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NEEDED: AGGRESSIVE IMPLEMENTATION OF THE CONGRESSIONAL REVIEW ACT

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INTRODUCTION

The 104th Congress achieved remarkable results in its efforts to transform such major programs as welfare and agriculture. It also put into place significant reforms of procedures for evaluating regulations and for conducting the daily business of Congress. The challenge for the 105th Congress will be not only to continue to move forward with a legislative agenda that remains committed to reforming the business of Congress and to transforming government, but also to ensure that the reforms passed during the 104th Congress are implemented effectively.

Some of these enacted reforms could produce dramatic results if Congress simply chose to implement them aggressively. For example, one little-noticed piece of legislation passed by Congress and signed by President Bill Clinton on March 29, 1996, is the Small Business Regulatory Enforcement Fairness Act (SBREFA). This legislation includes a subtitle known as the Congressional Review Act (CRA).[1] It establishes an expedited process by which Congress may review and disapprove essentially all federal agency regulations.[2] The effective use of the powers of the CRA will be critical to the success of future legislative efforts to improve the ways in which the federal government makes regulatory decisions, particularly those intended to protect public health, safety, and the environment. For this reason, the 105th Congress needs to make full use of the powers of the CRA.

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1 The Congressional Review Act is Subtitle E of Title II (The Small Business Regulatory Enforcement Fairness Act) of the Contract With America Advancement Act of 1996, Public Law 104–121. Title II adds a new Chapter 8 to Title 5, United States Code. Other parts of the SBREFA are intended to make federal agencies more responsive to the impact of rules on small business, most notably by allowing for judicial enforcement of the Regulatory Flexibility Act. For more information, including the text of the CRA, visit The Heritage Foundation's newest Internet site, *www.regulation.org,* a comprehensive source of regulatory statistics, facts, and related information.

2 Congress's authority covers all federal Cabinet agencies and such independent agencies as the Securities and Exchange Commission, Nuclear Regulatory Commission, and Federal Communications Commission. The centralized regulatory review process of the White House does not cover the independent agencies.

A POWERFUL AND IMPORTANT TOOL

The Congressional Review Act gives Congress ultimate accountability for the regulations issued by federal agencies that have been charged with implementing the statutes passed by Congress. Many of the new laws enacted during the 104th Congress—the Health Care Coverage and Affordability Act, the Safe Drinking Water Act, the Food Quality Protection Act, and many others—will cause agencies to generate a plethora of new regulations to give force to the laws. The CRA gives Congress the authority to scrutinize these new agency rules to ensure that the new regulations appropriately implement the laws as Congress intended and do so in a cost-effective manner that does not impose unnecessary burdens on the public.

For too long, Congress has blamed the federal agencies for many of the burdensome regulations these agencies crafted. Often this blame was justified. But by passing the CRA, Congress has made itself accountable and responsible to the American public for almost all regulations. In the past, when Congress enacted legislation, it delegated responsibility to an executive branch agency to write the regulations to implement the legislation. If the agency's rules failed to reflect the intent of Congress, Congress often held oversight hearings or the regulated entities would spend resources fighting the rules in court. Under the CRA, Congress essentially has tasked itself with the responsibility to ensure the regulations are necessary and do what they are intended to do in the most cost-effective and least burdensome manner. In some cases, this may mean that Congress will have to reconsider the laws it passed.

The scope of Congress's regulatory review authority under the CRA is quite broad. It covers almost all final regulations as well as interpretive rules, statements of general policy, and even guidance issued by federal agencies. The act requires each federal agency to submit to the Comptroller General of the U.S. General Accounting Office (GAO) and each house of Congress a copy of each final rule, a report describing the rule, and any associated cost-benefit, regulatory flexibility, Unfunded Mandates Reform Act,[3] or applicable Executive Order analyses[4] that the agency is required to perform.

In general, "major"[5] final rules cannot become effective for at least 60 calendar days after submission to Congress,[6] while a "non-major" rule can take effect whenever the agency designates an effective date. Major final rules for which an agency finds "good cause" that the normal Administrative Procedure Act (APA) notice and comment procedures are unnecessary are exempt from the delay, however, and can take effect as the agency determines. In addition, major final rules addressing imminent threats to safety and health, or other emergencies, criminal law enforcement, matters of national security, or issues pursuant to any statute implementing an international trade agreement, may be exempted by Executive Order from the 60-day minimum delay in the effective date. The decision by the President to exempt any major final rule from the 60-day delay as an

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3 For an assessment of the implementation of this act, see Angela Antonelli, "Promises Unfulfilled: The Unfunded Mandates Reform Act of 1995," Cato Institute *Regulation* No. 2, 1996.

4 For example, federal agencies will have to submit a report to Congress on each rule stating whether they have evaluated the costs of the rule relative to the benefits (E.O. 12866); whether it affects the relationship among federal, state, and local governments (E.O. 12612); whether it interferes with private property rights (E.O. 12630); or whether it has an impact on litigation (E.O. 12778).

5 A major rule is defined as one that the Administrator of the Office of Information and Regulatory Affairs (in the White House Office of Management and Budget) determines has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, jobs, investment, productivity, and the like. A major rule is essentially any rule deemed to be a "significant regulatory action" as defined in Section 3(f)(1) of E.O. 12866.

6 The Administrative Procedure Act requires a minimum 30-day effective date; the CRA extends that minimum period by an additional 30 days for major rules.

"emergency" rule is not subject to judicial review. Nevertheless, the agency issuing the rule still must submit the rule to Congress and the GAO as soon as practicable.

For major rules, the Comptroller General is required to prepare and submit to each house a report on the agency's compliance with analysis requirements within 15 days after receiving the agency's submission. Each rule and the GAO report are to be forwarded to the appropriate committees of jurisdiction in each house for review.

Although major rules are delayed for at least 60 calendar days, the congressional review period actually may run longer because it is suspended whenever Congress adjourns for three days or longer.[7] In other words, if, during the 60-calendar-day delay in the effective date, Congress adjourns for 10 days, it still allows 10 days after the date on which the rule actually takes effect for a Member to introduce a resolution of disapproval. Thus, there are really two distinct calendars, one governing the effective date of major rules and another governing the review time within which Congress can introduce a joint resolution.[8] If Congress adjourns at the end of a session before its review period expires, the review period begins again on the 15th day of the next session.[9]

Congress can pass a joint resolution of disapproval under expedited procedures (in other words, such resolutions cannot be subject to points of order or a Senate filibuster and debate is limited to 10 hours) during the review period. If Congress fails to act on a resolution during its review period, the resolution no longer would be subject to expedited procedures, but would be treated like any other bill subject to amendment.

A joint resolution is subject to presidential veto and the opportunity for a veto override. If the joint resolution is signed by the President, or vetoed but the veto has been overturned, the regulation is deemed not to have taken effect. It would have to be changed substantially before it could be resubmitted to Congress.

FEDERAL REGULATORS: TESTING CONGRESSIONAL RESOLVE

Although the CRA has been in effect since early 1996, Congress has done little with its authority so far. There are indications already that federal agencies are testing the resolve of Congress to use the act and to hold them accountable for the rules they promulgate. So far, congressional resolve appears weak. Between April 1, 1996, and January 28, 1997,[10] federal agencies submitted 3,294 nonmajor final rules to the GAO and Congress. In addition, 49 major final rules have been submitted that require the GAO to submit a statement to Congress.[11] Yet, to date, Congress has not passed a single resolution of disapproval for any of these rules.

The lack of congressional action so far appears to have convinced federal agencies that the law is little more than a needless bureaucratic hurdle.

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7 The review period is suspended during weekends, recesses, or whenever either house of Congress is adjourned.

8 The days Congress actually is working are referred to as legislative days in the House and session days in the Senate.

9 Depending on when a rule is issued and when it is delivered to Congress, the congressional review period could extend from four months to one year after the rule has been issued.

10 Data on the number of rules submitted to Congress are maintained by the GAO's Office of General Counsel. The CRA also covers any final rule promulgated between March 1, 1996, and March 29, 1996, the day the act actually took effect. According to the Office of Management and Budget, only two rules are covered by the CRA during this period: the Coast Guard's rule implementing financial responsibility requirements for vessels under the Oil Pollution Act (FR 2964, March 7, 1996) and an Environmental Protection Agency rule on new source performance standards for new municipal solid waste landfills (FR 9905, March 12, 1996).

11 For a list of GAO final reports to Congress, see *www.gao.org* on the Internet.

For example, on August 30, 1996, the Health Care Financing Administration (HCFA) published a major final rule in the *Federal Register* revising the Medicare hospital in-patient prospective payment system.[12] Although the CRA requires a 60-day delayed effective date, the changes the HCFA made were to take effect after 30 days, on October 1, 1996, the beginning of FY 1997. Thus, rather than comply with the requirements of a federal law, the HCFA followed its own timeline and assumed that Congress would not delay the effective date of a rule that would have significant financial implications for hospitals. Indeed, on September 17, 1996, the Senate failed to pass Senate Joint Resolution 60, which would have prevented the rule from taking effect.

The HCFA subsequently has continued to violate the requirements of the CRA, failing to provide required cost-benefit analyses for rules or ignoring the requirement that rules be submitted with a 60-day delayed effective date to allow for congressional review.[13]

There are other cases in which agencies simply chose to ignore the CRA's requirements even when there are legal opinions that make it clear the agency's rule is subject to congressional review.

For example, on July 2, 1996, the Secretary of Agriculture issued a memorandum concerning the Emergency Salvage Timber Sale Program but did not submit it formally to the GAO and Congress as required by the CRA. The White House Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), which is responsible for carrying out the Administration's final review of significant agency rules prior to their publication in the *Federal Register* and submission to Congress, considered the document a major rule. The GAO's General Counsel subsequently issued the opinion that the Department of Agriculture's memorandum constituted a "rule" as defined by the Administrative Procedure Act because it "provides substantive criteria for determining what timber should be included in the Emergency Salvage Timber Sale Program, thereby affecting the areas of and number of timber salvage sales...."[14] But Secretary of Agriculture Dan Glickman disagreed,[15] and the department went ahead and put the policies into effect. In the end, Congress took no action to stop it.

The 104th Congress moved quickly with an ambitious regulatory reform agenda. Federal regulatory agencies held back on releasing their most controversial, costly, and burdensome new initiatives to see what Congress would do. But after seeing no resolve in Congress to act, the Administration and federal agencies clearly do not expect Congress to challenge seriously the agencies' regulatory decisions. Absent any action that demonstrates that the 105th Congress is willing to enforce the CRA, federal regulators are likely to press forward with an aggressive regulatory agenda.

A FLOOD OF NEW RULES IS LIKELY

There are signs that the Clinton Administration is ready to take advantage of Congress's passive approach. Because of the interest of the 104th Congress in enacting comprehensive regulatory reform,[16] many federal agencies had slowed their pace in issuing new rules. In October 1996,

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12 See *Federal Register,* Vol. 61, No. 170 (August 30, 1996), pp. 46165–46215.

13 For background information on subsequent HCFA rules, see John C. Shanahan, "Congressional Review: Why It Exists and How to Make It Work," Alexis de Tocqueville Institute *Issue Brief* No. 144, January 27, 1997, p. 7.

14 Letter from Mr. Richard Murphy, General Counsel, U.S. General Accounting Office, to Senator Larry E. Craig (R–ID), September 16, 1996, p. 8.

15 Letter from Secretary of Agriculture Dan Glickman to Representative Charles H. Taylor (R–NC), September 17, 1996.

16 For an excellent summary of the legislative proposals considered, see Angela Antonelli, "Regulation," in Stuart M. Butler and Kim R. Holmes, eds., *Issues '96: The Candidate's Briefing Book* (Washington, D.C.: The Heritage Foundation, 1996). See also *The Legislator's Guide to Regulation* (Washington, D.C.: The Heritage Foundation,

however, President Clinton issued *The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions* (the *Agenda*),[17] which suggests that agencies have stepped up the pace of new rules that are being developed since the enactment of the CRA. Specifically,

- The October 1996 *Agenda* contains summaries of more than 4,680 rules currently in development; of these, 139 are major rules. Assuming each of the major rules has an economic impact of at least $100 million, agencies are in the process of developing rules that will have an impact in excess of $13 billion.
- The *Agenda* for April 1996 reported 116 major rules in development. Thus, six months after the passage of the CRA, and as the 104th Session of Congress was coming to a close, the Administration reported that federal agencies were preparing an *additional* 23 major rules, with a potential economic impact of more than $2 billion.

More recently, the Clinton Administration has announced a number of new regulatory proposals worthy of careful scrutiny. Although just a few examples are highlighted here—the Clean Air Act, wetlands, federal lands management, and workplace safety and health regulations—there are a number of additional examples of other rules that currently are under development and highlighted in the *Agenda*.

The Clean Air Act. On November 27, 1996, the Environmental Protection Agency (EPA) proposed new National Ambient Air Quality Standards for particulate matter and urban ozone. The EPA recommends the tighter standards even though the studies on which it relies do not show a link between breathing urban air and a greater incidence of illness and premature death. The medical evidence simply does not suggest health benefits from the adoption of tighter standards.

At the same time, the Department of Energy's Office of Health and Environmental Research prepared comments on the EPA's ozone standard and urged the EPA to establish the standard "with a consideration of both the beneficial health effects of reducing tropospheric ozone concentrations and the *potential harmful effects* that reductions in tropospheric ozone will have due to increased penetration of UV–B [ultraviolet radiation]."[18] The department's comments refer to evidence that increased exposure to UV–B radiation is associated with skin cancer, cataracts, and depressed immune systems. The EPA has refused to consider the fact that the tighter ozone standard, while decreasing respiratory diseases, actually might be increasing the incidence of skin cancer and other ailments.

In addition, a study of the costs of compliance with the proposed ozone standard for the city of Chicago suggests that it would cost the city between $2 billion and $7 billion annually to comply with the new standard.[19] What remains unexplored are the effects of the tradeoffs Chicago will have to make to meet these costs. If the cuts are necessary in the availability of normal city services, such as in the fire and police departments, in order to have the funds to pay for compliance with the tougher clean air standards, then there is very likely to be an increase in the risk and incidence of serious injury and death.

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forthcoming March 1997).

17 Regulatory Information Service Center, *The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions,* October 1996.

18 Transcript of statement made by Dr. Martin Frazier, U.S. Department of Energy, Office of Health and Environmental Research, at a meeting of the EPA's Clean Air Science Advisory Committee, March 21, 1995, pp. 205–221 (emphasis added).

19 Kenneth Chilton and Stephen Huebner, "Has the Battle Against Urban Smog Become 'Mission Impossible'?" Center for the Study of American Business *Policy Study* No. 136, November 1996, p. 2.

Clearly, there is considerable uncertainty within the Administration, the scientific community, and the public about the need for this rule, and yet the EPA persists. In July 1995, the former chairman of EPA's Clean Air Science Advisory Committee (CASAC), University of California Professor Sheldon K. Friedlander, stated that although "recent data indicate there is an enhanced risk from fine particles smaller than one micrometer, the why of this data is not very well understood. Any new standard setting is to be carefully done because the wrong regulations could cost U.S. industry and the public billions of dollars while leaving the real culprit untouched."[20] At a February 5, 1997, hearing of the Senate Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety, CASAC Chairman Dr. Sidney Wolff testified there were many gaps and uncertainties in the risk assessment analysis and no "bright line" as to the threshold level for public health benefits. Dr. Wolff also has stated he did "not think the standards that have been chosen reflect the advice CASAC has given the [EPA] administrator."[21]

Remarkably, the Clinton Administration, in acknowledging that generally scientists and others agree that considerably more research is needed to gain a concrete understanding of the health effects of particulate matter (PM), requested in its FY 1998 budget "$26.4 million for PM research, a 37 percent increase over 1997. To reduce the great uncertainty about PM's health effects, EPA will continue its efforts to identify the mechanisms by which particulates affect human health."[22] As part of the EPA's FY 1997 budget, and at CASAC's recommendation, Congress already had given the agency $18.8 million for research and monitoring of particulate matter. This was intended to encourage the EPA to conduct the research and monitoring activities necessary to determine the need for tighter standards conclusively.

Nevertheless, the EPA is persisting in tightening the current standards by summer 1997, perhaps because the American Lung Association (ALA), which received $5 million from the EPA between 1990 and 1995,[23] had sued the EPA to complete its review. This does not mean the EPA has to change the standards. As one observers notes, "If you think EPA is upset with ALA suing them, think again.... Truth be known, the EPA wants to be sued, because every time they are sued it expands the reach of the Clean Air Act."[24]

Thus, the EPA's regulation actually might hurt more people than it claims to help, yet the EPA's analysis fails to account for this.[25] And the EPA also persists even though it has admitted there is uncertainty about the need for the rule.

Wetlands. The Army Corps of Engineers intends to phase out a special permitting process that has been in effect since 1984. This process allows approval with limited or no paperwork for wetlands projects of 10 acres or less that the agency believes will have minimal environmental impact. For the next two years, the Corps will approve expedited permits only for projects affecting up to three acres, and projects under one-third of an acre do not need prior notice. Once the expedited process is entirely phased out two years from now, potentially thousands of new individual permit applications will have to be filed by homeowners, businesses, and communities, requiring time and money that are currently scarce. The Corps potentially will need taxpayer dollars to review an addi-

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20 University of California at Los Angeles press release, "Sheldon Friedlander, Pioneer in Aerosol Technology, Receives 1995 Lawrence K. Cecil Award," July 1995, p. 1.

21 John Merline, "Clean Air Rules Under Attack," *Investor's Business Daily,* December 11, 1996, p. A1.

22 Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1998,* p. 81.

23 John Merline, "EPA Boosters on the Government Tab," *Investor's Business Daily,* January 28, 1997, p. A1.

24 Scott Segal, an attorney with Bracewell & Patterson and a professor of environmental management at the University of Maryland, quoted in Merline, "EPA Boosters on the Government Tab," *op. cit.*

25 For background on this argument, see John Shanahan and Adam Thierer, "How to Talk About Risk: How Well-Intentioned Regulations Can Kill," Heritage Foundation *Talking Points* No. 13, April 26, 1996.

tional 20,000 permits for projects that pose little or no threat to the environment. Minor modifications to road crossings, utility line backfills, and bank stabilization projects are all examples of projects that qualify for permitting today but would not receive expedited review under the new rules.

Even though the costs are clear and the benefits uncertain, the Corps persists in making the change.

Federal Lands Management. The Department of the Interior's Bureau of Land Management (BLM) issued a proposed rule at the end of 1996[26] that would expand the criminal law enforcement powers of BLM officers on federal lands greatly. Specifically, the proposed rules would allow BLM enforcement officers to carry firearms; make arrests without warrant or process; stop, search, and seize vehicles; search any person without a warrant; and enter private property if they feel the owner is doing anything that has any effect on the public lands. Penalties include fines up to $500,000 and up to five years in prison. How the federal government is likely to enforce its new power is predictable based on previous experience. For example, because the famous race car driver Bobby Unser accidentally drove his snowmobile onto a federal wilderness area when he lost his way during a Colorado blizzard, the federal government is pursuing a $5,000 fine and a six-month prison term against him.[27]

Workplace Safety and Health. The Occupational Safety and Health Administration (OSHA) is very likely to move a number of rules this session that will have a significant impact on all businesses.

On January 10, 1997, OSHA published a final rule requiring employers to reduce workplace exposures to methylene chloride from 500 parts per million (ppm) to 25 ppm over an eight-hour, time-weighted period. The standard also requires employers to provide training, medical surveillance, and exposure monitoring, and includes new record-keeping requirements and hazard communications provisions. OSHA has estimated the costs of compliance to be in excess of $100 million a year for employers in the private sector.[28] Although the American Conference of Governmental Industrial Hygienists recommended that a limit of 50 ppm would be adequate to protect public health, OSHA has set the level at 25 ppm, despite the significant impact the lower limit would have on thousands of small businesses throughout the country.[29]

This OSHA rule—in particular, the quality of OSHA's risk assessment and its impact on small business—has been subject to controversy for some time. In fact, the rule was withdrawn from OMB review in January 1995 because of possible inconsistencies with EPA rules for methylene chloride emissions, concerns that appear to remain unresolved.[30] In addition, the Small Business Administration's own Office of Advocacy submitted comments to the OMB on the draft final rule in August 1996 stating its concerns that (1) OSHA failed to consider flexible alternatives for the

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26 *Federal Register,* Vol. 61, No. 217 (November 7, 1996), pp. 57605–57621.

27 For this and other stories, see Adam Thierer, "This Land Once Was Your Land," *The Washington Times,* January 28, 1997, p. A16.

28 *Federal Register,* Vol. 62, No. 7 (January 10, 1997), pp. 1493–1619.

29 "OSHA's own initial regulatory flexibility analysis showed that some 4,000 companies in these industries would be threatened by annual compliance costs in some cases equal to 120% of their profits." Letter from Senator Dan Coats (R–IN) to Ms. Sally Katzen, Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, September 13, 1996, p. 1.

30 Several Members of Congress, including Senator Dan Coats (R–IN) and Representatives Roger Wicker (R–MS) and Tim Roemer (D–IN), wrote to OSHA last year expressing their concerns about the rule. See also letter from the Honorable John Dingell, Ranking Member, U.S. House of Representatives Committee on Commerce, to the Honorable Robert B. Reich, Secretary of Labor, December 23, 1996, p. 1. See also Risk Policy Report, "Analyst Warner North Challenges OSHA Risk Characterization," January 24, 1997, pp. 11–13.

small firms affected by the rule making; (2) the paperwork requirements (which are a fundamental element of the rule) would not be reviewed, and thus subject to possible changes, until after the final rule is published, leading to considerable uncertainty; and (3) the differences between the EPA and OSHA on the hazards of methylene chloride still needed to be reconciled.[31]

Despite the questionable benefits of the rule, the possible inconsistencies in regulatory policies between the EPA and OSHA, and the considerable economic impact on small businesses, OSHA issued the rule anyway.

OSHA has a number of other costly new rules currently under development. These rules include (1) a final rule on indoor air quality; (2) a proposed rule on ergonomics (OSHA withdrew a rule proposed earlier during the 104th Congress); and (3) a proposed rule requiring employers to develop comprehensive safety and health programs. In the October 1996 *Agenda,* OSHA states that the indoor air rule is "one of the Agency's highest priorities."[32] Both the indoor air and ergonomics rules are likely to impose costs on businesses in excess of $12 billion. OSHA also estimates that the cost to business of developing and maintaining comprehensive safety and health programs is likely to be more than $1 billion annually.[33]

AGGRESSIVE USE OF THE CRA IS CRITICAL TO FUTURE REFORM

If the CRA empowers Congress to review thousands of rules each year and Congress finds fault with few or none of them, then those who argue that the current regulatory system is oppressive may find it very difficult to convince others of their case. Members of Congress who seek to reform the Food and Drug Administration, OSHA, or the EPA hardly can argue that these federal regulatory agencies do a poor job if they have been unable to identify one rule worthy of either serious scrutiny or a resolution of disapproval. Thus, Congress stands to lose credibility from ineffective implementation or outright neglect of the CRA.

On the other hand, if Congress indicates to federal agencies that it has the political will to tackle—through its aggressive oversight—those economically significant or otherwise important new regulatory initiatives, agencies will be much more inclined to take care in the development of regulations, to follow sound cost-benefit and risk assessment principles, and to make sure the rules hold up to public scrutiny.

WHAT CONGRESS SHOULD DO

To send a clear signal to federal agencies, Congress must show its resolve. And to give operational bite to its use of the CRA, Congress should take the following steps:[34]

Establish a coordinated committee review mechanism.[35] Effective implementation of the congressional review of rules requires a serious commitment to establish the mechanisms for identifying, prioritizing, and challenging agency rule making. To do this, Congress first should

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31 Letter from Jere W. Glover, Chief Counsel for Advocacy, U.S. Small Business Administration, to Ms. Sally Katzen, Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, August 27, 1996.

32 Regulatory Information Service Center, *The Regulatory Plan and the Unified Agenda,* p. 62084.

33 *Ibid.,* p. 62100.

34 For a more detailed discussion on how to think and talk about regulation, see Angela Antonelli and Adam Thierer, "Rethinking Regulation," in Stuart M. Butler and Kim R. Holmes, eds., *Mandate for Leadership IV: Turning Ideas Into Actions* (Washington, D.C.: The Heritage Foundation, 1997).

35 For background, see Center for Regulatory Effectiveness, "Urgent Need for a Congressional Mechanism to Assure Effective Implementation of the Congressional Review Act," undated memo, Fall 1996.

establish a coordinated mechanism—ideally including one committee in each house that has special technical and legal expertise on the complexities of the regulatory process—to keep track of the rules submitted. These committees should have both the institutional legal authority and the political stature to serve as the coordinator of the CRA process in each house of Congress. The functions of the coordinator committee would include making sure that the agencies and the GAO follow the requirements of the CRA; keeping track of the CRA process in each house of Congress; and coordinating the review of rules and joint resolutions of disapproval. At the same time, individual committees should take the lead in oversight of specific agency regulatory activities.

The overall purpose of the CRA is to alter the behavior of regulatory agencies, in part, by creating a realistic threat that Congress can pass a joint resolution of disapproval quickly. A coordinated review process in each house would make the threat more credible. The ideal solution would be for both houses to appoint a Joint Committee or Task Force on Regulation that can help facilitate and coordinate the work of individual committees in both the House and Senate.

Resist efforts to weaken the CRA.[36] Some groups that are uncomfortable with Congress's new review authority will insist on making the case that the CRA is needlessly cumbersome and slows down the rule-making process by placing too much of an administrative burden on Congress. The American Bar Association (ABA) is considering making a recommendation to Congress that the act should be amended to (1) limit review to "high-consequence, major legislative rules"; (2) repeal the prohibition against the ability of courts to draw inferences from congressional failure to enact a joint resolution, thereby enabling an agency to claim "that the mere failure of Congress to enact a law disapproving the regulation constitutes Congress's affirmative endorsement of the agency's action"; (3) abolish the time calculations established by Congress to regulate its own internal procedures in favor of a clear calendar date; and (4) stay the effective date of final rules for no longer than 90 days.

Any further debate about the CRA will serve only to keep Congress from implementing it. Those who oppose the act are more than willing to continue creating obstacles to keep Congress from the task at hand, fully cognizant that efforts to improve the regulatory process will suffer if Congress does nothing with its new authority.

The potential ABA recommendations are misguided. They seek to limit the ability of Congress to review effectively and comprehensively the implementation of the statutes it has passed and ensure that the agencies' methods of implementation address the issues as Congress intended. Those who would argue that the CRA is needlessly cumbersome fail to understand the content and purpose of the act. As Representative David McIntosh (R–IN) recently explained:

> The primary purpose of the CRA is not to encourage Congress to overturn a great number of rules that are submitted by agencies. Indeed, the CRA's success will be measured in part by how few rules we must overturn.... [T]he CRA was intended to allow more effective congressional oversight (both of individual rules and the rule-making process in general), to increase incentives regulators have to respond to views of the general public rather than narrow interests, and to make Congress and the President more politically accountable for the resulting rules.[37]

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36 For background, see Center for Regulatory Effectiveness, "Points in Opposition to the Cohen/Strauss Proposal for an ABA Resolution," undated memo, Fall 1996, p. 1.

37 Letter from Representative David M. McIntosh (R–IN), Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, to James T. Reilly, Chairman, Council of the Section of Administrative Law and Regulatory Practice, American Bar Association, January 30, 1997, pp. 1–2.

The potential ABA recommendations would undermine one of the most important functions of the CRA: to monitor the agencies' compliance and noncompliance with the President's Regulatory Reform Executive Order 12866 and regulatory reform laws including the Unfunded Mandates Reform Act of 1995, the Regulatory Flexibility Act of 1980 (as amended), and the Paperwork Reduction Act of 1995. In many cases, the non-major rules are the ones most in need of oversight because agencies tend to ignore those statutes that are intended to maximize public participation in the rule-making process.

Establish criteria for congressional action. Once a review structure has been put into place, Congress must decide the criteria for identifying those rules that should be the subject of more careful congressional review and perhaps a resolution of disapproval. Possible criteria, many of which already are part of the Clinton Administration's Executive Order 12886, Regulatory Planning and Review, might include the following:

- Does the rule have a significant economic impact ($100 million threshold)?
- Does the rule have a significant regional or industry impact (that is, would one area of the country or industry be hit disproportionately hard)?
- To what extent is the rule statutorily prescribed?
- Is the rule consistent with the congressional intent in the legislation?
- How does the rule significantly affect small businesses and individuals?
- Was there an open rule-making procedure and a complete and accurate rule-making record developed by the agency?
- Did the agency conduct a thorough examination of all reasonable alternatives, including the possibility of no regulation?
- Did the agency evaluate both costs and benefits of the rule, and provide a complete explanation of why a certain alternative was selected?
- Was adequate consideration given to economic incentives and market mechanisms?
- Were the best available scientific and unbiased risk assessments incorporated?
- Were opportunity costs (that is, tradeoffs) examined to maximize protection of the public health and the environment?
- Is the rule an unfunded mandate?
- Is the rule easy to understand, and to what extent will it encourage litigation?
- Do minority/ethnic groups or the poor suffer disproportionately as a consequence of the rule?

These criteria represent reasonable questions to ask in the regulatory decision-making process. Too often, federal regulators fail to ask such commonsense questions. Congress should do so. The CRA gives Congress the ability to hold federal regulators more accountable to the public for the rules they produce and to make sure rules are developed with maximum public participation.

Task the GAO to undertake more in-depth reviews of questionable rules. The GAO, as a legislative research arm of Congress, has resources that should be leveraged more effectively to implement the CRA. To date, the GAO has filed 49 major rule reports with Congress. The GAO currently is required to provide only little more than a checklist of whether each agency addressed the requirements, however, rather than give an assessment of the quality of the agency's analysis. It is not required to judge whether an agency's determination of its own compliance is accurate or not. Congress should task the GAO with conducting a more detailed assessment of

major rules. OIRA receives rules for review as well as underlying analyses that support the rules; the GAO should as well. When the GAO submits a report to Congress, it should indicate whether it is of the opinion that some of the agency's conclusions are questionable and worthy of more in-depth review. If this were done regularly, Congress could ask the GAO to conduct a much more thorough review of the underlying analysis that guides an agency's decision.

Devote staff to monitor and challenge agency rules more effectively. Because Congress has decided to give itself new responsibilities, it needs to devote the resources to carry out these tasks successfully. Congressional committees can and should allocate or reallocate some of their staff resources to monitoring agency rule making.

Hold oversight hearings and ensure adequate time for preparation and testimony. Effective oversight and congressional hearings require adequate preparation time, and often detailed research as well. Oversight hearings should be scheduled and undertaken by congressional committees only when the objective of each hearing is clear, in order to avoid surprises and ensure success in preparation and execution. Because appropriately conducted congressional review takes time, Congress must make sure it takes the necessary steps early in the process to implement the appropriate mechanisms for coordinating, identifying, targeting, focusing, and communicating on important regulatory proposals.

As the committees prepare for these oversight hearings, they must keep in mind that the degree of involvement of special-interest groups actually might weaken their efforts, leaving them vulnerable to charges of being driven by "big business," "big labor," or other groups. Congressional staff often rely on lobbyists from regulated industries to provide the information needed to assess an issue. Committee staff need to balance their efforts by taking advantage of other resources—like public policy research organizations and the academic community—to analyze and track these issues. These groups can offer alternative perspectives and analyses of the rules.

Take the message beyond the Washington Beltway. Examples of how federal regulators have made decisions that have harmed the public, and of alternatives that they failed to consider, need to be communicated back home in the congressional districts and by the local media. Too often the need for change is not at all obvious to the public. Effective oversight—as part of the implementation of congressional regulatory review authority—frequently presents excellent opportunities for Members of Congress to uncover important information that should be disseminated back home to help them make the case for change.

CONCLUSION

The 105th Congress declared that it would be the "implementation Congress." To make this description meaningful to the American public, Congress must make aggressive use of the Congressional Review Act. The act itself is critical to the success of future regulatory reform efforts. Success should not be measured by how many resolutions of disapproval are introduced or how many rules become law. The test should be whether Congress increases its scrutiny of rules being promulgated, and whether the unelected federal regulators pay more attention to the criticisms of their rules once a formal mechanism exists in Congress to review and accept or reject those rules.