement of the Judiciary Committee's version that CORA do its own cost-benefit analysis from scratch could be pointed to as an unnecessary cost factor, as well as a task that may not be possible to perform adequately within the allotted 45 days.

Congress agreed upon a limited test of the CORA concept, late in the 106th Congress, with the passage of the Truth in Regulatory Act of 2000, Pub.L. 106-312, 114 Stat. 1248-50. That legislation established a three year pilot project for the General Accounting Office to report to Congress on economically significant rules. Under this pilot program whenever an agency publishes an economically significant proposed or final rule, a chairman or ranking minority member of a committee of jurisdiction of either House of Congress may request the Comptroller General (CG) to review the rule. The CG is to report on each rule within 180 calendar days. The

¹²A companion bill, S. 1675, was introduced in the Senate by Senators Shelby and Bond. 143 Cong. Rec. S1007 (daily ed. Feb. 25, 1998).

¹³See H.Rept. 105-441, Parts 1 and 2 (105th Cong., 2d Sess.) (1998).

¹⁴Section 4 (a) (3) (A).

report must contain an “independent evaluation” by the CG of the agency’s cost-benefit analysis. Thus far we are aware of only one request, which was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate over the Department of Agriculture’s forest planning and roadless area rule. GAO advised the requesters that although Act authorized \$5.2 million per year for the program, no monies had been appropriated and it could not proceed with the request. No further action was taken on the request and as yet Congress has not enacted an appropriation thereby forestalling implementation of the project. The 180-day reporting period does not mesh exactly with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of proposed rules might coincide with such reviews. The pilot program is to expire in January 2004.

2. Lack of an Expedited House Procedure. The current absence of an expedited consideration procedure in the House of Representatives may well be a factor discouraging use of the process in that body since, as a practical matter, it will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of Members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of the leadership, perhaps only the most well situated in the body will be able to gain access within the limited period of review. This also might deter action in the Senate if it is perceived that no action will be taken in the House.

3. The Deterrent Effect of the Ultimate Need for a Supermajority to Veto a Rule. A consideration behind any serious effort to use the full CRA review mechanism likely has been the realization that any joint resolution disapproving a rule that has the support of the administration would be vetoed and require a two-thirds vote in each House to override. The deterrent potential of the need for a supermajority in each House to overcome a presidential veto is significant, unless the object of the exercise is simply to provide the impetus for informal accommodations, such as occurred in the HCFA surety bond matter, or to influence Members to support remedial legislation. But a realization by agencies over time that passage of a disapproval resolution is highly unlikely could substantially reduce the efficacy of such a threat. Additionally, a possible consequence of such an assumption is that agencies will not factor in congressional disapproval as part of rule development process. The validity of this assumption may soon be tested. On March 1, 2001 Senator Nickles and three co-sponsors introduced S.J.Res. 6 to disapprove the Clinton Administration’s controversial ergonomics rule. See 65 Fed. Reg. 68261 (2000). It has been reported that the President has indicated he will sign a disapproval resolution if presented to him. It has also been reported that a discharge petition signed by 30 or more Senators has been filed. If so, the stage is set for the first truth test of the CRA.

Even if disapproval of the ergonomics rules is successful, the supermajority flaw still remains. One possible solution is to establish a multi-tiered disapproval mechanism. That is, instead of all rules, major or non-major, being treated equally in that they can only be overturned by a joint resolution of disapproval, a process in which the entire burden of action is on the Congress, some rules might be designated for more selective, special review. For example, major or significant rules might be subject to a joint resolution of *approval*. Under such a scheme a major or significant

rule would not become effective unless a joint resolution approving it passed both Houses within a specified period of time.¹⁵ To make such scheme effective someone or some body other than the OIRA Administrator or a congressional agency such as the proposed CORA might have to be vested with the authority to designate which rules are “major” or “significant” and thereby subject to the affirmative approval requirement. The obvious benefit from the congressional standpoint is that the burden for supporting and justifying such rules falls on the promulgating agencies. All other rules would be subject to disapproval resolutions.¹⁶

4. The Reluctance to Disapprove an Omnibus Rule Where Only One Part of the Rule Raises Objection. Section 808 of the review provision sets forth the mandatory text of any joint resolution of disapproval: “That Congress disapproves the rule submitted by the _____ relating _____, and such rule shall have no force or effect. (The blank spaces being appropriately filled in).” The quoted text refers to “the rule” and “such rule,” indicating a rule in its entirety. The limited experience of nine joint resolutions of disapproval thus far introduced is that the first blank is filled with the name of the promulgating agency and the second with a generic title or description of the rule.¹⁷ Similarly, the text of the review provision refers to “such rule,” “a rule,” or “the rule,” with no language anywhere expressly referring in any manner to a part of any rule under review. The procedure leading to a vote on the proposed disapproval resolution allows for no amendments, and the final vote is up or down on the joint resolution as introduced.

The legislative history of the provision is similarly uniform in using language that would ordinarily indicate a reference to a submitted rule in its entirety, except in one instance. During a discussion of the Section 802 procedure that would obtain when one House completes its action on a joint resolution and sends it to the other House before the second House has yet to complete any action, the following comment is made:

. . . Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a

¹⁵See *e.g.*, Reorganization Act Amendments of 1984, providing that both Houses of Congress had to pass a joint resolution approving a reorganization plan within 90 days of continuous session after the date of presidential submission or else it was deemed disapproved. 5 U.S.C. 906 (a) (1994).

¹⁶Two bills introduced in the 106th Congress to revise the CRA utilized the joint resolution of approval approach. See S. 1348, 106th Cong., 1st Sess. (1999)(Sen. Brownback) S. 2670, 106th Cong., 2nd Sess. (2000)(Sen. Thomas). A similar was suggested and described in Morton Rosenberg, “Whatever Happened to Congressional Review of Agency Rulemaking? A Brief Overview, Assessment and Proposal for Reform,” 51 Adm.L.Rev. 1051 (1999).

¹⁷S.J.Res. 50 and H.J.Res. 123, “relating to surety bond requirements for home health agencies under the medicare and medicaid programs....”

House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). *If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.*¹⁸ (Emphasis supplied).

The last two sentences seem to raise some uncertainty. The next to last sentence would appear to contemplate the possibility of a conference to resolve differences in resolutions. The last sentence minimizes what those differences could be. Some have suggested that the explanation contemplates that parts of rules may be the subject of disapproval resolutions, arguing that the framers of the provision would have known that many rules are complex and contain a variety of provisions, only one or a few of which may be objectionable, and would not have required a whole rulemaking to be brought down simply because of one offending portion out of many. It might also be argued that in light of the Section 801 (b) (2) prohibition against agency issuance of a rule “in substantially the same form” after passage of a disapproval resolution unless Congress by subsequent law authorizes it, not allowing partial vetoes would have a draconian result.

In fact, this result would appear to have been the intent of the framers of the review provision. The language and structure of the provision, and the supporting explanation of the legislative history, contemplates a speedy, definitive and limited process. It is not unlike the legislative processes created for congressional actions dealing with military base closings,¹⁹ international trade agreements,²⁰ and presidential reorganization plans,²¹ among others. Each dealt with complex, politically sensitive decisions which allowed only an up or down vote by the Congress on the entire package presented. It was understood that piecemeal consideration would delay and perhaps obstruct legislative resolution of the issues before it. For similar reasons, the statutory structure and legislative history of the review provision strongly indicate that Congress intended the process to focus on submitted rules as a whole and not to

¹⁸Joint Explanatory Statement of House and Senate Sponsors, 143 Cong. Rec. E 571, at E 577 (daily ed. April 19, 1996); 143 Cong. Rec. S 3683, at S 3686 (daily ed. April 18, 1996)(Legislative History).

¹⁹Defense Base Closure and Realignment Act of 1990, P.L. 101-510, sec. 2908 (b) 104 Stat. 1808, in note following 10 U.S.C. 2687 (1994).

²⁰See, 19 U.S.C. 2191-2193 (1994).

²¹See, e.g., Reorganization Act of 1984, 5 U.S.C. 909-912 (1994).

allow veto of individual parts. Perhaps a proper reading of the quoted portion of the legislative history is that it was contemplating the possibility that the blank to be filled in after “relating to” might have different generic descriptions of the rule subject to disapproval. A broader reading of these sentences would not otherwise appear warranted by either the legislative language itself or the rest of the explanatory legislative history.

However, if this reading is correct it may be a factor in the limited use of the mechanism. As indicated, vetoing a rule means disabling an agency from regulating in the area covered by the rule unless Congress passes further authorization legislation, a significant consequence of any disapproval action. On the other hand, expressly authorizing veto of portions of a rule might allow competing disapproval resolutions within each House and the certainty of a long, drawn out conference with the possibility of no agreement.

5. The Uncertainty of Which Rules Are Covered By SBRFA. The framers of the congressional review provision intentionally adopted the broadest possible definition of the term “rule” when it incorporated Section 551 (4) of the APA. As indicated previously,²² the legislative history of Section 551 (4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents – such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like – which as a legal or practical matter an agency wishes to make binding on the affected public.

The legislative history of the SBRFA provision emphasizes that by adoption of the Section 551 (4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variation of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: “The committee’s intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”²³ The framers of the legislation indicated their awareness of the now widespread practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically,²⁴ and noted that it was the intent of the legislation to subject just such documents to congressional scrutiny:

. . . The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by

²²See footnotes 1-4, *supra*, and accompanying text.

²³Legislative History, *supra* n. 18, at E 579, S 3687.

²⁴This practice has been long recognized and criticized in administrative law commentaries. See, e.g., Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like— Should Federal Agencies Use Them To Bind The Public?, 41 Duke L.J. 1311 (1992). Cf. also, General Accounting Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules, GAO/GGD-98-126 (August 1998).

trying to give legal effect to general statements of policy, “guidelines,” and agency policy and procedure manuals. The committees admonish the agencies that the APA’s broad definition of “rule” was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.²⁵

It is likely that virtually all the 21,249 non-major rules thus far reported to the Comptroller General have been either notice and comment rules or agency documents required to be published in the Federal Register. This would mean that perhaps thousands of covered rules have not been submitted for review.²⁶ Pinning down a concrete number is difficult since such covered documents are rarely if ever published in the Federal Register and thus will come to the attention of committees or Member only serendipitously. Five such agency actions have come to the attention of committee chairmen and a Member and were referred to the Comptroller General for determinations whether they were covered rules. In four of the five cases the CG determined the action documents to be covered rules.²⁷

Believing such instances to be only a small portion of unreported agency actions, GAO, at the behest of the House Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, engaged

²⁵Legislative History, *supra* n. 18, at E 578, S 3687.

²⁶An indication of the vast number of unreported covered rules came as a result of an investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (Government Reform) which revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. See “Non-Binding Legal Effect of Agency Guidance Documents,” H.Rept. No. 106-1009, 106th Cong., 2nd Sess. (2000).

²⁷See letter to Honorable David M. McIntosh, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, B-281575 (January 20, 1999 (EPA “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits” held to be covered because it created new, mandatory steps in the procedure for handling disparate impact assessments which gave recipients new rights they did not previously possess for obtaining complaint dismissals, a substantive alteration of the previous regulation.); letter to Honorable Ted Stevens, Chairman, Senate Appropriations Committee, et al, B-275178 (July 3, 1997) (Tongass National Forest Land and Resources Management Plan held an agency statement of general applicability and future effect that implements, interprets, and prescribes law and policy.); letter to Honorable Larry Craig, Chairman, Senate Committee on Energy and Resources, B-274505 (September 16, 1996) (memorandum of Secretary of Agriculture concerning the Emergency Salvage Timber Sale Program held to a covered rule because it is of general applicability and interprets and implements the statutory program.); and letter to Senator Conrad Burns, B-278224 (November 10, 1997) (the American Heritage River Initiative announced by the Council on Environmental Quality was not a covered rule because it was established by presidential executive order and direction and the President is not an “agency” under the APA and is not subject to the provisions of the APA.); letter to the Hon. James A. Leach, Chairman, House Banking Committee, B-286338 (October 17, 2000)(Farm Credit Administration’s national charter initiative held to be a rule under the CTA).

in discussions with the Office of Management (OMB) during 1998 for the creation of a uniform reporting form for use by agencies in reporting covered rules to the CG, and for the promulgation of an OMB guidance document covering such matters under the review provision as the definition of a covered rule, reporting requirements, the good cause exemption, and the consequences of failing to report a rule, among others. The failure to issue such a guidance prompted insertion of the following directive in FY 1999 appropriation for OMB: “OMB is directed to submit a report by March 31, 1999, to the Committees on Appropriations, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform and Oversight that . . . issues guidance on the requirements of 5 U.S.C. Sec. 801 (a) (1) and (3); sections 804 (3), and 808 (2), including a standard new rule reporting form for use under section 801 (a)(1)(A)-(B).”²⁸ OMB, in the view of the Subcommittee, failed to substantially comply with that statutory directive.²⁹

If the guidance issued in compliance with the statutory direction is not consonant with the congressional understanding of the intent, meaning and scope of the congressional review provision, it might be used as a vehicle for oversight hearings and possible remedial legislation.

6. The Uncertainty of the Effect of An Agency’s Failure to Report a Covered Rule to Congress. Section 801 (a) (1) (A) of the congressional review provision provides that “[b]efore a rule can take effect,” the Federal agency promulgating such rule shall submit to each House of Congress and the Comptroller General a report containing the text of the rule, a description of the rule, including whether it is a major rule, and its proposed effective date. Section 805 states that “no determination, finding, action or omission under this chapter shall be subject to judicial review.” The Department of Justice has broadly hinted that the language of Section 805 “precluding judicial review is unusually sweeping” so that it would presumably prevent judicial scrutiny and sanction of an agency’s failure to report a covered rule.³⁰ Arguably, the text and structure of the review provision, together with its clearly articulated purpose in its legislative history, make it likely that a reviewing court would find that it was empowered to enforce the submission requirement of Section 801(a)(1)(A). However, if a legislative revision of the review provision is undertaken, clarifying the judicial enforceability of a failure to report would forestall unnecessary litigation.

The plain, overarching purpose of the review provision of SBRFA was to assure that all covered final rulemaking actions of agencies would come before Congress for scrutiny and possible nullification through joint resolutions of disapproval.³¹ The

²⁸P.L. 105-277, Division A, title III.

²⁹See H.Rept. 106-1009, *supra* n. 26 at 4-5.

³⁰See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at pp 9-11 (DOJ Memorandum).

³¹“This legislation establishes a government-wide congressional review mechanism for most
(continued...)”

scheme provides for the delayed effectiveness of some rules deemed innately important (“major rules”), Section 801(a)(3), and temporarily waives the submission requirement of Section 801 for rules establishing, modifying, opening, closing or conducting a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or for a rule an agency “for good cause” finds that notice and public procedure are impractical, unnecessary, or contrary to the public interest. Section 808. Rules promulgated pursuant to the Telecommunications Act of 1996 are excluded from the definition of “major rule”. But all such rules must ultimately be submitted for review. And while the scheme anticipates that some (or even most) rules will go into effect before a joint resolution of disapproval is passed, the law provides that enactment of a joint resolution terminates the effectiveness of the rule and that the rule will be treated as though it had never taken effect. Sections 801(b)(1), 801(f). Further, a rule that has been nullified cannot be reissued by an agency in substantially the same form unless it is specifically authorized to do so by law after the date of the disapproval. Section 801(b)(2).

The review scheme also requires a variety of actions by persons or agencies in support of the review process, and time for such actions to be scrutinized by both Houses to implement the scheme. Thus, the Comptroller General must submit a report to Congress on each major rule submitted within 15 calendar days after its submission or publication of the rule (Section 801(a)(2)(A)); the Administrator of OIRA determines whether a rule is a “major rule” (Section 804(2)); and after a rule is reported the Senate has 60 session days, and the House 60 legislative days, to pass a disapproval resolution under expedited procedures. Section 802. But Congress has preserved for itself a period of review of at least 60 session or legislative days. Therefore, if a rule is reported within 60 session days of the Senate (or 60 legislative days of the House) prior to the date Congress adjourns a session of the Congress, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1).

Thus the statutory scheme is geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance defeats that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to “determination[s], finding[s], action[s], or omission[s] *under this chapter,*” a plain reference to the range of actions authorized or required as part of the review process. Thus Congress arguably did not intend, as is more fully described below, to subject either its own internal procedures to judicial scrutiny, or the validity of Presidential determinations that rules should become effective immediately for specified reasons, or the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his reporting function. These are matters that Congress can remedy by itself. However, without the potential

³¹(...continued)

new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects.” Legislative History, *supra* note 18, at E 575 and S 3683.

of court invalidation of enforcement actions based on the failure to submit covered rules, agencies are not likely to comply with submission requirements. If Section 805 is read so broadly, it would arguably render ineffective as well the Section 801(b)(2) prohibition against an agency promulgating a new rule that is “substantially the same” as a disapproved rule unless it “is specifically reauthorized by a law enacted after” the passage of a disapproval resolution. It is more than likely that a determination whether a new or reissued rule is “substantially the same” as a disapproved rule is one that a court will be asked to make.³² Congress appears to have contemplated (and approved) judicial review in this and other situations when it provided in Section 801(g) that “[i]f Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.”

The legislative history of the review provision confirms this view of the limited reach of the judicial review preclusion language. A key sponsor of the legislation, Rep. McIntosh, explained during the floor debate on H.R. 3136 that “Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.” 143 Cong. Rec. H3005 (daily ed. March 28, 1996).

Shortly thereafter, the principal Senate and House sponsors of H.R. 3136 published a Joint Explanatory Statement in the Congressional Record providing a detailed explanation of the provisions of the congressional review provision of SBRFA and its legislative history. Senator Nickles explained:

Mr. NICKLES. Mr. President, I will submit for the RECORD a statement which serves to provide a detailed explanation and a legislative history for the congressional review title of H.R. 3136, the Small Business Regulatory Enforcement Fairness Act of 1996. H.R. 3136 was passed by the Senate on March 28, 1996, and was signed by the President the next day .

³²Potential disapproval of the ergonomics rule underlines the necessity for judicial review in certain instances where enforcement is necessary and appropriate to support the statutory scheme. If that rule, which is broad and encompassing in its regulatory scope, is vetoed, the question will arise as to how far can the agency go before it reaches the point of substantial similarity in its promulgation of a substitute, a matter not addressed by either the statute or its sparse legislative history. If the new rule is not again disapproved by the Congress and is then challenged in court, the failure of Congress to act under its CRA authority cannot be used as an indication of congressional intent one way or another. Section 801(g). As a consequence, a reviewing court would likely look for guidance in the floor debates that led to the original disapproval for clues as to what provisions of the rule provoked the veto action. If those reasons are discernable and were not addressed in the agency’s revised rule, a court might find substantial similarity and reject the rule. If the debates do not provide such guidance the court will be effectively left to its own devices to define a resolution. Congress could, of course, enact a new authorization but is not required to. Indeed, the structure and legislative history of the CRA indicate that it was aware of the potentially draconian results of passage of a disapproval resolution. See Legislative History, *supra*, note 18 at E 577 and S 3686.

. . . Because title III of H.R. 3136 was the product of negotiation with the Senate and did not go through the committee process, no other expression of its legislative history exists other than the joint statement made by Senator REID and myself immediately before passage of H.R. 3136 on March 28. I am submitting a joint statement to be printed in the RECORD on behalf of myself, as the sponsor of the S. 219, Senator REID, the prime co-sponsor of S. 219, and Senator STEVENS, the chairman of the Committee on Governmental Affairs. This joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms. The same statement has been submitted today in the House by the chairmen of the committees of jurisdiction over the congressional review legislation.³³

The Joint Explanatory Statement is clear as to the scope and limitation of the judicial review provision:

Limitation on judicial review of congressional or administrative actions

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter". Thus, the major rule determinations made by the Administrator of the Offices of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings". U.S. Const. art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determinations or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval", or by implication, when it has not yet done so. In deciding cases or controversies properly before it,

³³Legislative History, *supra* note 18, at 143 Cong. Rec. S 3683.

a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).³⁴

The Justice Department has suggested that such post-enactment legislative history should not carry any weight, particularly in view of the unambiguous nature of the preclusion language at issue.³⁵ However, as discussed below, the courts appear to have taken a contrary view in analogous interpretive situations.

The Joint Explanatory Statement is a contemporaneous explanation of the congressional review provision by the legislative sponsors of the legislation which is consonant with the text and structure of the legislation. Such statements by legislative sponsors have been described by the Supreme Court as an “authoritative guide to the statute’s construction.” *North Haven Bd. Of Education v. Bell*, 456 U.S. 512, 526-27 (1982)(citing a bill summary placed in the Congressional Record by the bill’s sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983)(relying on a 1965 explanation by “an important figure in the drafting of the 1957 [Atomic Energy Act]”); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984)(remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).

Finally it may be noted that analogous preclusion of judicial review provisions in the original Paperwork Review Act of 1980, P.L. 96-511 and in the 1995 revision of the Act, P.L. 104-13, have been uniformly construed by the courts to allow enforcement of its public protection provision. Thus 44 U.S.C. 3504 (1994), which authorized the Director of OMB to review and approve or disapprove information collection requirements in agency rules, and to assign control numbers to such forms, provided that “there shall be no judicial review of any kind of the Director’s decision to approve or not to act upon a collection of information requirement contained in an agency rule.” 44 U.S.C. 3504(h)(9). A similar provision appears in the 1995 revision of the Paperwork Act at 44 U.S.C.A. 3507(d)(6)(West, 1998 Supp.). The 1980 legislation also contained a “public protection” provision which absolved a person from any penalty for not complying with an information collection request if the form did not display an OMB control number or failed to state that the request was not subject to the Act. See 44 U.S.C. 3512 (1994). The public protection provision has been the subject of numerous court actions, some finding Section 3512 applicable and providing a complete defense to noncompliance, others finding it inapplicable. But no court has ever raised a question with respect to preclusion of judicial review.³⁶

³⁴*Id.*, at E 577 and S 3686.

³⁵See DOJ memorandum, *supra* n. 30, at 10 n.14.

³⁶Compare *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1980)(failure of Forest Service (continued...))

A reviewing court construing the language of the congressional review provision, the structure of the legislation, and its legislative history, is therefore likely to hold that a court is not precluded from preventing an agency from enforcing a covered rule that was not reported to Congress in compliance with Section 801(a)(1)(A).

Conclusion

The structural and interpretive issues identified in this report appear to be the major causative sources of the full rulemaking review provision's limited use. While there have been some instances of the law apparently influencing the implementation of certain rules, the limited utilization of the formal disapproval process in the five years since enactment has arguably reduced the threat of possible congressional scrutiny and disapproval as a factor in agency rule development. Moreover, there is evidence suggesting that a significant number of covered rules are not being submitted for review at all. OMB was directed to prepare, by March 31, 1999, guidance for executive agencies with respect to such critical issues as the scope of the definition of the term rule, the consequence of failing to report a rule, the good cause exemption, the 60-day delay requirement for major rules, the nature of reporting requirements, among other matters. It failed to do so. The current Congress may exercise its authority under the CRA since the White House appears amenable to overturning rules inherited from the prior Administration. Any rule promulgated after July 13, 2000 (59 session days prior to the end of the second session of the 106th Congress) is subject to CRA scrutiny for 60 session or legislative days in the first session of the 107th Congress as long as a disapproval resolution is introduced in the House by April 30 or in the Senate by April 6. For the long run, however, the structural and interpretative issues identified in this report appear to merit congressional scrutiny and possible development of remedial legislation.

³⁶(...continued)

requirement to file a plan of operations to have OMB control number precluded conviction for failure to file) and *Cameron v. IRS*, 593 F.Supp. 1540, *aff'd* 773 F.2d 126 (6th Cir. 1984)(failure of IRS forms to have OMB control numbers did not violate section since it was a collection of information during the investigation of a specific individual or entity which is exempt under the provision).