The Congressional Review Act: Frequently Asked Questions

Dania Douglas

Introduction

The Congressional Review Act (CRA) was enacted in 1996 in an effort to give Congress more oversight of agency rulemaking.[1] 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. Following the 2020 elections, the Biden-Harris Administration signed three CRA resolutions passed by the Democrat controlled Congress.[2] As the 2024 elections approach, it is important to consider how this tool might be used by future Congresses and Administrations to address regulations.

This issue brief will answer the following questions:

[1] Title II, Subtitle E, P.L. 104-121, 5 U.S.C. §§ 601 et seq.
[2] The White House, *Remarks by President Biden Signing Three Congressional Review Act Bills into Law: S.J.Res.13; S.J.Res.14; and S.J.Res.15* (Jun. 30, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/30/remarks-by-president-biden-signing-three-congressional-review-act-bills-into-law-s-j-res-13-s-j-res-14-and-s-j-res-15/.

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.[3] It is important to note that these 60 days refer to 60 "working days," which means 60 ***legislative*** days in the House and 60 ***session*** days in the Senate.[4] Thus, the 60 days referred to in the Congressional Review Act are often much longer than 60 calendar days.[5]

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.[6]

As noted earlier, prior to the 115th Congress, the CRA had only been used once to invalidate a regulation.[7] 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

---

[3] 5 U.S.C. § 802.
[4] 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 Cong. Rsch. Serv., *House and Senate Rules of Procedure: A Comparison* (Apr. 16, 2008), https://crsreports.congress.gov/product/pdf/RL/RL30945. For uniformity, we refer to both as "working days" throughout this issue brief.
[5] Daniel R. Pérez, Geo. Wash. Univ. Regul. Stud. Ctr., *Congressional Review Act Fact Sheet* (Dec. 9, 2019), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/downloads/Insights/GW%20Reg%20Studies%20-%20CRA%20Factsheet%20-%20DPerez_12.9.19.pdf.
[6] Cong. Rsch. Serv., *The Congressional Review Act (CRA): Frequently Asked Questions* (Nov. 2021) [hereinafter Congressional Research CRA FAQs], https://crsreports.congress.gov/product/pdf/R/R43992.
[7] *Id.*

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 (APA), which defines a rule as:

> 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.[8]

However, the CRA lists three exceptions. It does not apply to:

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;
(B) any rule relating to agency management or personnel; or
(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.[9]

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.[10] 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.[11]

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 Office on Management and Budget determines has resulted in or is likely to result in:

---

[8] 5 U.S.C. § 551(4).
[9] 5 U.S.C. § 804(3).
[10] Congressional Research CRA FAQs, *supra* note 6, at 6.
[11] *Id.* at 6-9.

(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.[12]

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).[13] Second, the Comptroller General must submit a report that includes information on the agency's compliance with the rulemaking process within 15 days of when the rule is published or submitted to the appropriate congressional committees of jurisdiction.[14]

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

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.[15]

This process was used in 2018 to disapprove a Consumer Financial Protection Bureau (CFPB) bulletin that had not gone through notice and comment rulemaking.[16] The CFPB bulletin was nearly five years old. However, Congress reasoned that since the CFPB never submitted the

---

[12] 5 U.S.C. § 804(2). Note that a major rule "does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act."
[13] 5 U.S.C. § 801(a)(3).
[14] 5 U.S.C. § 801(a)(2)(A).
[15] Cong. Rsch. Serv., *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress* (Mar. 6, 2019), https://crsreports.congress.gov/product/pdf/R/R45248.
[16] *See* S.J. Res. 57, which was signed into law on May 21, 2018, and became P.L. 115-172.

"rule" to Congress, the 60-day time clock had not started running until the date it was reported to Congress through the GAO opinion.[17] 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 that 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.[18]

The CRA does not specifically define the phrase "substantially the same form." The only guidance on this is a statement, inserted by the sponsors of the CRA into the legislative history following the enactment of the law.[19] This statement indicated that the sponsors of the CRA believed that the debate around the disapproval of a rule would provide guidance to an agency on deciding next steps, including whether or not to reissue a rule.[20]

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 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.[21]

---

[17] *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).
[18] 5 U.S.C. § 801(b)(2).
[19] 142 CONG. REC. E571-E579 (daily ed. Apr.19, 1996) (statement of Rep. Henry Hyde).
[20] Congressional Research CRA FAQs, *supra* note 6, at 19-20.
[21] Bethany A. Davis Knoll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 22-23 (2019), https://minnesotalawreview.org/wp-content/uploads/2019/11/Noll_Revesz_FINAL.pdf.

It is also unclear who has final decision-making authority over whether a rule is "substantially the same."[22] 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.[23] However, no courts have offered an opinion on the matter and the answer remains unclear.[24]

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[25] of when the previous Congress adjourned *sine die*.[26] Under the lookback period, the 60-day clock "resets" in a new Congress, beginning on the 15th 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.[27] Historically, the lookback period for the Congressional Review Act has fallen somewhere between May and August, most often occurring in July.[28]

---

[22] Congressional Research CRA FAQs, *supra* note 6, at 21-22.
[23] *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).
[24] Congressional Research CRA FAQs, *supra* note 6, at 21-22.
[25] Working days refers to 60 session days in the Senate or 60 legislative days in the House, whichever is earlier. *See* Cong. Rsch. Serv., *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress* 6 (Sept. 3, 2008), https://fas.org/sgp/crs/misc/RL34633.pdf.
[26] 5 U.S.C. § 801(d)(1).
[27] *See* Daniel R. Pérez, Geo. Wash. Univ. Regul. Stud. Ctr., *Upcoming CRA Deadline has Implications for Regulatory Oversight by Congress* (Dec. 11, 2019) [hereinafter Pérez Upcoming CRA Deadline], https://regulatorystudies.columbian.gwu.edu/upcoming-cra-deadline-has-implications-regulatory-oversight-congress. The term *sine die* is used to indicate the end of a legislative session (*sine die* is Latin for "without day"). It generally refers to the final adjournment of an annual or two-year session of Congress. *See* U.S. Senate, *Glossary Terms*, https://www.congress.gov/help/legislative-glossary#a.
[28] Pérez Upcoming CRA Deadline, *supra* note 27.

Conclusion

As we approach the 2024 elections, the CRA once again becomes a focus and concern for policymakers, advocates, and legislators. Depending on the outcome of the elections, it is possible that a new Congress and President could take advantage of the CRA lookback period to disapprove rules finalized by the current administration. Such speculation, of course, relies on the possibility that any new Congress and Administration could find enough common ground to pass and sign joint resolutions of disapproval. The Biden-Harris Administration should aim to finalize any critically important rules prior to May of 2024, at the latest, to avoid the possibility that the CRA may be used to invalidate any of these rules. As a larger matter, now is a good time for analysts and lawmakers to weigh the advantages against the dangers of using the CRA as a political tool.