



# The Congressional Review Act: Frequently Asked Questions

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## Introduction

The Congressional Review Act was enacted in 1996 in an effort to give Congress more oversight of agency rulemaking.<sup>1</sup> The CRA requires executive branch agencies to report their rulemaking activities to Congress and creates a process for Congress to overturn these federal rules. Until 2017, the CRA had been used only once to strike down a federal regulation. Following the 2016 elections, however, a Republican controlled Congress, under the Trump Administration, used the CRA to invalidate dozens of federal rules enacted under the Obama Administration. Depending on the outcome of the 2020 elections, the CRA might serve as an important tool for a new Congress and Administration to rescind actions of the Trump Administration.

This issue brief will answer the following questions:

- [How can Congress use the CRA to disapprove administrative rules?](#)
- [What types of actions are reviewable under the CRA?](#)
- [What is a major rule?](#)
- [What process does Congress use to review a rule that has not been reported to Congress?](#)
- [Can an agency issue a similar rule if Congress disapproves a rule under the CRA?](#)
- [What is the CRA “lookback period” and how is that calculated?](#)

## How can Congress use the CRA to disapprove administrative rules?

After a rule is reported to Congress, members have 60 days of “continuous session” to introduce a joint resolution of disapproval.<sup>2</sup> It is important to note that this 60 days refers to 60

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<sup>1</sup> Title II, Subtitle E, P.L. 104-121, 5 U.S.C. §§ 601 et seq.

<sup>2</sup> 5 U.S.C. § 802.

“working days” which means 60 legislative days in the House and 60 session days in the Senate.<sup>3</sup> Thus, the 60 days referred to in the Congressional Review Act is often much longer than 60 calendar days.<sup>4</sup>

Any member of Congress can introduce a CRA joint resolution of disapproval (“CRA resolution”), which is then referred to the relevant committee of jurisdiction. A CRA resolution can be passed by a simple majority in both the House and the Senate. Special “fast-track” procedures in the Senate allow CRA resolutions to bypass the Senate filibuster. After it is passed by Congress, a CRA resolution must be signed by the President to take effect. If the President vetoes the CRA resolution, Congress can override the veto with a two-thirds majority in both houses.<sup>5</sup>

As noted earlier, prior to the 115<sup>th</sup> Congress, the CRA had only been used once to invalidate a regulation.<sup>6</sup> In large part, this is because the CRA hinges on the ability to pass a resolution through both houses of Congress and have the President sign it. Passing a joint resolution of disapproval requires either bipartisan cooperation, or more likely, that both houses of Congress and the Presidency are controlled by the same party.

### **What types of actions are reviewable under the CRA?**

The CRA covers a wide variety of rules promulgated by federal agencies, including some agency guidance documents. The CRA’s definition of a rule comes from Section 551 of the Administrative Procedure Act, which defines a rule as:

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<sup>3</sup> A legislative day begins when either chamber convenes following an adjournment and ends when the chamber once again adjourns. The House of Representatives typically adjourns at the end of each calendar day, so a legislative day in the House generally represents a single calendar day. The Senate often recesses instead of adjourning, so a legislative day can last much longer. Hence, the CRA specifies that this period is measured by session days in the Senate and legislative days in the House. For more information see, Judy Schneider Congressional Research Service, *House and Senate Rules of Procedure: A Comparison* (April 16, 2008), <https://www.senate.gov/CRSpubs/7d6c0162-b917-4efd-9585-acaef8a1660b.pdf>. For uniformity, we refer to both as “working days” throughout this memo.

<sup>4</sup> Daniel R. Pérez, George Washington University Regulatory Studies Center, Congressional Review Act Fact Sheet (December 9, 2019), [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/Insights/GW%20Reg%20Studies%20-%20CRA%20Factsheet%20-%20DPerez\\_12.9.19.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/Insights/GW%20Reg%20Studies%20-%20CRA%20Factsheet%20-%20DPerez_12.9.19.pdf).

<sup>5</sup> Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions* (January 2020), <https://fas.org/sgp/crs/misc/R43992.pdf> [hereinafter Congressional Research CRA FAQs].

<sup>6</sup> Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions 3* (January 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.<sup>7</sup>

However, the CRA lists three exceptions. It does not apply to any rule: 1) that sets “future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions;”<sup>8</sup> 2) involving agency staff or management; 3) that does not “substantially affect the rights or obligations of nonagency parties.”<sup>9</sup>

The CRA’s definition of a rule relies on the broadest possible interpretation of the APA and extends beyond actions that are subject to the APA’s notice and comment rulemaking procedures.<sup>10</sup> As a result, actions such as interim final rules, amendments to previously issued rules, and various types of agency guidance may all be subject to review under the CRA.<sup>11</sup>

### **What is a major rule?**

While being applicable to most federal agency rules, the CRA adds additional review requirements for “major” rules. The CRA defines a major rule as one the OMB determines is likely to result in:

- (A) an annual effect on the economy of \$100,000,000 or more;
- (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.<sup>12</sup>

The CRA mandates that major rules go through two extra procedural steps before they can take effect. First, the agency must delay the effective date of a rule for 60 days after it is submitted to Congress or published in the Federal Register (whichever is later).<sup>13</sup> Second, the Comptroller General must submit a report that includes information on the agency’s

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<sup>7</sup> 5 U.S.C. § 551(4).

<sup>8</sup> 5 U.S.C. § 804(3).

<sup>9</sup> *Id.*

<sup>10</sup> Congressional Research Service, CRA FAQs at 6.

<sup>11</sup> *Id.* at 6-9.

<sup>12</sup> 5 U.S.C. § 804(2). Note that this “term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act” *Id.*

<sup>13</sup> 5 U.S.C. § 801(a)(3).

compliance with the rulemaking process within 15 days of when the rule is published or submitted to the appropriate congressional committees of jurisdiction.<sup>14</sup>

### **What process does Congress use to review a rule that has not been reported to Congress?**

Occasionally, an agency will fail to report a rule to Congress. This most often happens when an agency action meets the definition of a rule under the CRA but it did not go through the formal notice and comment proceedings required by the Administrative Procedure Act. To remedy this, Congress developed procedures to review these types of agency action. Members of Congress can ask the Government Accountability Office (GAO) for a formal opinion on whether an agency action qualifies as a rule under the CRA. If the GAO finds that an agency action should qualify as a rule, Congress has used the GAO's affirmative opinion as notice to make the rule available for review.<sup>15</sup>

This process was used in 2018 to disapprove a Consumer Financial Protection Bureau (CFPB) bulletin that had not gone through notice and comment rulemaking.<sup>16</sup> The CFPB bulletin was nearly five years old. However, Congress reasoned that since the CFPB never submitted the "rule" to Congress, the 60-day time clock had not started running until the date it was reported to Congress through the GAO opinion.<sup>17</sup> Given this 2018 action, it is plausible that a myriad of guidance documents issued by the Department of Health and Human Services, including bulletins, policy statements, and even Dear State Medicaid Director/Health Official Letters could potentially be open to review under the Congressional Review Act.

### **Can an agency issue a similar rule if Congress disapproves a rule under the CRA?**

If Congress disapproves a rule under the CRA, it not only stops the rule from taking effect, it also prohibits the agency from issuing another rule that is "substantially the same form" as the previous rule, unless follow-up legislation is enacted permitting the agency to do so.<sup>18</sup>

The CRA does not specifically define the phrase "substantially the same form". Thus, if an agency issues a rule on a similar topic to a disapproved rule, the question of whether the new rule was "substantially the same" would likely be open to debate. This has led some legislators to be wary of using the CRA to disapprove of a regulation, given the constraints that a repeal could have on future agency rulemaking. However, administrative law experts have noted the

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<sup>14</sup> 5 U.S.C. § 801(a)(2)(A).

<sup>15</sup> Congressional Research Service, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress* (March 6, 2019), <https://fas.org/sgp/crs/misc/R45248.pdf>

<sup>16</sup> See S.J.Res. 57, which was signed into law on May 21, 2018, and became P.L. 115-172.

<sup>17</sup> See, e.g., Paul J. Larkin Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J. L. & PUB. POL'Y 505, 510-511 (2018).

<sup>18</sup> 5 U.S.C. § 801(b)(2).

CRA does offer the advantage of repealing a rule “as though such rule had never taken effect” allowing the previous regulatory guidance to come back into effect. Further, these experts note the “substantially the same” doctrine should not prevent rulemaking that is diametrically opposed to a rule that was disapproved under the CRA.<sup>19</sup>

It is also unclear who has final decision-making authority over whether a rule is “substantially the same.”<sup>20</sup> The CRA does contain a general prohibition on judicial review and courts have generally interpreted this prohibition to mean that they do not have authority to decide whether an agency has violated the CRA. Some legal experts have argued that the question of whether a rule is “substantially the same” is different and that the prohibition on judicial review would not apply.<sup>21</sup> However, no courts have offered an opinion on the matter and the answer remains unclear.<sup>22</sup>

### What is the CRA “lookback period” and how is that calculated?

The CRA contains a special provision often referred to as “the lookback period” that allows a new Congress to review rules submitted within 60 working days<sup>23</sup> of when the previous Congress adjourned *sin die*.<sup>24</sup> Under the lookback period, the 60 day clock “resets” in a new Congress beginning on the 15<sup>th</sup> day of the new session. Practically speaking, this means a new Congress has 75 working days to review and act on any rules from the previous session.<sup>25</sup>

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<sup>19</sup> Bethany A. Davis Knoll & Richard L. Revesz, Regulation in Transition, 104 MINN. L.REV. 1, 22-23 (2019), available at [https://minnesotalawreview.org/wp-content/uploads/2019/11/Noll\\_Revesz\\_FINAL.pdf](https://minnesotalawreview.org/wp-content/uploads/2019/11/Noll_Revesz_FINAL.pdf).

<sup>20</sup> Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions* (January 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

<sup>21</sup> See, e.g., Michael J. Cole, Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe 'Substantially the Same,' and Decline to Defer to Agencies Under Chevron, 70 Admin L. Rev. 53 (2018); Adam M. Finkel & Jason W. Sullivan, A Cost-Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again? 63 Admin. L. Rev. 707, 732 fn. 122 (2011).

<sup>22</sup> Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions* (January 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

<sup>23</sup> Working days refers to 60 session days in the Senate or 60 legislative days in the House, whichever is earlier. See Congressional Research Service, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress* 6 (Sept 3, 2008), <https://fas.org/sgp/crs/misc/RL34633.pdf>.

<sup>24</sup> 5 U.S.C. § 801(d)(1).

<sup>25</sup> See Daniel R. Pérez, George Washington University Regulatory Studies Center, *Upcoming CRA Deadline has Implications for Regulatory Oversight by Congress* (December 11, 2019), [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/Commentaries/GW%20Reg%20Studies\\_CRA%20Lookback\\_DPe%CC%81rez\\_.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/Commentaries/GW%20Reg%20Studies_CRA%20Lookback_DPe%CC%81rez_.pdf) [hereinafter Pérez, Upcoming CRA Deadline] The term *sin die* is used to indicate the end of a legislative session (without day). It generally refers to the final adjournment of an annual or two year session of Congress. See United States Senate, Glossary Terms, Adjournment Sin Die, [https://www.senate.gov/reference/glossary\\_term/adjournment\\_sine\\_die.htm](https://www.senate.gov/reference/glossary_term/adjournment_sine_die.htm).

With the 2020 elections looming, many experts speculate that a new Congress and President could take advantage of the CRA lookback period to disapprove rules, much the way the 115<sup>th</sup> Congress did in 2017. Such speculation relies, first, on the notion that a new Congress and new Administration find enough common ground to pass and sign joint resolutions of disapproval on rules passed within the last 60 working days of the current Congress. Historically, the lookback window for the Congressional Review Act has fallen somewhere between May and August, most often occurring in July.<sup>26</sup>

This year's cut-off date for the lookback period remains in question. According to the original 2020 legislative calendar, the lookback period cut-off seemed like it would be in late May of 2020.<sup>27</sup> Yet Congress typically alters its legislative calendar as the year progresses, often adding days at the end of a legislative session. This year, the COVID-19 pandemic, hearings on a new Supreme Court nominee, and the expected post-election lame duck session have thrown the Congressional calendar into flux. Given this uncertainty, it is impossible to know what the cut-off date for a CRA lookback period will be, until the 116<sup>th</sup> Congress's final adjournment. However, there remains the possibility that a new Presidential Administration and the 117<sup>th</sup> Congress will have the opportunity to utilize the Congressional Review Act to invalidate rules passed by the Trump Administration over the last year.

## Conclusion

The CRA could serve as an important tool for Democrats if they win the Presidency and re-take control of the Senate in 2021 (or if there are issues of strong bipartisan agreement in Congress). However, until the 116<sup>th</sup> Congress adjourns in December it is difficult to know how many, or what regulations would be open to review under the CRA. Even if Democrats do take control of the Presidency and Senate in 2021, there are multiple reasons why a new Administration may be wary of overusing the CRA to rescind rules, including constraints around the "substantially similar" doctrine. Given this, advocates should be aware that while the CRA may certainly be one tool Congress and the President could turn to, it may have limited efficacy.

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<sup>26</sup> See . Pérez, *Upcoming CRA Deadline* at 3.

<sup>27</sup> *Id* at 2.