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Congressional Reviews of Agency Regulations

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RECENT DEVELOPMENTS

REGULATORY REFORM & THE 104TH CONGRESS

CONGRESSIONAL REVIEW OF AGENCY REGULATIONS

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INTRODUCTION

On March 29, 1996, President Clinton signed Public Law 104-121, the Contract with America Advancement Act of 1996.[1] Title II, the Small Business Regulatory Enforcement Fairness Act of 1996 ("Act"),[2] among other things, added a new chapter 8 to Title 5 of the United States Code. Chapter 8 requires congressional review of agency regulations.[3] Beginning March 29, 1996, all federal agencies, including independent agencies, are required to submit each final and interim final rule for review by Congress and to the General Accounting Office (GAO) *before the final or interim final rule can take effect* (hereinafter final and interim final rules will be collectively referred to as "rule").[4]

In addition to a copy of the rule, agencies are required to submit a concise general statement relating to the rule and its proposed effective date (hereinafter referred to as a "report").[5] Further, when an agency submits a report, the agency is also to provide GAO and to make available upon request to each house of Congress (1) a complete copy of the cost-benefit analysis of the rule, if any; (2) information concerning the agency's actions under the Regulatory Flexibility Act;[6] (3) information concerning the agency's actions under the Unfunded Mandates Reform Act;[7] and (4) any other relevant information or requirements under any other law and any other Executive Order (hereinafter referred to as "required information").[8]

I. STATUTORY PROVISIONS

A. Required Agency Action

The statute's definitional section, 5 U.S.C.A. § 804, states that for purposes of congressional review of agency rules under the procedure in Public Law 104-121, the term "rule" has the same meaning as in 5 U.S.C.

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1. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 1996 U.S.C.C.A.N. (110 Stat.) 847.
2. *Id.* at 857 (to be codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.).
3. 5 U.S.C.A. § 801 (West Supp. 1996).
4. *Id.*
5. *Id.*
6. 5 U.S.C. §§ 601-612 (1994).
7. Pub. L. No. 104-4, 1996 U.S.C.C.A.N. (109 Stat.) 48 (to be codified in scattered sections of 2 U.S.C.).
8. 5 U.S.C.A. § 801(a)(1)(B).

§ 551(4).[9] This definition is broader than merely those rules subject to notice–and-comment rulemaking procedures under 5 U.S.C. § 553. It includes regulatory actions such as interpretative rules, technical amendments, grant rules, and rules that other laws exempt from 5 U.S.C. § 553. Heretofore, general statutes have not required statements of basis and purpose or a specified effective date for their actions to be effective. Thus, while the diction of section 801, the operative section, seems to have "legislative" rules in view, the effect of the definitional provision may be to impose new procedural requirements on other forms of rulemaking.

As remarked above, an agency must submit a report and the required information to Congress and GAO regarding each rule, however unlikely it may be for the agency to have such materials for non-legislative rules. In important respects, however, the law distinguishes between "major" rules and all other rules. A "major" rule is defined as one that the Administrator of the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB), finds 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.[10] Essentially, a "major" rule would be any rule determined to be an economically significant rule under section 3(f)(1) of Executive Order 12,866.[11]

A non-major rule may take effect in its normal course.[12] Congress will have the opportunity, however, to introduce and act upon a joint resolution of disapproval of the rule, pursuant to procedures described below.[13] Should Congress successfully enact a joint resolution of disapproval of a rule that has taken effect, securing presidential acquiescence or enacting the resolution over the President's veto, the rule will be treated as though it had never taken effect.[14]

For major rules, GAO has fifteen days from the date Congress receives the initial report to submit a report concerning the rule to each house of Congress.[15] The GAO report must include an assessment of the agency's compliance with the procedural requirements of the various statutes and Executive Orders under which the agency must submit required informa-

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9. *Id.* § 804(3).
10. *Id.* § 804(2).
11. Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (1993).
12. 5 U.S.C.A. § 801(a)(4).
13. *Id.* § 801(b)(1).
14. *Id.* § 801(f).
15. *Id.* § 801(a)(2)(A).

tion.[16] Most importantly, with certain exceptions, all major rules have their effectiveness delayed at least sixty days while under congressional review.[17] A major rule submitted to Congress for review takes effect on the latest of three possible dates:

> (1) Under section 801(a)(3)(A), the later of either sixty calendar days after Congress receives the report, or when the rule is published in the *Federal Register*;[18]
> (2) Under section 801(a)(3)(B), if Congress passes a joint resolution of disapproval of the rule and the President vetoes that resolution, the effective date would be the earlier of when either house of Congress votes and fails to override the veto of the President, or thirty session days after Congress receives the veto and the objections of the President;[19] or
> (3) the date the major rule would have become effective if not for this review requirement, unless a joint resolution of disapproval is enacted.[20]

In any event, the effective date of an otherwise effective rule would not be delayed beyond the date that either house of Congress votes to reject a joint resolution of disapproval, or by reverse implication, votes to accept a joint resolution of approval.[21]

The statute permits three exceptions to delays in the effective date for major rules. First, any major rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to fishing, hunting, or camping can become effective as the agency determines.[22] Second, any major rule for which an agency can make a good cause finding (and incorporates the finding and a brief explanatory statement in the rule) that notice–and–comment procedures are unnecessary, impracticable, or contrary to the public interest, can become effective as the agency determines.[23] The third exception requires the President to issue an Executive Order under 5 U.S.C.A. § 801(c). Under this section, a major rule whose effective date the statute would ordinarily delay pending congressional review may take immediate effect if the President determines, and notifies Congress in writing, that the rule is necessary due to an imminent threat to health or safety or other emergency; necessary for the enforcement of criminal laws; necessary for national

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16. *Id.*
17. *Id.* § 801(a)(3).
18. 5 U.S.C.A. § 801(a)(3)(A)(i)-(ii).
19. *Id.* § 801(a)(3)(B)(i)-(ii).
20. *Id.* § 801(a)(3)(C).
21. *Id.* § 801(a)(5).
22. *Id.* § 808(1).
23. *Id.* § 808(2).

security; or issued pursuant to any statute implementing an international trade agreement.[24] Any major rule which falls under one of these exceptions may take effect as the agency determines. However, the requirement to submit the rule and the information required for review still applies.

More general exemptions are sparingly granted. Only a limited group of rules are specifically exempted from congressional review: (1) rules of particular applicability; (2) any rule relating to agency management or personnel; or (3) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.[25] Further, rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee are not considered rules for purposes of congressional review.[26] Finally, a limited exemption is granted to any rule promulgated under the Telecommunications Act of 1996,[27] and the amendments made by that act. While these are rules for resolution of disapproval purposes, they are specifically exempted from the definition of major rule and so may become (provisionally) effective in ordinary course.[28]

B. Congressional Procedures

5 U.S.C.A. § 802 establishes procedures under which Congress will review all agency rules. These procedures are ostensibly designed to provide an expedited process for Congress to act on a joint resolution of any agency rule. The careful reader, however, will be aware that Congress could pass a joint resolution of disapproval at any point in time, and that resolution, if signed by the President or enacted over his veto, would have full legal effect. She will also note that the statute states no direct legal consequence for failure by Congress to act by particular times. Moreover, it specifies procedures only for Senate, not House, action.[29]

A joint resolution of disapproval is required to be introduced within sixty calendar days after Congress receives a report on a rule, excluding days when either house of Congress is adjourned for more than three days during a session.[30] Note, then, that since section 801(a)(3)(A) does not embody

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24. 5 U.S.C.A. § 801(C)(2)(A)-(D).
25. *Id.* § 804(3).
26. *Id.* § 807.
27. Pub. L. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56.
28. 5 U.S.C.A. § 804(2).
29. *Id.* § 802.
30. *Id.* § 802(a).

similar exclusions,[31] there is no assurance that the congressional process will even begin before the section 801(a)(3)(A) period has expired. It is virtually inconceivable that by that time a resolution will have been introduced, passed by both houses, and presented to the President for veto or approval—the conditions set by section 801(a)(3)(B).[32] As long as the resolution has been timely introduced, however, its eventual enactment appears to have the effect not only of disapproval, but also of altering the agency's mandate, as discussed below.[33]

After introduction, a joint resolution is to be referred to the committee of jurisdiction within each house of Congress.[34] The law specifies an expedited process for consideration of a joint resolution by the Senate.[35] Under those procedures, if the committee to which a joint resolution is referred has not acted on the joint resolution within twenty calendar days after the submission or publication date,[36] the committee may be discharged from further consideration of the joint resolution by a written petition filed by thirty senators.[37] If such a petition is filed, the joint resolution must be placed on the Senate calendar.[38] It is in order at any time after a committee to which the joint resolution has been referred has reported the joint resolution, or after a joint resolution has been discharged by written petition, to offer a motion to proceed on the joint resolution; all points of order against the resolution are waived.[39] If the motion to proceed to the joint resolution is agreed upon, the joint resolution remains the unfinished business of the Senate until disposed of.[40] Debate on the joint resolution is limited to ten hours, divided equally between those favoring and those opposed.[41]

The expedited procedures for Senate consideration of a joint resolution of disapproval apply only for sixty session days after the rule's submission or publication date.[42] It is entirely possible, then, if not likely, that a joint

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31. *See supra* text accompanying note 18.
32. *See supra* text accompanying note 19.
33. *See infra* text accompanying notes 60–67.
34. 5 U.S.C.A. § 802(b).
35. *Id.* § 802(c)-(e).
36. For purposes of the Senate's expedited process, the statute defines "submission or publication date" to mean the later of the dates on which Congress receives the report on the rule or the rule is published in the *Federal Register*. *See id.* § 802(b)(2).
37. *Id.* § 802(c).
38. *Id.*
39. *Id.* § 802(d)(1).
40. 5 U.S.C.A. § 802(d)(1).
41. *Id.* § 802(d)(2).
42. *Id.* § 802(e).

resolution will still be pending in committee, when the sixty days lapse, so that it will be brought to the floor at a time when these procedures need not be complied with. Presumably, the resolution nonetheless remains valid congressional business and would have legal effect if validly enacted. Save for lifting the (one-house) commitment to expedition once the sixty days expire, the statute does not speak to this issue.

Further timing complications are introduced when an agency submits its report on a rule less than sixty session days in the Senate (sixty legislative days in the House of Representatives) before that session of Congress finally adjourns. In such cases, the rule is to be treated as if it had been first submitted to the Senate and House on the fifteenth session or legislative day of the *next* Congress or session of Congress, respectively, and the Senate's and House's time begins to count from that point forward.[43] In the case of a rule that is carried forward in this way for consideration of a joint resolution of disapproval, however, the rule's effectiveness is not postponed pending congressional consideration; it can take effect as otherwise provided by law, including the requirements of section 801.[44]

5 U.S.C.A. § 802(f) provides procedures for consideration of a joint resolution of disapproval by one house of Congress, after a joint resolution has been passed by the other body. In such a case, the joint resolution passed by the first house is not referred to a committee in the second house. Rather, regardless of the procedures used to consider a joint resolution in the second house, and no matter when the vote takes place, the final vote of the second house will be on the joint resolution of the first house.[45] This provision was included in the legislation because section 802(a) sets forth the language of a joint resolution of disapproval. As such, there should be little difference in a joint resolution of disapproval introduced in either house of Congress.

Rules are sometimes required to be adopted by a stated deadline, either in particular statutes or as a result of court order.[46] Where a joint resolution of disapproval is enacted, the statute provides that any such deadline is to be delayed for one year after enactment of the joint resolu-

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43. *Id.* § 801(d)(1).

44. *Id.* § 801(d)(3).

45. *Id.* § 802(f)(2)(A)-(B).

46. The term "deadline" is defined to mean any date certain for fulfilling any obligation or exercising any authority established by or under any federal statute or regulation, or by any court order implementing any federal statute or regulation. 5 U.S.C.A. § 803(b).

tion.[47] The same provision, however, appears to give precedence to such deadlines where they conflict with section 801(a)'s ordinary effects. Absent enactment of a joint resolution of disapproval, a statutory or court deadline is unaffected by reason of the delay in effective date of a major rule under section 801(a)(3).

Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution is treated as though the rule never took effect.[48] A rule that does not become effective, or does not continue in effect, due to enactment of a joint resolution of disapproval may not be re-issued by the agency in substantially the same form.[49] Further, a new rule that is substantially the same as the disapproved rule may not be issued unless "specifically" authorized by a law enacted after the date of the joint resolution disapproving the original rule.[50]

No finding, determination, action, or omission made under this review procedure is subject to judicial review.[51] Further, a court or agency may not infer any meaning or intent of Congress for taking or not taking some action under this review procedure.[52]

II. ANALYSIS

A. The Extent of the Statute's Application

The importance of major rulemaking, and the desirability of attaching to Congress some political responsibility for rules' large impacts on the American economy, could provide a significant justification for a statutory scheme like this one. A first observation about the Act, however, is that its apparently very broad definition of "rule" seems likely to defeat this worthy goal, while also opening up the risk of special interest mischief.

Every action an agency takes that fits the Administrative Procedure Act's (APA) definition of "rule," must be submitted to Congress for consideration under the review procedures.[53] Even though major rules are, in some respects, singled out for more intensive analytical requirements and have their effective date delayed for some period of time, even policy statements, interpretative rules, and technical manuals face congressional review. The

47. *Id.* § 803(a).
48. *Id.* § 801(f).
49. *Id.* § 801(b)(2).
50. *Id.*
51. *Id.* § 805.
52. 5 U.S.C.A. § 801(g).
53. *See supra* text accompanying note 9.

great volume of regulatory actions that Congress will theoretically be called upon to consider means, in most cases, that Congress will fail to provide useful guidance on agency implementation of statutes. By requiring the submission of all regulatory actions meeting the APA definition of "rule" in 5 U.S.C. § 551, a much broader category than rulemaking *procedures* apply to, Congress has spread its resources extremely thin. Even had it asked to consider only those rulemakings referenced in the semiannual *Unified Agenda of Federal Regulatory and Deregulatory Actions*[54] (primarily legislative rulemakings) Congress would be reviewing approximately 4,600 regulatory actions each year. Other actions meeting section 551's definition of "rule," apparently also subjected to this procedure, occur in much larger numbers.[55] Review of each regulatory action submitted to determine whether a resolution of disapproval is appropriate would require enormous staff effort, consuming resources vital for Congress to undertake its ordinary legislative business. The inevitable reliance on staff, as well as the limited debate that will result from hearing so many possible targets for action, opens the door for individual members of Congress, or lobbyists interested in opposing particular regulatory actions, to persuade the Congress as a whole to adopt a joint resolution of disapproval without the full consideration that would be likely if Congress reviewed only the relatively few "major" rules.[56]

For major rules, the statute has the potential of balancing the President's established mechanisms for political control of important rulemaking. Executive Order 12,866, entitled *Regulatory Planning and Review*,[57] establishes the procedure by which the Clinton Administration reviews regulations to be issued by the Executive Branch. This order requires each agency,[58] prior to issuance, to inform OIRA, a division within the OMB, of all rulemakings it intends to undertake and allows OIRA to determine

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54. *See, e.g.*, 61 Fed. Reg. 22,701 (May 13, 1996).

55. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1469 (1992).

56. In sharp contrast is the one-house legislative veto issue in *INS v. Chada*, 462 U.S. 919, 948 (1983) (stating that bicameralism ensures careful consideration by elected officials).

57. Exec. Order 12,866, *supra* note 11.

58. Independent regulatory commissions, such as the Nuclear Regulatory Commission and the Consumer Product Safety Commission, are not subject to the centralized review requirements of Executive Order 12,866 or any of its prior incarnations. *Id.* at 51,740. The congressional review law, however, effectively subjects the independent regulatory commissions to presidential oversight by providing, among other things, that the President may either sign or veto a joint resolution of disapproval. This article takes no position on the wisdom of this result.

which of those actions it would like submitted for a more detailed review.[59] For a major rule at least, the President will have significant opportunities to influence the outcome of regulatory action prior to its issuance by the Executive Branch. Presumably, the run-up to the review process will afford important congressional actors balancing opportunities for influence; agencies might well change their proposals to reduce the chance of delayed effectiveness in a rule even if they believe both that the President would stand behind their judgment by vetoing a joint resolution of disapproval, and that Congress would be unable to override that veto. Outside the context of major and near-major rules, however, the President lacks practical controls over agency rulemaking—certainly so, if one considers the full range of rules within the section 551 definition. Congressional influence in that arena cannot be as easily defended as a political check on the presidency.

B. Failures of Political Responsibility

In at least two important respects, the Act fails to secure the enhanced congressional responsibility for the outcomes of rulemaking that seems to be among its principal justifications. First, recall that the enactment of a resolution of disapproval alters the agency's statutory mandate in an unusual way. The congressional review statute is explicit that if any rule is disapproved, the agency may not re-issue the same or a substantially similar rule unless the agency has been provided specific statutory authority enacted after the date of the joint resolution disapproving the original rule.[60] Of course Congress may amend statutes. Under this procedure, however, a simple and unelaborated "No!" withdraws from agencies a range of substantive authority that cannot be determined without subsequent litigation. This uncertainty is in effect a delegation to the courts, without intelligible principle, of power to narrow agency authority. It effectively deprives the Executive Branch of its usual responsibilities for implementing statutes enacted by Congress. The text of the statute has not been changed; but Congress's particular and unexplained action raises the risk that a future court may find unauthorized a rule that otherwise would come within the language of the unamended enabling statute.

This difficulty is emphasized by the later instruction that courts may attach no significance to a congressional failure to act on a rule.[61] If we

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59. *See id.* at 51,740-43.

60. 5 U.S.C.A. § 801(b)(2) (West Supp. 1996).

61. Thanks to Harold Krent for suggesting this line of thought.

imagine an agency adopting a replacement rule that might or might not be thought precluded by the first disapproval, we see that this rule too must undergo the congressional review process. If it is disapproved there is no need for this judicial review process. If it is not disapproved, courts are told to give no weight to that fact; their finding the replacement rule to be within the non-verbal amendment would underscore the strange nature of this delegation.

Beyond this possible constitutional problem, the provision reflects a missed opportunity to provide clear direction to agencies engaged in rulemaking, and thus to increase political accountability for the regulatory system. The congressional review procedure would have clear benefit if Congress took the enactment of a joint resolution as a means to better define an implementing agency's authority. The congressional review statute, however, sets out the exact language of a joint resolution, and nowhere does that provision allow for the explanation of Congress's intent in formulating the underlying statute being implemented. As such, Congress may find it easy to tell an agency when it is wrong, but never specify how the agency could get it right. The result is to compound the difficulties created by unclear initial delegations. Rather than take political responsibility for defining the agency's authority, Congress leaves to the courts the task of working out the meaning of its Delphic "No!" This is an evasion, not an assumption, of political control.

The second failure of responsibility represented by this statute arises from the provision that courts interpreting the statute are to attach no importance to Congress's failure to act.[62] As a practical matter, most rules will *not* be disapproved. Further, the question of whether a regulatory action will be disapproved will be resolved within a relatively short period of time, surely faster than the years judicial review typically consumes. As such, the "result" of congressional review will be known by the time a court might be faced with a case challenging the rulemaking. While the Act's provision seems sensible enough for less important rules that are unlikely to draw much review attention, the likelihood of serious congressional consideration could easily support a different conclusion for the major rules to which it ought to have been limited. One might have hoped that the submission of a controversial, high-consequence rule for congressional review might enable a court to draw some sort of conclusion from Congress's action or inaction with respect to that rulemaking. In particular, any active congressional review process could bear importantly on

62. 5 U.S.C.A § 801(g).

"hard–look" review for arbitrariness or capriciousness of agency judgment.[63] Hard–look review, widely criticized for its contributions to rulemaking ossification, is defended as a kind of substitute for adequate political controls. A regular process for congressional review of the policy aspects of rulemaking could have provided the basis for some judicial retreat from the current intensity of fact-and-policy review.[64] The statute, however, explicitly instructs a court to pay no attention to Congress's consideration of a rule. By placing this provision in the law, Congress again missed an opportunity to take responsibility for and improve a regulatory system that members so often deride. This provision is a denial that Congress has undertaken any political accountability for rules that are left in place. While Congress's preference to act in this way is understandable in the conventional cynical terms of public choice theory, the result is to suggest that this review process is nothing more than another procedural hurdle for an agency to jump, further increasing the costs and uncertainties of rulemaking, with little, if any, added benefit.[65]

C. *Effective Dates for Non-Legislative Rules*

As remarked above, one possible, if not inevitable, effect of using section 551's definition of "rule" for purposes of congressional review is to create "effective dates" for non-legislative rules (as well as to require them to be accompanied by statements of basis and purpose). In part because they have no legally binding effect, more importantly because the kind of structure and advice they provide is usually wanted as soon as it is available, interpretive rules and general statements of policy generally have no effective date as such; they are assumed to provide the guidance and structure they contain from the moment of their issuance, and indeed may even govern events prior to their announcement.[66] A recent, unanimous Supreme Court decision held that it did not offend principles against retroactivity in rulemaking to give agency interpretations announced in rules (in that case, a legislative rule) effect for situations arising before the rule was promulgated: "Where . . . a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be

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63. 5 U.S.C. § 706(2)(A) (1994).

64. Strauss, *supra* note 55, at 1472.

65. *See also* Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 406 (1996).

66. Strauss, *supra* note 55, at 1468.

absurd to ignore the agency's current authoritative pronouncement of what the statute means."[67]

If the statute will be read to require an "effective date" for non-legislative rules different from the date of their announcement, the useful activity of providing interpretations and guidance to the subjects of regulation will be impaired. The application of interpretations to events already transpired, just endorsed by the Court, would seem to be precluded. Even though such rules are rarely if ever "major" (though the consequences of some tax advice, for example, could easily place it in that category), the simple fact of requiring an effective date raises the question of when that might be. The APA's rulemaking provisions set an ordinary minimum of thirty days between publication and effectiveness, although with an explicit exception for interpretive rules and statements of policy.[68] It seems highly unlikely that Congress wished to inhibit, for example, the Internal Revenue Service's publication of tax guidance that could be relied on for the current tax year. Yet one quickly sees, beyond the problem just described, how the application of the "effectiveness" provisions of section 801 to "major" interpretations of tax law would also hamper that useful activity. How one could escape these impacts is uncertain, but perhaps the courts can be persuaded that, despite the use of section 551's definition of "rule," section 801 applies only to those rules that meet its presuppositions: those that would usually be accompanied by a statement of basis and purpose, and that would ordinarily have an announced and postponable effective date, differing from the date of their announcement.

D. Timing Issues

For those rules to which it does apply, the density of this new statute's language presents serious implementation questions sure to create substantial uncertainty and increased costs for both regulated entities and federal agencies.[69] Nowhere is this more problematic than the calculation of the effective date of a major rule. Recall that section 801(a)(3)(A), previously described, requires that the effective date of a major rule, with minor exceptions, be delayed until the latest of one of three possible dates.[70] No provision, however, restrains the period within which

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67. Smiley v. Citibank, 116 S. Ct. 1730, 1735 n.3 (1996).

68. 5 U.S.C. § 553(d)(2) (1994).

69. Perhaps agencies should issue rules to define how they intend to implement the congressional review statute and send those regulatory actions to Congress to see if Congress disapproves.

70. *See supra* text accompanying notes 18-21.

Congress must act, so long as a resolution of disapproval is *introduced* within the qualifying period—a period that itself may end days or weeks after "60 calendar days" of section 801(a)(3)(A) have expired.

Suppose, then, "60 calendar days" have expired and no joint resolution of disapproval has been introduced in either house, although time remains in which to do so. May the rule take effect? The second condition of section 801(a)(3)(B) requires actual enactment of a joint resolution of disapproval and a presidential veto, but the stage for these events has not been set and the statute does not limit the time within which they might occur.[71] Congressional statements concerning this law addressed a much more limited possibility. Shortly after the Act became law, Senators Nickles, Reid, and Stevens issued a statement about the congressional review procedures asserting that, "[b]y necessary implication, if Congress passes a joint resolution of disapproval *within the sixty calendar days provided in section 801(a)(3)(A)*, the delay period in the effectiveness of a major rule must be extended at least until the President acts on the joint resolution or until the time expires for the President to act."[72] But one may be confident that the more common situation will be one in which "60 calendar days" will expire before either house has voted on a joint resolution of disapproval or even begun to consider such a resolution.

To avoid the constitutional problems that would be suggested by an *indefinite* postponement of effectiveness,[73] we suppose that in such cases the "60 calendar day" provision will control. Otherwise the effect will be to permit one house, or even a single member introducing a timely resolution, to postpone indefinitely (and thus negate the effectiveness of) executive action under delegated authority. The uncertainty and length of delay, in our judgment, easily brings this case within the ambit of the Court's rejection of the legislative veto on constitutional grounds.[74]

The possibility that an effective rule will be undercut by (late) enactment of a joint resolution of disapproval will have practical, if not legal effects on agency authority, by creating uncertainty about agency action. Enactment of a joint resolution of disapproval has the effect of rendering a rule

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71. 5 U.S.C.A. § 801(2)(B)(3)(A)(ii) (West Supp. 1996).

72. 142 CONG. REC. S3,683-84 (daily ed. April 18, 1996) (statement by Senators Nickles, Reid, and Stevens) (emphasis added).

73. *See* Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958, *cert. denied*, 488 U.S. 918 (1988) (denying certiorari after petitioner's motion); Lear Siegler v. Lehman, 842 F.2d 1102 (9th Cir. 1988), *partially vacated en banc*, 893 F.2d 205 (9th Cir. 1989).

74. *See* INS v. Chada, 462 U.S. 919, 955 (1983).

that had become effective as if it had never existed.[75] Presumably, in such a situation the rule that existed before the disapproved rule would be effective once more, and if no rule previously existed that would again be the case. This presents significant problems for any party required to comply with a specific regulatory action, particularly one in which compliance is irreversible. An example will serve to illustrate this problem. Assume that the Commerce Department's National Marine Fisheries Service issues a final rulemaking that, for conservation purposes, requires fishermen to cut a four foot hole in the middle of their nets. If the enactment of a joint resolution after this rule takes effect returns the law to its prior state, while raising questions about the department's continuing authority to regulate nets for conservation reasons, a great many fishermen are going to have to pay the cost of replacing their nets. This problem is exacerbated if taking the irreversible action would cause the regulated party to be in conflict with the previously existing rule.

CONCLUSION

The statute's impact will be to raise further the costs of rulemaking. Particularly at a time when the government's budget is being severely curtailed, one can expect agencies to look for alternative means of accomplishing their business. Agencies may be motivated to undertake a series of related, incremental regulatory actions, rather than consolidated "major" rules. Agencies can also be expected to engage in actions outside the APA definition of the term "rule" if they can limit their exposure to congressional oversight and increased implementation costs. For example, agencies might issue guidance and policies that, although not altering the rights of non-agency parties, may nonetheless help to shape desired conduct; or agencies may seek to act through rules of particular applicability or orders issued pursuant to some adjudicatory process. Any of these options, should they come to pass, leads to less publicly accessible and transparent agency actions; and the agency's own processes for communicating its demands to the world it regulates will have become markedly less efficient.[76]

This new law requiring congressional review of agency regulations might have been much better than it is. As enacted, the law places new burdens on an already procedure-laden system, while also missing the opportunity for constructive legislative input about the meaning of laws requiring

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75. 5 U.S.C.A. § 801(a)(4)(b)(1).
76. Mashaw, *supra* note 65, at 422.

implementing regulations. The review mechanism's tangled web of date and time calculations create uncertainty over the effectiveness of rules. Congress undertook only to tell an agency it "got it wrong" implementing a legislative enactment, accepting for itself no obligation to articulate clear standards for agency implementation of legislation, while blurring the constitutional lines separating the branches of government. And the statute denies any congressional responsibility even for high-consequence rules that it does *not* abrogate, denying to the courts any opportunity to relax their supervision of issues to which political oversight might seem likely and better suited to attend. Generally, then, the congressional review requirement will do little to produce "better" rulemaking, but will likely increase rulemaking costs and public skepticism. This result is exactly opposite the professed intention of the President and congressional regulatory reformers when the law was enacted.