GOVERNMENT AFFAIRS

CONGRESSIONAL INFLUENCE ON RULEMAKING IS ON THE RISE

Congress has long had direct and indirect influence over the making, modification, and rescission of rules promulgated by federal agencies. The level and frequency of such influence have risen significantly in the Trump administration.

The most common exercise of direct congressional authority is the passage of laws that either explicitly order an agency to issue a rule and set specific parameters or requirements for the rule, provide more general rulemaking authority and discretion, or overturn an existing rule.

Until 2017, one of the most prominent recent instances occurred in 2014, when the Centers for Medicare & Medicaid Services (CMS) proposed a rule that would eliminate "protected status" for certain categories of drugs under Medicare Part D. Protection under Part D meant that Medicare was required to cover all drugs in these categories.

"Congress was outraged at the possibility that senior and disabled citizens might lose access to the drugs, which included critically needed antidepressants and antiseizure drugs, among others," notes Jim Flood, a Crowell & Moring partner and chair of the firm's Government Affairs Group, who formerly served as a counsel to the Senate Judiciary Committee and as an assistant U.S. attorney. "The full Senate Finance Committee and a bipartisan group of 50 members of two House committees wrote letters to CMS demanding withdrawal of the proposed rule. In response, CMS promptly turned tail and scrapped it."

THE CRA AS RULEMAKING AVENGER

Just three years later, Congress entered a new era of rulemaking influence with its unprecedented use of the Congressional Review Act. The CRA was passed in 1996 as a bipartisan measure enabling Congress to review and disapprove (i.e., overturn) agency-issued rules via an expedited legislative process. Once a rule is disapproved, the CRA prohibits reissuance of the rule in substantially similar form or issuance of a substantially similar rule unless the reissued or new rule is specifically authorized by a subsequently enacted law.

Prior to 2017, the CRA had successfully been invoked to disapprove a rule only once—in 2001, when Congress disapproved a workplace ergonomics rule issued by the Clinton administration. During the first two years of the Trump administration, by contrast, Congress pounced on the CRA as a means to undo regulations issued under Barack Obama.

Starting in early 2017, congressional Republicans took up this task with gusto, using the CRA to repeal 16 Obama-era rules such as a change to the Interior Department's restriction on mining activities that can occur next to streams, the requirement that the Social Security Administration disclose information about mentally incapacitated people to agencies conducting background checks for gun purchases, and the Federal Communications Commission's net neutrality rule.

In 2017, Congress began examining older executive branch actions such as guidance documents and interpretive rules that had not been submitted to Congress for review and had not been considered subject to the CRA's expedited procedures. This is no small matter: A 2017 Brookings Institution study identified 348 federal rules with significant reporting deficiencies that could expose them to CRA disapproval.

Byron Brown, a senior counsel in Crowell & Moring's Government Affairs and Environment & Natural Resources groups, who formerly served as a senior official in the Environmental Protection Agency and both houses of Congress, has seen firsthand how the Trump administration is more receptive to lobbying by both industry and Congress.

"At the beginning of the current administration, the White House put out a clear message that it was open for business

"Time-tested blocking and tackling ... could be more effective because of the administration's interest in less rulemaking and more deregulation."—*Jim Flood*

"People are coming to agencies with wish lists of new, revised, or repealed rules without thinking through the probability or risks of litigation. They sometimes ask for actions that may be hard to defend in court." —*Byron Brown*

and interested in hearing directly from the regulated community," Brown says. "Not only does this mean more opportunities for direct lobbying than previously, but it also results in companies and other advocates increasingly engaging with their representatives and senators to help them articulate and make their cases through letters, appropriations language, and even holds on nominations."

A prime example was the intense pressure exerted by Iowa Senators Charles Grassley and Joni Ernst and Texas Senator Ted Cruz over the Trump administration's plans to reform the EPA's Renewable Fuel Standard program. One idea would have reduced the amount of corn-based ethanol that oil refineries would be required to blend with gasoline, prompting Grassley to threaten to call for then-EPA Administrator Scott Pruitt's resignation if the idea moved forward. It didn't.

CAN'T WIN 'EM ALL

Members of Congress and their constituents, of course, don't always get what they want from regulatory agencies. Says Brown, "People are coming to agencies with wish lists of new, revised, or repealed rules without thinking through the probability or risks of litigation. They sometimes ask for actions that may be hard to defend in court. In these cases, even if a rule is administratively stayed or delayed as part of a reconsideration process, the agency and the affected industry may see only short-term relief as courts are becoming more aggressive in striking down these delay tactics."

This scenario has unfolded most notably at the EPA and the Department of the Interior. New political appointees at the agencies agreed to delay or reconsider several Obama-era environmental regulations, resulting in some high-profile court losses that reinstated the old rules.

In one such decision, the Court of Appeals for the D.C. Circuit told government lawyers that the EPA's rationale for delaying the Chemical Disaster Rule "makes a mockery" of the Clean Air Act. In another, a Northern District of California judge granted a bid by New Mexico and California for a preliminary injunction against an Interior rule. The judge called the reasoning behind the rule, which suspended a regulation aimed at reducing leaks of methane gas during oil production on federal land, "untethered to evidence," among other criticisms.

Brown suggests that companies seeking regulatory relief before federal agencies may benefit from road-testing their ideas with outside counsel, who can help both to gauge the litigation risks and measure the political support that may be needed to help get the idea across the finish line and successfully through the courts.

MIDTERM ELECTION RESULTS WILL INCREASE SCRUTINY

The midterm elections produced a split Congress, with a new Democratic majority in the House of Representatives and a returning Republican majority in the Senate. Even before they took office, the anticipated new House committee chairs announced plans for aggressive oversight of Trump's regulatory reform agenda, including the EPA's new greenhouse gas regulations and chemical safety rules.

The expected uptick in oversight may cause agencies to divert limited resources away from work revising or repealing regulations in order to respond to congressional requests for information, and the eventual public disclosure of agency documents through this process may make it more difficult for agencies to defend their actions in court or before the public.

STRATEGIES FOR SUCCESS

How should organizations attempt to influence rulemaking in today's environment?

Crowell & Moring's Jim Flood recommends an approach that combines legal, political, and publicity strategies. "While much of this is time-tested blocking and tackling," he says, "it's no less effective now than in the past. If anything, it could be more effective because of the administration's interest in less rulemaking and more deregulation." He suggests companies consider these steps:

- Ask members of Congress and other interested parties to write letters to agency rulemakers.
- Develop and implement public relations strategies in selected markets and media.
- Talk to members of Congress during the appropriations process, and ask counsel to try to contribute language to the committee and conference reports that often accompany appropriations law.
- Use social media to amplify the voices of people affected by the proposed rule as well as to attract the attention of Congress and rulemakers.