

NRC STAFF COMMENTS ON DRAFT REPORT ON CONGRESSIONAL REVIEW ACT

1. As a general matter, the Report focuses almost entirely on the CRA as it affects the relationship between Congress and the Executive Branch. It does not, however, include much analysis of the internal administration of the CRA by the individual federal agencies and OMB/OIRA. The Report should also address these very important nuts-and-bolts aspects of the CRA. For example:

A. Under the CRA, agencies can't move forward with even the most minor rules or new guidance documents until OIRA makes its statutorily-required finding on the major vs. non-major status of the new "rules." See 5 USC 804(2). (We can't promulgate new rules or issue guidance documents until we've heard back from OIRA.) But under the law, OIRA has no deadline to make this finding, which can preclude timely agency action if OIRA takes many months to communicate its decision to the agencies. To remedy this problem, ACUS should encourage Congress to require, or OIRA to voluntarily adopt, something like a 60-day deadline for its finding, perhaps with the possibility of expedited findings in certain cases where quick agency action is necessary. Alternatively, ACUS could recommend the adoption of a negative-consent process, whereby agency rules are automatically considered non-major if OIRA does not reach a decision within 60 days or some other reasonable time-frame.

B. Likewise, ACUS should encourage OIRA to issue generic determinations that certain classes of agency actions (such as amendments to particular CFR parts or certain types of guidance documents) would not constitute "major rules." This would speed up the issuance of certain categories of minor rules and guidance documents that will invariably never be "major" rules under the Act. It would also free up limited agency and OMB resources. OMB has been reluctant to make such generic determinations.

Obviously, these concerns would evaporate if Congress were to enact legislation limiting the scope of the CRA along the lines recommended in the first draft recommendation.

2. We strongly support the first recommendation, that the CRA should be amended to require the reporting and review of only "major" rules (p. 40). This would improve the efficiency of the process, and allow Congress, OIRA, and the agencies to focus on rules that have major economic impacts. Presumably, this would remove guidance documents from the scope of the CRA and concerns that could arise regarding the meaning of a Congressional disapproval of a guidance document. Since guidance documents are intended to inform the regulated community of acceptable means to comply with regulatory requirements, the literal effect of eliminating a guidance document would be to reduce regulatory clarity without changing the underlying statute or regulation that the guidance would implement.

3. We strongly oppose the second recommendation, which supports amendment of CRA to require a joint congressional resolution of approval before any major rule can take effect (p. 41). The NRC, for example, is statutorily required to promulgate an annual fee rule that results in collection of fees from the nuclear industry that exceed \$100 million dollars per year, making each annual rule a "major rule." In light of the tight statutory deadline for assessing and collecting fees, we have concerns that these deadlines could not be met if prior Congressional approval of the fee schedule is required. Fee schedules do not raise policy issues warranting Congressional attention. Instead, they result in the collection of a specified sum that Congress

has established. Thus, there would clearly need to be exceptions to any such legislation. In any event, this recommendation raises significant issues regarding whether Congress should be able to preclude Executive Branch action through Congressional inaction. We would further note that if Congressional approval of major rules is required, this would create an incentive for OMB to determine in close cases that a rule is not “major” and would encourage agencies to split large rulemaking efforts into multiple smaller, sub-major rules so that none of the rules would be “major.” It could also encourage agencies to address issues through adjudications (which are not subject to the CRA), rather than through rulemaking. Last, while we do not support this proposal in general, if it were nonetheless adopted we would support the sub-proposal to eliminate judicial review (with the exception of Constitutional challenges) of rules approved by Congress. We would, however, recommend providing a clearer and more thorough discussion of this important point than what is currently included on p. 46. The current discussion of the issue recognizes judicial review of such rules pursuant to the APA as “anomalous,” but could benefit from explaining why. For instance, it could be noted that if Congress is to be the ultimate decision maker on major rules, it would make little sense for the agency’s record, rather than the Congressional record, to serve as the official rationale for the rule on judicial review. It also would make little sense for a prior Congressional enactment (the APA) to be the basis for, essentially, declaring a subsequent Congressional enactment (approval of a major rule) unlawful. Given that the REINS Act, as currently drafted, would expressly permit judicial review of major rules despite the requirement of Congressional approval, and would in fact instruct courts to ignore the fact of Congressional approval altogether, the anomalous aspects of retaining APA judicial review and the potential accountability problems it could create may not yet be obvious to all, and should be expanded upon.

4. We support the fifth recommendation (p. 48) which would amend the CRS to allow agencies to submit CRA reports electronically (rather than by paper) to GAO, which would publish them in the Congressional Record. This would improve the efficiency of the process.

5. We oppose the seventh recommendation (p. 48), that would amend the CRA to provide that if an agency fails to report a covered rule, an agency’s annual appropriation may be subject to a point of order to reduce the salary of the agency head or diminish its funding request. This seems unnecessarily punitive, especially if the CRA continues to apply to minor rules. Agencies may inadvertently fail to recognize that some minor actions are subject to the CRA, and the determination whether an action is subject to the CRA is frequently not clear cut. Again, this concern would evaporate if Congress adopted the first recommendation.

6. We recommend rewording of the eighth recommendation, (p. 48) that the CRA be amended to provide that if a rule is disapproved, the agency is prohibited from reissuing only those provisions of the rule that the review process/floor debates clearly identify as unobjectionable. Instead, the recommendation should provide that Congress, in the text of a resolution of disapproval, should make clear which portions of the rule are being disapproved. This avoids the potential pitfalls of relying on legislative history.