FTC Rule-A-Palooza Meets *Loper Bright*

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Leonard L. Gordon
Partner and Chair of Advertising & Marketing | 212.370.6252 | lgordon@Venable.com

Shahin O. Rothermel
Partner | 202.344.4550 | sorothermel@Venable.com

Maeve Rothman
Senior Counsel | Maeve.Rothman@mastercard.com

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Agenda

1. “Rule-A-Palooza”
2. Impact of *Loper Bright*
3. Challenges to FTC Rules
4. FTC Enforcement
5. Congressional Review Act

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Rules, Rules, and…More Rules

Federal Trade Commission Announces Final "Click-to-Cancel' Rule Making It Easier for Consumers to End Recurring Subscriptions and Memberships

FTC Proposes Rule to Ban Junk Fees

FTC Announces CARS Rule to Fight Scams in Vehicle Shopping

FTC Issues Rule to Deter Rampant Made in USA Fraud

FTC Implements New Protections for Businesses Against Telemarketing Fraud and Affirms Protections Against AI-enabled Scam Calls

FTC Announces Rule Banning Noncompetes

Federal Trade Commission Announces Final Rule Banning Fake Reviews and Testimonials

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Rule-A-Palooza

FTC Rule	Status
Negative Option	Final, Challenged in Court
Non-Compete	Final, Set Aside by court after challenge
Combating Auto Retail Scams (CARS)	Final, Stayed by FTC after court challenge
Unfair or Deceptive Fees	Proposed
Children's Online Privacy Protection Rule	Proposed
Energy Labeling	Final
Ophthalmic Practice	Final
Use of Consumer Reviews and Testimonials	Final
Telemarketing Sales Rule: Recordkeeping, B2B	Final
Telemarketing Sales Rule: Technical Support	Proposed
Deceptive or Unfair Earnings Claims	Proposed
Safeguarding Customer Financial Information	Final

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Rule-A-Palooza (cont.)

FTC Rule	Status
Risk-Based Pricing	Final
Government and Business Impersonation	Final
Business Opportunity	Proposed
Funeral Industry Practices	Proposed
Power Output Claims for Amplifiers Utilized in Home Entertainment Products	Final
Disclosure Requirements and Prohibitions Concerning Franchising	Final
Commercial Surveillance and Data Security	Proposed
Health Breach Notification	Final
Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles	Proposed
Care Labeling Rule	Terminated

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What Changed? The Rules for Making Rules

FTC Voted to Update Rulemaking Procedures

Previous Rule	Revised Rule
The Chief ALJ serves as the Chief Presiding Officer of the rulemaking hearing process.	FTC Chair serves as Chief Presiding Officer, retaining authority to designate another to serve as the Chief Presiding Officer.
The Presiding Officer maintains the conduct of the informal hearings.	Gives the Commission the authority to issue a notice of informal hearing, setting the hearing agenda, choosing the issues to discuss, selecting parties permitted to testify, and permitting cross-examination and offering of rebuttal evidence.
The Presiding Officer finalizes disputed issues of material fact after public comment.	Commission designates disputed issues of material fact necessary to be resolved with limited opportunity to add disputed issues of material fact.
Commission staff required to publish report analyzing the rulemaking record as to the final rule for public comment and making recommendations.	Eliminates staff report requirement because “the Commission believes [that] will provide for more efficient proceedings without undermining the Commission’s ability to formulate effective rules.”
Allows interested persons to petition the Commission or appeal rulings of the Presiding Officer during an informal hearing.	Eliminates appeal procedures because “they are unnecessary given the enhanced role the Commission will play in establishing the agenda of the informal hearing and designating disputed issues[.]”

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FTC: A House Divided

The FTC Commissioners have increasingly engaged in a war of words, through either public remarks or dissenting statements relating to FTC enforcement actions.

In the Matter of H&R Block

Commissioner Ferguson: *"My allegiance is to the Constitution, not to the administrative state. The "direction" in which I wish to "steer" the Commission is towards the Constitution, rather than away from it. When the majority proposes sound policy consistent with the law, I will vote for it and defend it. When the majority violates the commands of Congress or of the Constitution, I will dissent and explain why. Dissenting in those circumstances is what my oath requires."*

In the Matter of Coulter Motor Company

Commissioner Holyoak: *"[T]he Commission's ongoing effort to unilaterally expand its own authority looks even more problematic given the Court's recent decision in Loper Bright Enterprises v. Raimondo, and what that case generally portends about the importance of adhering carefully to what Congress has said—not what some at the Commission may wish it had said. Indeed, in a recent opinion striking down an analogous broadening of the Commission's authority, a federal district court explained that agencies 'do not have unlimited power to accomplish their policy preferences,' but 'have only the powers that Congress grants through a textual commitment of authority.'"*

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The Law Before *Loper Bright*

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Early Challenges to Agency Actions

- *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)
  - To be valid, agency rules must be based on explicit or implicit Congressional authority, and courts will sustain Congress's delegations of authority if Congress provides an "Intelligible Principle" to which the agency must conform

- *A. L. A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935)
  - Congress cannot grant the executive branch unfettered discretion in developing codes of conduct, but instead must set standards and limits in the scope of authority

- *Yakus v. United States*, 321 U.S. 414 (1944)
  - The doctrine of separation of powers does not prevent Congress from granting an agency the ability to use its own judgment

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Chevron and *Mead*

- *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)
  - *Chevron* Two-Step
    - Step One: Has Congress directly addressed the issue in the statutory text?
    - Step Two: Is the agency's interpretation permissible?

- *United States v. Mead Corp.*, 533 U.S. 218 (2001)
  - *Chevron* "Step Zero"
  - Congress can delegate authority by leaving gaps for the agency to fill
    - Notice and comment
    - Force of law
    - Clarify right and obligations

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Leading up to *Loper Bright*

- *Kisor v. Wilkie*, 588 U.S. 558 (2019) narrows *Auer v. Robbins*, 519 U.S. 452 (1997)
  - If a regulation is genuinely ambiguous and the agency's analysis is entitled to weight, a court can defer to the agency's interpretation

- *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022)
  - Agency must have clear congressional authorization for rules that implicate "major questions"

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Loper Bright and the New Legal Landscape

By Oyez

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Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024)

- **Holding**: Deference to an agency's interpretation of a statute is contrary to the Administrative Procedure Act (APA) and the judiciary's responsibility to interpret statutes and decide questions of law
  - APA requires courts to decide questions of law and statutory interpretation. Courts cannot ignore traditional methods of statutory interpretation in favor of determining whether an agency's interpretation is "permissible"
  - Courts may also not assume that statutory ambiguity was Congress's implicit delegation of authority or discretion to an agency
  - Applying *Chevron* proved to be "unworkable," arbitrary, and inconsistent
  - *Stare decisis* does not prevent overruling *Chevron*, although decisions applying *Chevron* endure

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Impact of *Loper* Bright

ECONOMIC POLICY

Supreme Court ignites wave of lawsuits against federal regulations

Major businesses cited a trio of pivotal rulings from June in a bid to invalidate a vast array of federal climate, education, health and labor rules.

Tony Romm, The Washington Post

- Broadly deregulatory (at federal level), but many regulations won't simply disappear
- Regulations and enforcement actions are more vulnerable to court challenge, especially where agency is potentially exceeding congressional intent
- Court challenges may occur in any jurisdiction, potentially exacerbating patchwork effect

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Lower Courts Apply *Loper Bright*

***Restaurant Law Center v. United States Department of Labor*, 115 F.4th 396 (5th Cir. 2024)**

- Challenge to the Department of Labor's final rule promulgated under the Fair Labor Standards Act (FLSA) that would have limited employers from taking a "tip credit" against the federal minimum wage work by tipped employees. The district court had relied on *Chevron* to deny the challenge. But on appeal, *Loper Bright* was decided and the Fifth Circuit reversed the district court and found the DOL's interpretation of the FLSA to be erroneous and that the rule was arbitrary and capricious under the APA.
- *"Chevron is overruled….the [Supreme] Court has instructed that we are to return to the APA's basic textual command: 'independently interpreting the statute and effectuating the will of Congress.' (cleaned up).*

***Pacific Gas & Electric Co. v. FERC*, 113 F.4th 943 (D.C. Cir. 2024)**

- PG&E filed suit against FERC's orders issued under its interpretation of the Federal Power Act.
- Applying *Loper Bright*, the DC Circuit found that FERC's statutory reading was "unpersuasive" and contrary to law, and vacated FERC's orders.
- *"[W]e must seek the 'single, best meaning' of a statute, not just permissible interpretations."*

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Supreme Court Set to Expand *Loper Bright*?

- Last month, the Supreme Court decided to hear ***McLaughlin Chiropractic v. McKesson***, No. 23-1226.
- Question presented
  - *Whether the Hobbs Act required the district court in this case to accept the Federal Communications Commission's (FCC) legal interpretation of the Telephone Consumer Protection Act (TCPA)*
- Background
  - The Hobbs Act has limited judicial review of FCC "final orders" to appellate courts and required district courts to accept the FCC legal interpretation of the TCPA.
  - The Courts of Appeals have split on whether FCC final orders bind district courts.

- The merits briefing is under way, but it may be another chance for the Supreme Court to apply the reasoning in *Loper Bright* and limit deference to agency decisions.

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Beyond *Loper* Bright

- *Corner Post, Inc. v. Board of Governors of the Federal Reserve*, 144 S. Ct. 2440 (2024)
  - An APA claim accrues when a plaintiff is injured by final agency action, even when the government action being challenged occurred earlier. The focus is on the plaintiff's injury, not the agency's actions
- *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024)
  - The Seventh Amendment guarantees a defendant a jury trial when the SEC seeks civil penalties against the defendant for committing securities fraud, and the use of an ALJ to decide such cases is unconstitutional
- *National Rifle Association of America v. Vullo*, 144 S. Ct. 1316 (2024):
  - Agency cannot use enforcement actions or the risk of enforcement actions to promote or suppress a particular viewpoint. This is true even if certain actions being investigated are indisputably illegal

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FTC Rules Challenges

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FTC Negative Option Rule

- Covers negative option programs for both consumer and B2B transactions in any media, including online, telephone, print, and in-person.
- Finalized in October 2024. But…

Business Groups Rush to File Federal Court Challenges to the FTC's Negative Option "Click-to-Cancel" Rule

By Leonard L. Gordon, Ellen T. Berge, Shahin O. Rothermel & Jay Prapaisilp on October 24, 2024

- The Michigan Press Association and the National Federation of Independent Businesses filed a petition challenging the rule in the Sixth Circuit Court of Appeals, while a separate petition was filed by multiple trade associations in the Fifth Circuit.
- The petitions request that the courts vacate and set aside the rule. If either petition is granted, the FTC will not be able to enforce its Negative Option Rule.

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FTC Final Rule on Non-Compete Clauses

- In January 2023, FTC proposed a rule that would, with certain limited exceptions, ban all employee non-compete clauses. The FTC issued the Final Rule in April 2024, which was scheduled to take effect in September 2024.
- The rule would have applied retroactively and required recission with notification to employees. But…

Court Rules FTC's Non-Compete Rule Is Unenforceable Nationwide

By Leonard L. Gordon, Liz Clark Rinehart & Jay Prapaisilp on August 22, 2024

- Litigation challenging the rule under the Administrative Procedure Act (APA) quickly ensued in the Northern District of Texas. The plaintiffs alleged that the FTC's actions in issuing the rule exceeded the agency's authority, were unconstitutional, and were arbitrary and capricious.

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FTC Final Rule on Non-Compete Clauses (cont.)

- The court quoted *Loper Bright*, noting that the APA serves "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."
- The court then held that **Section 6(g) of the FTC Act did not authorize the Non-Compete Rule**, finding that the plain language of Section 6(g) demonstrated that it permitted the FTC to engage in procedural rulemaking, but not substantive rulemaking.
  - Before the Non-Compete Rule, the FTC had not promulgated a substantive rule under Section 6(g) since 1978 and, even before that, had rarely invoked Section 6(g).
  - Congress has never affirmatively granted the FTC substantive rulemaking power regarding unfair methods of competition. When Congress added Section 18 to the FTC Act, it provided the FTC with substantive rulemaking authority that was limited to unfair and deceptive acts or practices.
- The court also found the rule **arbitrary and capricious**, finding that it was overbroad without a reasonable basis for that breadth, rendering the rule arbitrary and capricious under the APA.
- Pursuant to the APA, the court set aside the rule and ordered that it shall not be enforced or take effect, explicitly stating that the remedy was to apply nationwide.

FTC CARS Rule

- Applies generally to car dealerships
- Mandates certain disclosures relating to pricing, add-ons, and fees
  - Clear and conspicuous
- Forbids add-on charges without the consumer's express, informed consent
- Prohibits certain misrepresentations as unfair and deceptive practices
- Recordkeeping requirements

- Final Rule published on January 4, 2024
- Originally set to go into effect July 30, 2024
- But FTC paused the effective date pending a legal challenge by industry associations
  - Filed a petition in the United States Court of Appeals for the Fifth Circuit
  - The Petition challenged the Rule on the asserted grounds that it is "*arbitrary, capricious, an abuse of discretion, without observance of procedure required by law, or otherwise not in accordance with law[.]*"

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FTC Enforcement Actions

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FTC Rule Enforcement: Unabated and Undeterred

- Despite numerous setbacks, the FTC continues to bring enforcement challenges for alleged violation of its promulgated Rules.
  - *FTC v. Grand Canyon Education, Inc.; Grand Canyon University*
    - Telemarketing Sales Rule
  - *FTC v. Kubota North America Corporation*
    - Made in USA Rule
  - *FTC v. Empire Holdings Group LLC*
    - Business Opportunity Rule

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FTC v. Grand Canyon Education, Inc.; Grand Canyon University

- Alleged violations of the Telemarketing Sales Rule, including:
  - Engaging in telemarketing by a plan, program, or campaign conducted to induce the purchase of educational services by the use of one or more telephones and which involves more than one interstate telephone call
  - Misrepresenting the nonprofit status of the educational institution
  - Failing to remove individuals from its call list after receiving requests to cease making calls and scrub its call list against the National Do Not Call Registry

- Separately, the federal court held that Section 5 of the FTC Act does not apply to nonprofit entities. Citing to *Loper Bright*, the court dismissed the agency's FTC Act claims against GCU and its president.

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FTC v. Kubota North America Corporation

- Alleged violations of the Made in USA Rule, including:
  - Labeling thousands of replacement parts as Made in USA when, in fact, they were wholly imported
  - Failing to update its package designs that included the Made in USA labels, resulting in the sale of millions of replacement parts with the false label
  - Kubota entered into a Stipulated Order and agreed to cease making unqualified Made in USA claims unless it can show that the product's final assembly or processing—and all significant processing—takes place in the United States and that all or virtually all components of the product are made and sourced in the United States

- Fined a record-breaking $2 million civil penalty for Made in USA violations.

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FTC v. Empire Holdings Group LLC

Alleged violation of the Business Opportunity Rule, including:

- Failed to provide required statements and disclosure documents when selling their business opportunities.
- Made earning claims without the required substantiation and disclosures.
  - Claimed consumers could make thousands of dollars by "harnessing the power of artificial intelligence."
- The case against Empire Holdings was part of a larger "crackdown" on deceptive uses of artificial intelligence.

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Congressional Review Act

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What Is the Congressional Review Act (CRA)?

The Congressional Review Act is a way for Congress to repeal or block agency actions.

Agency actions subject to the CRA are usually final rules that have gone through the formal rulemaking process, but the CRA is broad in its scope, covering anything "of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" (5 U.S.C. §551).

- Exceptions include executive orders, rules affecting agency personnel, and rules affecting how an agency operates that do not affect non-agency parties.

The CRA is a blunt instrument, applying to final rules in their entirety. The CRA cannot be used to block parts of rules.

Agencies cannot issue a new rule in "substantially the same form" if a CRA resolution is successful. What constitutes "substantially the same" is not defined.

Rules disapproved of under the CRA cease to have effect immediately, or never go into effect if the CRA resolution becomes law before the rule's start date.

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The Basic CRA Process

Agency Rule

Federal agencies must submit rules to Congress and the Government Accountability Office (GAO) and publish them in the *Federal Register*

Introduction

Any lawmaker can introduce a joint resolution of disapproval within 60 "continuous session" days of Congress receiving a rule; includes all calendar days except when chamber adjourns for more than three days

(Note: The 60-day window is slightly different at the end of a congressional session. See next slides.)

Committee

Senate: Disapproval resolution can be removed from committee, or discharged, to the floor after 20 calendar days with a petition signed by 30 senators

House: No explicit procedures for committee consideration

Floor Action

Senate: Any senator can force a vote on a discharged CRA resolution; **only a simple majority is needed for passage, as CRA resolutions cannot be filibustered** (i.e., no 60-vote threshold)

House: No explicit procedures for initial floor consideration; can pass resolutions with a simple majority under terms set by Rules Committee at any time

President

The president can sign, veto, or take no action on a disapproval resolution

Two-thirds majority needed in both chambers to override a veto, as with a regular bill

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Graphic adapted from Bloomberg Government

CRA Timing

Using the CRA in the middle of a Congress rarely makes political sense.

Successfully using the CRA requires either support from the President or, failing that, two-thirds support in each chamber. Two-thirds majorities are exceedingly rare in today's political climate, and it would be similarly unlikely for a President to want to use the CRA to overturn one of their own agency's actions. The Trump administration, did, however, use the CRA twice to overturn Consumer Financial Protection Bureau rules issued during his presidency.

Congressional Republicans have been able to pass nine CRA resolutions in the current Congress with the support of a few Democrats in the Senate. But all were vetoed by President Biden.

Vetoed Resolution	Rule Description
H. J. Res. 30	Labor Department rule allowing employers to consider ESG factors when choosing investments for retirement plans
H. J. Res. 27	Environmental Protection Agency and Army Corps of Engineers rule expanding protection for additional bodies of water
H. J. Res. 39	Commerce Department rule suspending tariffs on solar panels from Southeast Asia for two years
H. J. Res. 45	Education Department student loan rule to cancel federal student loan debt for certain borrowers
S. J. Res. 11	EPA rule establishing new emission standards for heavy-duty engines and vehicles
S. J. Res. 9	Fish and Wildlife Service rule listing two populations of the lesser prairie chicken under the Endangered Species Act
S. J. Res. 24	FWS rule designating the northern long-eared bat as an endangered species
S. J. Res. 32	Consumer Financial Protection Bureau rule requiring lenders to collect data on small business loan applicants
S. J. Res. 38	Federal Highway Administration rule temporarily waiving Buy America rules for material used in electric vehicle chargers

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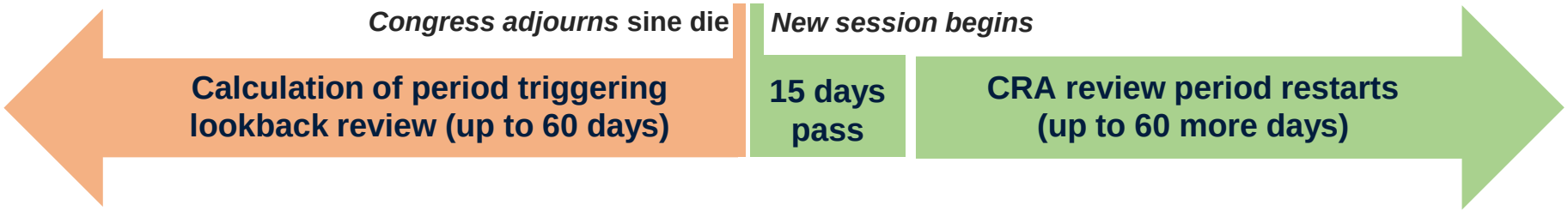
Graphic adapted from Bloomberg Government

The CRA Lookback Window

CRA timing is calculated differently at the end of a Congress and the start of a new one.

The new Congress can use the CRA to overturn rules issued during the previous Congress if those rules were issued in a certain "lookback window," which restarts the CRA clock.



Any rule finalized in the last 60 days of a congressional session can be subject to a new 60-day window in the next Congress. ***The House calculates using legislative days, the Senate uses session days***. A rule can therefore be subject to different lookback windows in each chamber simultaneously.

- "Legislative days" refers to a daily session between gaveling in and adjourning. If there is no adjournment at the end of the calendar day, the legislative day continues into the next calendar day until there is an adjournment.
- At the other extreme, there could be multiple adjournments in the same calendar day, leading to multiple legislative days passing.

Regulations finalized during the lookback period are treated as having been submitted on the 15th legislative day of the new session and restart the regular 60-day CRA review period.

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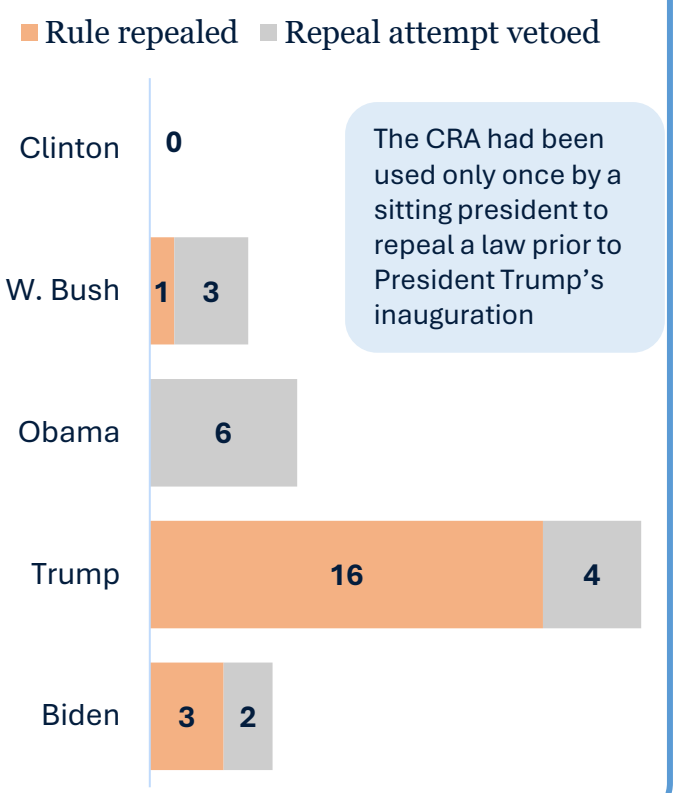
Graphic adapted from Bloomberg Government

Successful Uses of the CRA

Uses of the CRA since 1996



The CRA had been used only once by a sitting president to repeal a law prior to President Trump's inauguration

Biden administration uses of the CRA

President Biden and congressional Democrats passed three CRA resolutions in 2021 to reverse Trump-era rules, taking advantage of the lookback window.

1. **S.J.Res. 13 (117th Congress)**
   Nullified an EEOC rule amending conciliation procedures for charges violating Title VII of the Civil Rights Act of 1964
2. **S.J.Res. 14 (117th)**
   Nullified an EPA rule downscaling which pollutants are regulated under new source performance standards finalized in 2012 and 2016
3. **S.J.Res. 15 (117th)**
   Nullified a Comptroller of the Currency rule amending guidelines determining when a national bank or federal savings association bank is considered a "true lender"

Trump administration uses of the CRA

President Trump holds the record for successful CRA uses, at 16. Those resolutions applied to:

- SEC payment disclosure regulation
- The "Stream Protection Rule"
- Social Security Administration data provided for gun background checks
- Fair pay in defense contracting
- An Interior land use plans rule
- Every Student Succeeds Act accountability
- A teacher preparation rule
- Drug testing for unemployment benefits
- Wildlife refuges in Alaska
- On-the-job injuries recordkeeping
- FCC broadband provider privacy requirements
- Title X family planning project recipients
- State-run savings plans
- County/city-run savings plans
- EPA emissions standards for oil and natural gas
- Lending by banks and savings associations

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Calculating the Lookback Window for 2024-2025

***A new Congress will take office on January 3, 2025. The lookback window into 2024 will not be known until the current Congress officially adjourns* sine die.**

As of July 2024, the Congressional Research Service (CRS) unofficially estimates that rules finalized and noticed in the *Congressional Record* on August 1 or later will be subject to CRA disapproval in 2025.

This date can change; for example, House leadership added an additional week of recess after CRS made its estimate, potentially leading to fewer legislative days in 2024, which would push the House CRA lookback period into July.

The "starting point" for the lookback is likely January 3, 2025, because Congress usually officially adjourns the same day that the new Congress is sworn in. In other words, the 2024 session of Congress spills over slightly into 2025.

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Final Thoughts

The Congressional Review Act could be used come 2025 to block Biden administration rules finalized from August 2024 onward.

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Questions? Contact Us

Leonard L. Gordon
Partner
+1 212.370.6252
lgordon@Venable.com

Shahin O. Rothermel
Partner
+1 202.344.4550
sorothermel@Venable.com

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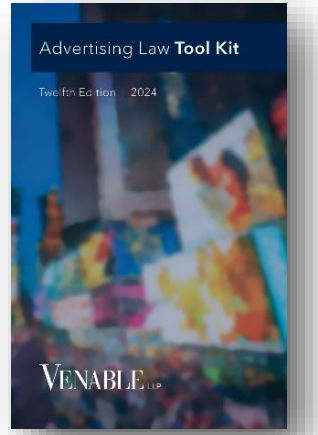

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