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The Congressional Review Act: Frequently Asked Questions

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Summary

The Congressional Review Act (CRA) is an oversight tool that Congress may use to overturn a rule issued by a federal agency. The CRA was included as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA), which was signed into law on March 29, 1996. The CRA requires agencies to report on their rulemaking activities to Congress and provides Congress with a special set of procedures under which to consider legislation to overturn those rules.

Under the CRA, before a rule can take effect, an agency must submit a report to each house of Congress and the Comptroller General containing a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; and the proposed effective date of the rule. Upon receipt of the report in Congress, Members of Congress have specified time periods in which to submit and take action on a joint resolution of disapproval. If both houses pass the resolution, it is sent to the President for signature or veto. If the President were to veto the resolution, Congress could vote to override the veto.

If a joint resolution of disapproval is submitted within the CRA-specified deadline, passed by Congress, and signed by the President, the CRA states that the "rule shall not take effect (or continue)." That is, the rule would be deemed not to have had any effect at any time. Even provisions that had become effective would be retroactively negated.

Furthermore, if a joint resolution of disapproval were enacted, the CRA provides that a rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law. The CRA does not define what would constitute a rule that is "substantially the same" as a nullified rule. Additionally, the CRA prohibits judicial review of any "determination, finding, action, or omission under this chapter."

This report discusses the most frequently asked questions received by the Congressional Research Service about the CRA. It addresses questions relating to the applicability of the act; the submission requirements with which agencies must comply; the procedural requirements that must be met in order to file and act upon a CRA joint resolution of disapproval; and the legal effect of a successful CRA joint resolution of disapproval. This report also discusses potential advantages and disadvantages of using the CRA to disapprove rules, as well as other options available to Congress to conduct oversight of agency rulemaking.

For further questions not addressed here, please contact one of the authors: (name redacted) (questions regarding history of and agency compliance with the CRA); (name redacted) (questions regarding congressional procedures and day counts under the CRA); or (name redacted) (questions regarding legal issues under the CRA).

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Overview of the Congressional Review Act (CRA)

What Is the CRA?

The Congressional Review Act (CRA) is an oversight tool that Congress may use to overturn a rule issued by a federal agency. When Congress passes a law, it often grants rulemaking authority to federal agencies to implement provisions in the law. That delegation of rulemaking authority, and the rules issued by federal agencies under this authority, is a crucial component of the policy process. Congress has an interest in ensuring that, when issuing rules, federal agencies are faithful to congressional intent. To conduct proper oversight of federal agency actions, Congress has a number of tools available, including the CRA.[1]

The CRA was enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA).[2] Under the CRA, before a rule can take effect, an agency must submit the rule to Congress and the Government Accountability Office (GAO).[3] Upon receipt of the rule by Congress, Members of Congress have a specified time period in which to submit and take action on a joint resolution disapproving the rule. If both houses pass the resolution, it is sent to the President for signature or veto. If the President were to veto the resolution, Congress could vote to override the veto.

What Are Advantages of Using the CRA?

Procedural

The CRA establishes a special set of parliamentary procedures for considering a joint resolution disapproving an agency final rule. Supporters cite two main advantages to these procedures over the regular legislative process. First, when a joint resolution of disapproval meets certain criteria, it cannot be filibustered in the Senate. Specifically, once 20 calendar days have passed after the receipt and publication of the final rule, the Senate committee to which a joint resolution disapproving the rule has been referred can be discharged of further consideration if 30 Senators sign and file a petition.[4] Once the committee is discharged, any Senator can make a nondebatable motion to proceed to consider the disapproval resolution. Should the Senate choose to consider the disapproval resolution, debate on it is limited and a final vote would be all but guaranteed.[5]

The second advantage of the CRA process often cited by its supporters is that if a joint resolution of disapproval is enacted, it not only invalidates the rule in question, but in most cases also bars the agency from issuing another rule in "substantially the same form" as the disapproved rule unless authorized to do so in a subsequent law.[6]

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[1] For a broader discussion of Congress's oversight tools, see CRS Report RL30240, *Congressional Oversight Manual*, by (name redacted) et al.

[2] Title II, Subtitle E, P.L. 104-121, 5 U.S.C. §§ 601 *et seq*.

[3] 5 U.S.C. § 801(a)(1)(A).

[4] 5 U.S.C. § 802(c).

[5] 5 U.S.C. § 802(d).

[6] 5 U.S.C. § 801(b)(2). For a discussion of the bar on promulgating another substantially similar rule, see "When Is a New Rule "Substantially the Same" as a Disapproved Rule?"

Failure of a CRA Joint Resolution of Disapproval Could Make a Major Rule Take Effect Faster than Otherwise Allowed Under the CRA

In the case of some major rules, use of the CRA mechanism may make the rule go into effect *more quickly* than it otherwise would. Under the requirements of the CRA, agencies must delay the effective date of major rules by at least 60 days. This is essentially an extension of the Administrative Procedure Act's (APA's) requirement that agencies delay the effective date of rules by at least 30 days.[7] Should either chamber choose to consider a joint resolution disapproving a major rule and then vote to reject it, the rule in question may go into force immediately, notwithstanding any layover period in its effective date established by the CRA.[8] No rule may go into effect, however, until the effective date set by the agency in the rule itself has been reached. This provision of the CRA could be viewed as an advantage for Members who support a particular major rule and want it to take effect as soon as possible.

Agency Oversight

The CRA provides Congress with a method of conducting oversight of agency rulemaking. Not only can Congress use the CRA to overturn agency rules, but certain provisions of the CRA may help to increase congressional awareness of federal agency actions in general. The requirement for agencies to submit their rules to Congress,[9] and the subsequent referral of each rule to the committee of jurisdiction,[10] functions as a notification mechanism through which committees and Members can be made aware of rulemaking activity in which they may be interested. Although Members are likely to become aware of high-profile rules that are of broad interest and receive national media attention, the referral of each rule upon receipt in Congress provides an additional notification for rules that may be of a more localized or specialized interest to Members.

In addition, the threat of submission or passage of a disapproval resolution may provide a mechanism through which a Member can pressure an agency for a particular outcome, either on that particular rule or on another matter.[11] On the other hand, however, the single successful use of the CRA to overturn an agency rule in 2001 (discussed in more detail below) suggests that agencies may not consider use of the CRA to be a credible threat, and Members of Congress may be best served by exploring other options to influence agency actions.

Increased Oversight of Independent Regulatory Agencies

As discussed more below (see "Presidential Veto/De Facto Supermajority Requirement"), the biggest obstacle to enactment of a CRA resolution is generally considered to be the likelihood that a President would veto a joint resolution disapproving a rule issued by his own Administration. It might be expected, however, that Presidents are more likely to sign a resolution

[7] Under the APA's requirement for notice and comment rules, agencies must generally allow at least 30 days to elapse between the publication of a rule and its effective date, though there are some exceptions (5 U.S.C. § 553(d)). In many cases, agencies allow additional time beyond the required 30 days before making a rule effective.

[8] 5 U.S.C. § 801(a)(1)(C)(5).

[9] 5 U.S.C. § 801(a)(1)(A).

[10] 5 U.S.C. § 801(a)(1)(C).

[11] For examples of cases in which the threat of congressional review under the CRA is thought to have influenced agency actions, see Allan Freedman, "GOP's Secret Weapon Against Regulations: Finesse," *CQ Weekly*, September 5, 1998, and Steven J. Balla, "Organization and Congressional Review of Agency Regulations," *Journal of Law, Economics, & Organization*, vol. 16, no. 2 (October 2000), pp. 426-429.

disapproving a rule that has been issued by an independent regulatory agency, a type of agency over which the President has less control.

Congress created a number of federal agencies with certain characteristics to make them independent from the President, and, in some cases, from Congress itself. Those agencies are generally referred to as independent regulatory agencies or independent regulatory commissions.[12] The President has limited ability to remove officials from those agencies, for example, and those agencies' budget requests may be submitted directly to Congress without modification by the President. In addition, some agencies may receive their funding outside the annual appropriations process.

Most notably for rulemaking purposes, the independent regulatory agencies do not submit their regulations to the Office of Management and Budget (OMB) for review, unlike executive agencies such as Cabinet departments. Therefore, the independent regulatory agencies' regulations are considered to be more removed from presidential control than executive agencies', because the President—through OMB—does not have a direct influence over the content of their rules. As such, the rules issued by those agencies are more likely to be incongruent with the President's policy preferences, so that he may be more likely to sign a resolution disapproving such a rule. As one scholar states, "while still not representing much of a change from the Article I legislative process, the CRA may provide some real power in the case of political review of rulemaking by independent agencies."[13]

Drawing Attention to a Rule

Another potential advantage of the CRA is that it provides a method for Members of Congress to draw attention to a particular rule or to make clear their position on a rule. The required language of a joint resolution of disapproval, which is stipulated in the CRA, provides for a relatively straightforward process through which a Member can make clear his or her opposition to a rule. In addition, the expedited procedures by which a resolution may reach the Senate floor provide an opportunity for a minority of the Senate to obtain floor consideration.

Increased Transparency of Rulemaking

Another benefit of the CRA, for Members of Congress as well as for the public, is that it has increased opportunities for transparency in the federal rulemaking process, primarily through a database compiled by GAO. Since the CRA's enactment, GAO has posted the rules agencies submit to GAO under the CRA to a database on its website that is publicly available.[14] The website can be used to search for final rules that have been published by agencies, by elements such as the title, issuing agency, date of publication, type of rule (major or non-major), and

[12] The independent regulatory agencies are listed at 44 U.S.C. § 3502(5) and include, for example, the Federal Reserve Board and Securities and Exchange Commission. For a discussion of the characteristics that make a number of those agencies independent from Congress and the President, see CRS Report R43391, *Independence of Federal Financial Regulators*, by (name redacted), (name redacted), and (name redacted).

[13] Note, "The Mysteries of the Congressional Review Act," *Harvard Law Review*, vol. 122 (2008-2009), p. 2182.

[14] GAO's federal rules database is available at http://www.gao.gov/legal/congressact/fedrule.html. It is important to note that the date of receipt of a final rule listed in the GAO database represents the date that the final rule was received by GAO; this date may or may not be the same date that the rule was received by the House and Senate, the latter being the date used for calculating the various CRA time periods for review and action. See "How Do I Introduce a Joint Resolution of Disapproval?" for a discussion of how "receipt by Congress" is determined for purposes of estimating the time periods governing the CRA disapproval mechanism.

effective date. The website also contains GAO's reports on major rules that are required under the CRA and discussed more below.

What Are Disadvantages of Using the CRA?

Procedural

Use of the CRA mechanism also involves several potential procedural disadvantages:

- First, one might argue that the likelihood of a presidential veto (discussed in detail below) constitutes a *de facto* supermajority requirement to which most CRA disapproval resolutions are likely to be subject.
- Second, the CRA does not establish any "fast track" procedures for initial consideration of a disapproval resolution in the House of Representatives. As a result, unless the House majority party is willing to schedule the measure for consideration, it in all likelihood will not be considered.
- Third, unlike the regular legislative process, the CRA disapproval mechanism is available in the Senate only during certain specific time periods.
- Fourth, calculating the periods established by the CRA for submitting and acting on a disapproval resolution can be difficult, especially in cases where the act provides for additional submission and action periods in a subsequent session of Congress.
- Fifth, unlike regular legislation, each CRA disapproval resolution can only be aimed at a single agency final rule in its entirety; multiple disapproval resolutions cannot be "bundled" together and still maintain their privileged parliamentary status.
- Finally, as is noted above, if either chamber rejects a CRA disapproval resolution on a major rule, it could have the effect of putting a regulation in force sooner than would otherwise be the case. This provision of the CRA could be viewed as a disadvantage for Members who oppose a particular major rule and would prefer as long of a period as possible to elapse before the rule becomes effective.

Disapproval of an Entire Rule

Unlike under the regular legislative process, the CRA can only be used to invalidate an agency final rule in its entirety; it cannot be used to modify or restructure a rule in order to make it acceptable to Congress.

If Congress were to use the regular legislative process instead of the CRA, Congress could invalidate part of a rule or instruct the agency to amend or repeal part of a rule. However, regular legislation would not be eligible for the same expedited procedures in the Senate in the same way a CRA resolution would. It would not be assured of the opportunity for floor consideration and might be subject to filibuster.

Presidential Veto/De Facto Supermajority Requirement

Perhaps the most widely cited reason why the CRA has been used to overturn only one rule is that a President is generally expected to veto a joint resolution of disapproval attempting to overturn a rule proposed by his own Administration. A joint resolution of disapproval requires the signature of the President to become law—a very unlikely prospect if his own Administration issued the

rule. If the President were to veto the measure, Congress could attempt to override the veto. A two-thirds majority of both houses of Congress is required to override a President's veto; this creates a *de facto* supermajority requirement for a CRA joint resolution to be enacted.

During a transition following the inauguration of a new President, however, the CRA is more likely to be used successfully. Because of the structure of the periods during which Congress can take action under the CRA, there may be a period at the beginning of each new Administration during which rules issued near the end of the previous Administration would be eligible for consideration under the CRA.[15] The one instance in which the CRA was used to overturn a rule took place during such a period—the resolution was enacted in the early days of the George W. Bush Administration and overturned a rule that had been issued late in the Clinton Administration. See "How Many Rules Have Been Overturned Using the CRA?" for more information on this instance.

How Many Rules Have Been Overturned Using the CRA?

To date, the CRA has been used to overturn one rule.

In November 2000, the Clinton Administration's Occupational Safety and Health Administration (OSHA) in the Department of Labor (DOL) issued a rule on ergonomics standards.[16] The full congressional consideration period provided for in the CRA did not elapse before the second session of the 106th Congress adjourned, so additional periods for review became available.[17] The Senate passed the CRA resolution, S.J.Res. 6, on March 6, 2001. The House voted on the Senate resolution and passed it the following day. On March 20, 2001, President George W. Bush signed into law P.L. 107-5, overturning the rule. To date, OSHA has not attempted to re-issue another version of the ergonomics rule.[18]

For a discussion of why the CRA has only been used to overturn one rule, see the section above titled "Presidential Veto/De Facto Supermajority Requirement."

Definitions Under the CRA

What Is a Rule Under the CRA?

The CRA adopts the definition of a "rule" that appears in Section 551 of the Administrative Procedure Act (APA) with three exceptions.[19] Section 551 of the APA defines a rule as

[15] The rules issued near the end of an Administration are often referred to as "midnight rules." See CRS Report R42612, *Midnight Rulemaking*, by (name redacted), for more information about the history, practice, and oversight of midnight rulemaking.

[16] U.S. Department of Labor, Occupational Safety and Health Administration, "Ergonomics Program," 65 *Federal Register* 68262-68870, November 14, 2000.

[17] For more information on the reset periods, see "What Happens if Congress Adjourns Before the CRA Initiation or Action Periods Conclude?"

[18] For a more detailed discussion of the events that occurred in 2001 surrounding the OSHA rule, see Adam M. Finkel and 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?", *Administrative Law Review*, vol. 63, no. 4 (Fall 2011), and Stuart Shapiro, "The Role of Procedural Controls in OSHA's Ergonomics Rulemaking," *Public Administration Review*, vol. 67, no. 4 (July-August 2007), pp. 688-701.

[19] 5 U.S.C. § 804(3).

> 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.[20]

The first exception in the CRA definition of a "rule" is for rules of particular applicability, including several of the types of rules specifically included in the APA definition: 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."[21] Second, the CRA's definition of a rule excludes "any rule relating to agency management or personnel ... "[22] Finally, "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties" is also excluded from the definition of "rule."[23]

Notably, the CRA adopts the broadest definition of "rule" contained in the APA, which is broader than the category of rules subject to notice and comment rulemaking.[24] Therefore, some agency actions that are not subject to notice and comment rulemaking under the APA, and thus may not be published in the *Federal Register*, may still be considered a rule under the CRA.

Does the CRA Apply to Interim Final Rules?

Yes. Interim final rules are considered to be final rules and, therefore, an interim final rule that satisfies the CRA definition of a "rule" will be subject to the CRA. Interim final rules are used by agencies to promulgate rules without providing the public with notice and an opportunity to comment before publication of the final rule, while reserving the right to modify the rule following a post-promulgation comment period.[25] Agencies must assert a valid "good cause" in order to issue any interim final rule.[26] Interim final rules are considered final rules that carry the force and effect of law.[27]

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[20] 5 U.S.C. § 551(4).

[21] 5 U.S.C. § 804(3)(A). The CRA definition of a "rule" does not specifically exclude facilities or appliances, which are also listed in the APA definition of a "rule" (5 U.S.C. § 551(4)).

[22] 5 U.S.C. § 804(3)(B).

[23] 5 U.S.C. § 804(3)(C).

[24] 5 U.S.C. § 553. Generally, notice and comment rulemaking does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" or "when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

[25] While there are numerous examples of the use of interim final rules prior to 1995, the practice of post-promulgation comments appears to have its genesis in a 1995 recommendation of Administrative Conference of the United States (ACUS), which suggested the procedure whenever the "impracticable" or "contrary to the public interest" prongs of the "good cause" exemption were invoked. See ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 *Federal Register* 43110, August 18, 1995. See also Michael R. Asimow, "Interim-Final Rules: Making Haste Slowly," *Administrative Law Review* vol. 51, no. 3 (Summer 1999).

[26] 5 U.S.C. § 553(b)(B) ("Except when notice or hearing is required by statute, this subsection does not apply... when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."); see also Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4th ed. (2006), pp. 114-115.

[27] See Career College Ass'n v. Riley, 74 F.3d 1265 (D.C. Cir. 1996) ("The key word in the title 'Interim Final Rule,' unless the title is to be read as an oxymoron, is not interim, but *final.* 'Interim' refers only to the Rule's intended duration—not its tentative nature.")

Does the CRA Apply to Proposed Rules?

It does not appear that the CRA applies to proposed rules issued by an agency. Arguably a proposed rule does not satisfy the CRA definition of a "rule." A proposed rule is not "designed to implement, interpret, or prescribe law or policy";[28] instead, it is generally created by the agency as a draft with which to solicit and receive public comments.[29] Additionally, a proposed rule has no "future effect," because a rule subject to a notice of proposed rulemaking may not go into effect until comments are received and considered by the agency and a final rule is published in the *Federal Register*.[30] Presumably on these grounds, GAO specifically advises agencies not to submit proposed rules to Congress or GAO under the CRA.[31]

In 2014, GAO published an opinion discussing the CRA and proposed rules.[32] GAO limited its analysis to three questions regarding GAO's role under the CRA and its precedents analyzing whether specific agency actions are rules under the CRA.[33] It concluded that "the terms of [the] CRA, and its supporting legislative history, clearly do not provide a role for GAO with regard to proposed rules, and do not require agencies to submit proposed rules to GAO."[34]

Furthermore, GAO stated that its prior decisions found "that an agency action constituted a rule for CRA purposes ... [if] the action imposed requirements that were both certain and final."[35] Since proposed rules "are proposals for future agency action that are subject to change ... and do not have a binding effect on the obligations of any party,"[36] GAO concluded they are "not a triggering event for CRA purposes."[37] GAO also noted that, because the CRA's expedited procedure for review of agency rules was enacted pursuant to Congress's constitutional authority

[28] 5 U.S.C. § 804(3); 5 U.S.C. § 551(4).

[29] 5 U.S.C. § 553(b).

[30] 5 U.S.C. § 553(c).

[31] GAO, "Congressional Review Act (CRA) FAQs," available at http://www.gao.gov/legal/congressact/cra_faq.html#6 ("[Question:] Should agencies submit proposed rules to GAO? [Answer:] No. Agencies should only submit major, nonmajor, and interim final rules to GAO.").

[32] Letter from Susan A. Poling, General Counsel, Government Accountability Office, to the Honorable Harry Reid, Mitch McConnell, Barbara Boxer, and Thomas Carper, May 29, 2014 (regarding GAO's Role and Responsibility Under the Congressional Review Act), p. 1. [hereinafter GAO May 2014 CRA Letter]. This opinion was written in response to a request from Senator Mitch McConnell, who asked GAO to analyze whether an EPA proposed rule satisfied the definition of "rule" in the CRA. Letter from Senator Mitch McConnell to Gene L. Dodaro, Comptroller General of the United States, January 16, 2014. Senator McConnell specifically argued that the manner in which the EPA issued the proposed rule gave it "immediate legal effect," which distinguished this proposed rule from other proposed rules, which have no immediate legal effect. In its response opinion, GAO did not specifically address the argument that this proposed rule was different than other proposed rules, instead concluding that "the issuance of a proposed rule is an interim step in the rulemaking process intended to satisfy APA's notice requirement, and, as such, is not a triggering event for CRA purposes." GAO May 2014 CRA Letter, p. 6.

[33] GAO May 2014 CRA Letter, p. 1. Specifically, GAO "agreed to answer three questions: (1) what is GAO's role under CRA and what type of agency action triggers that role; (2) what role does GAO play under CRA with regard to a proposed rule; and (3) do prior GAO opinions under CRA examining final agency actions outside of the rulemaking process provide precedent in answering these questions."

[34] Ibid., p. 5.

[35] Ibid., p. 8.

[36] Ibid.

[37] Ibid., p. 6.

to establish its own procedural rules,[38] it is for "Congress to decide whether [the] CRA would apply to a resolution disapproving a proposed rule."[39]

What Is a Major Rule Under the CRA?

The CRA defines a major rule as

> any rule 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—
>
> > (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.
>
> The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.[40]

A previous CRS report provided information on the number of major rules issued in recent years, and noted that the 100 major rules issued in calendar year 2010 were considered major because of their effect on the economy, measured in other ways than just in costs for compliance. For example, 37 of the rules appeared to be major because they involved transfers of funds from one party to another (most commonly, federal funds to the recipients of those funds, such as payments to Medicare providers). Ten other rules appeared to be major because they were expected to prompt consumer spending, or because they established fees for the reimbursement of federal functions. Thirty-nine rules appeared major because they were expected to result in at least $100 million in annual compliance costs, regulatory benefits, or both.[41]

What Happens When a Rule Is Designated as Major?

When a rule is designated as major pursuant to the CRA, the act subjects it to two additional requirements. The first is that the Comptroller General is required to prepare and submit to the committee of jurisdiction a report on each major rule within 15 calendar days of its submission or publication date.[42] This report is to contain "an assessment of the agency's compliance with procedural steps" required for the rule, including any cost-benefit analysis or other analysis under certain statutes such as the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.[43]

Second, the CRA contains provisions that may delay the effective dates of major rules. Specifically, if the rule is major, the statute provides that it "shall take effect on the latest of"

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[38] U.S. Constitution, Article I, Section 5, clause 2.

[39] GAO May 2014 CRA Letter, p. 9.

[40] 5 U.S.C. § 804(2).

[41] CRS Report R41651, *REINS Act: Number and Types of "Major Rules" in Recent Years*, by (name redacted) and (name redacted) .

[42] 5 U.S.C. § 801(a)(2)(A). The major rule reports are posted on GAO's website at http://www.gao.gov/legal/congressact/majrule.htmlhttp://www.gao.gov/legal/congressact/fedrule.html.

[43] P.L. 96-354; P.L. 104-4.

- 60 days after the date that the rule is published in the *Federal Register* or received by Congress, whichever is later;
- if Congress passes a joint resolution of disapproval and the President vetoes it, the date on which either house of Congress votes and fails to override the veto or 30 session days after the date Congress received the veto, whichever is earlier; or
- the date the rule would have otherwise taken effect, if not for this provision of the CRA.[44]

The delay provided for in the CRA allows Congress additional time to consider whether to overturn a major rule before it goes into effect.

If the rule is not major, the CRA states that the rule "shall take effect as otherwise provided by law after submission to Congress."[45]

Who Determines Whether a Rule Is Major?

Under the CRA, the Administrator of OIRA is responsible for determining whether a rule is major.[46] However, the CRA does not specifically require agencies to submit their rules to OIRA so that such a determination can be made.[47] A former OIRA Administrator, Cass Sunstein, stated that "[o]nce an agency has submitted a rule to Congress and the GAO under the CRA, OMB does not conduct retrospective reviews of their appropriate designation" as major or non-major rules.[48]

Executive agencies, excluding independent regulatory agencies, are required to submit "significant regulatory actions" to OIRA for its review, in accordance with Executive Order 12866.[49] As part of that review process, agencies and OIRA make a determination as to whether a rule is "economically significant" as defined under Section 3(f)(1) of Executive Order 12866.[50] The definitions for "economically significant" rule and major rule are not identical, but they are very similar. In most cases, a rule determined to be "economically significant" under the executive order will also be major under the CRA, and vice versa.

Independent regulatory agencies do not submit their rules to OIRA for review under Executive Order 12866. However, OIRA is still tasked with determining whether an independent regulatory agency's rule is major. Accordingly, it is not clear whether and how rules issued by the independent regulatory agencies should be designated as major under the CRA. Sally Katzen, who was the OIRA Administrator when the CRA was enacted, stated in testimony to Congress that,

> Because OIRA does not review the regulations issued by the independent regulatory agencies under Executive Order 12866, we had to design a process for us to determine whether the final rule of an independent regulatory agency is "major" within the meaning of the statute. Therefore, we invited regulatory contacts from the independent regulatory

[44] 5 U.S.C. § 801(a)(3). For a more detailed discussion about how the CRA may alter the effective date of major rules, see "How Does the CRA Affect the Effective Date of a Rule?" below.

[45] 5 U.S.C. § 801(a)(4).

[46] 5 U.S.C. § 804(2).

[47] 5 U.S.C. § 801(a)(1)(A); see 5 U.S.C. § 804(2).

[48] Letter from Cass R. Sunstein, Administrator, OIRA, to the Honorable Charles E. Grassley, Ranking Member, Committee on Finance, United States Senate, April 28, 2010.

[49] Executive Order 12866, "Regulatory Planning and Review," § 3(b).

[50] For more on the OIRA review process, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by (name redacted).

> agencies... to a meeting on April 12, 1996, to discuss my April 2 memorandum [on the CRA] and how they could best coordinate with us on our determination of "major." After this meeting, the independent regulatory agencies began sending OIRA summaries of their upcoming final regulations for us to decide whether or not these rules were "major." Initially, there was a flurry of staff discussions; this process for the "independents" has now become routine.[51]

More recent accounts suggest, however, that at least some of the independent regulatory agencies no longer appear to be acknowledging a role for OIRA in the determination of rules as major.[52] Rather, these agencies appear to be making the determination themselves. A December 2013 GAO report stated that the independent regulatory agencies were inconsistent in how they determined whether a rule was major, which could "raise the risk of some rules not being properly classified as major, limiting Congress's ability to review these rules before they become effective."[53]

Does the CRA Apply to Non-Major Rules?

Yes. The CRA can be used to overturn any final rule, regardless of whether the rule is major.

Agency Submission of Rules

When Does an Agency Have to Submit a Rule to Congress and GAO?

The CRA does not specify when an agency must submit a rule. However, a rule cannot become effective until after it is submitted.[54] In practice, agencies generally submit rules around the time the rule is finalized and published.

How Do I Check if a Rule Has Been Submitted Under the CRA?

Submissions to Congress

When final rules are submitted to Congress pursuant to the CRA, notice of each chamber's receipt and referral appears in the respective House and Senate sections of the daily

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[51] U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Congressional Review Act*, Statement of Sally Katzen, Administrator of the Office of Information and Regulatory Affairs, 105th Cong., 1st sess., March 6, 1997 (Washington: GPO, 1997), p. 60. For more information on existing executive control of rulemaking, see CRS Report R42821, *Independent Regulatory Agencies, Cost-Benefit Analysis, and Presidential Review of Regulations*, by (name redacted) and (name redacted); CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues*, by (name redacted) and (name redacted); and CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by (name redacted).

[52] Arthur Fraas and Randall Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," *Administrative Law Review*, vol. 63, Special Edition (2011), p. 221; and Joseph Aldy, Art Fraas, and Randall Lutter, "OMB: Obscurity in Management and Budget?", *Regulation*, Winter 2013-2014, pp. 5-6.

[53] U.S. Government Accountability Office, *Agencies Conducted Regulatory Analyses and Coordinated but Could Benefit from Additional Guidance on Major Rules*, GAO-14-67, December 2013, http://www.gao.gov/assets/660/659586.pdf.

[54] 5 U.S.C. § 801(a)(1)(A).

Congressional Record devoted to "Executive Communications." They are also entered into a database which can be searched using the Legislative Information System of the U.S. Congress (LIS). House communications can be accessed at http://www.congress.gov/execcomh/search.html and Senate communications at http://www.congress.gov/execcoms/search.html.

Submissions to GAO

As mentioned above, GAO has a database on its website that tracks rules submitted to GAO under the CRA. The database can be accessed at http://www.gao.gov/legal/congressact/fedrule.html. The GAO database also contains links to the reports that GAO produces on major rules. It is important to note that the date of receipt of a final rule listed in the GAO database represents the date that the final rule was received by GAO; this date may or may not be the same date that the rule was received by the House and Senate, the latter being the date used for calculating the various CRA time periods for review and action. See "How Do I Introduce a Joint Resolution of Disapproval?" for a discussion of how "receipt by Congress" is determined for purposes of estimating the time periods governing the CRA disapproval mechanism.

What Happens If an Agency Does Not Submit a Rule to Congress?

In some instances, an agency has considered an action not to be a rule under the CRA and has declined to submit it to Congress. Although the disapproval procedures established in the CRA seem to be triggered by agency submission of a rule to Congress,[55] it appears that Congress may still be able to utilize the CRA even if an agency fails to submit a rule. In the past, when a Member of Congress has thought an agency action is a rule under the CRA, the Member has sometimes asked GAO for a formal opinion on whether the specific action satisfies the CRA definition of a "rule" such that it would be subject to the CRA's disapproval procedures.[56]

GAO has issued 11 opinions of this type at the request of Members of Congress. In seven opinions, GAO has determined that the agency action satisfied the CRA definition of a "rule." After receiving these opinions, some Members have submitted CRA resolutions of disapproval for the "rule" that was never submitted. In four opinions, GAO has determined that the agency action does not satisfy the CRA definition of "rule," either because it falls under one of the exceptions or is outside the scope of the statute altogether.[57]

Members have had varying degrees of success in getting resolutions recognized as privileged under the CRA even if the agency never submitted the rule to Congress.[58] It appears from recent practice that, in these cases, the Senate has considered the publication in the *Congressional Record* of the official GAO opinions discussed above as the trigger date for the initiation period

[55] 5 U.S.C. § 802(a) ("For the purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report [containing a copy of the rule]... is received by Congress and ending 60 days thereafter ... ").

[56] See, e.g., Letter from Lynn H. Gibson, General Counsel, Government Accountability Office, to the Honorable Orrin Hatch and the Honorable Dave Camp, September 4, 2012 (regarding a Dept. of Health and Human Services Information Memorandum on the Temporary Assistance for Needy Families program); Letter from Gary L. Kepplinger, General Counsel, Government Accountability Office, to the Honorable John D. Rockefeller, IV and the Honorable Olympia Snowe, April 17, 2008 (regarding a letter issued by the Centers for Medicare & Medicaid Services concerning the State Children's Health Insurance Program); Letter from Robert P. Murphy, General Counsel, Government Accounting Office, to the Honorable Conrad Burns, November 10, 1997 (regarding the American Heritage River Initiative).

[57] See **Appendix**, "Government Accountability Office (GAO) Opinions Regarding the Applicability of the CRA."

[58] See, e.g., H.J.Res. 118 (112th Congress); S.J.Res. 50 (112th Congress); S.J.Res. 44 (110th Congress).

to submit a disapproval resolution and for the action period during which such a resolution qualifies for expedited consideration in the Senate.[59] (For a discussion of these periods and their triggers, see "How Do I Introduce a Joint Resolution of Disapproval?" and "What Are the CRA "Fast Track" Procedures?" below.)

It is important to note that it is unlikely that an affected party would be able to challenge in court an agency's failure to submit a rule to Congress pursuant to the CRA, because the statute explicitly states that "no determination, finding, action, or omission under [the CRA] shall be subject to judicial review." See "Is There Judicial Review Under the CRA?" below.

Congressional Procedures Under the CRA

How Do I Introduce a Joint Resolution of Disapproval?

In most respects, submitting (introducing) a CRA joint resolution of disapproval is the same as initiating any other House or Senate bill. There is, however, a very specific time period during which a qualifying joint resolution can be submitted, and its text must read exactly as laid out in the law.[60]

The receipt of a final rule by Congress begins a period of 60 "days-of-continuous-session" during which any Member of either chamber may submit a joint resolution disapproving the rule under the CRA.[61] For purposes of the act, a rule is considered to have been "received by Congress" on the later date of its receipt in the Office of the Speaker of the House or its referral to Senate committee. In calculating "days of continuous session" every calendar day is counted, including weekends and holidays, and the count is only paused for periods where either chamber (or both) is gone for more than three days, that is, pursuant to an adjournment resolution. In order to qualify for the special parliamentary procedures of the CRA, a joint disapproval resolution must be submitted during this 60-day period, not before, and not after.[62]

Under Section 802(a) of the act, the text of a CRA joint disapproval resolution is also stipulated. It states the matter after the resolving clause must read,

> "That Congress disapproves the rule submitted by the ____ relating to ____, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).

The first blank would identify the agency promulgating the final rule and the second the name of the rule itself.

Can a Joint Resolution of Disapproval Contain a Preamble?[63]

It is unclear. While the CRA procedure does not specifically bar a joint disapproval resolution from having a preamble, including one raises a number of unanswered questions about House and Senate consideration of the measure. For example, does the inclusion of a preamble destroy the

[59] See, e.g., *Congressional Record*, daily edition, vol. 158, September 10, 2012, p.S6047.

[60] 5 U.S.C. § 802(a).

[61] Ibid.

[62] Ibid.

[63] A preamble is a series of "whereas" clauses found before the resolving clause describing the reasons for, and intent of, a measure.

privileged status of the measure in the eyes of either chamber? In the Senate, the preamble to a joint resolution is voted on after the passage of the resolution itself, and is separately amendable. Would the consideration of a preamble fall under the "fast track" Senate procedures banning amendments and limiting debate? Because of these and other ambiguities, Members considering including a preamble in a CRA joint disapproval resolution are advised to consult with the House and Senate Parliamentarians to obtain their definitive guidance on the question prior to submission.

How Is a Joint Resolution of Disapproval Different from a Bill?

Bills and joint resolutions each have traditional uses, but for purposes of the legislative process, the two are generally interchangeable. In order to be enacted, a bill or joint resolution has to pass the House and Senate with precisely identical text and be presented to the President for his signature, enacted over his veto, or become law without his signature.[64]

Can a Joint Resolution of Disapproval Be Used to Invalidate Part of a Rule or More than One Rule?

No. Each CRA joint resolution of disapproval can only be used to invalidate one final rule in its entirety.[65]

What Are the CRA "Fast Track" Procedures?

The CRA contains "fast track" procedures (sometimes called "expedited parliamentary procedures") for both committee consideration and floor consideration of a CRA disapproval resolution in the Senate.[66]

The CRA does not contain "fast track" procedures for initial consideration in the House. A CRA disapproval resolution would likely be considered in the House under the terms of a special rule reported by the Rules Committee and adopted by the House. The CRA also provides expedited procedures which govern the consideration by either the House or Senate of a disapproval resolution received from the other chamber.

What Are the CRA "Fast Track" Procedures for Senate Committee Consideration?

Any time after the expiration of a 20-calendar-day period which begins after a final rule is received by Congress and published in the *Federal Register*, a Senate committee can be discharged from the further consideration of a CRA joint resolution disapproving the rule.[67] This discharge occurs upon the filing on the Senate floor of a petition signed by at least 30 Senators.[68] While the act does not specify the text of a CRA discharge petition, those that have been used in the past resemble a cloture petition. For example,

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[64] Constitutional amendments are traditionally introduced as joint resolutions, but are not presented to the President following passage in Congress.

[65] See 5 U.S.C. § 802(a) (requiring the text of a CRA resolution of disapproval to cite a rule in its entirety).

[66] 5 U.S.C. § 802(c), (d).

[67] 5 U.S.C. § 802(c). It is important to note that the 20-day period is calculated from the receipt and publication of the rule, not from the submission of a disapproval resolution aimed at the rule.

[68] Ibid.

> We, the undersigned Senators, in accordance with chapter 8 of title 5, United States Code, hereby direct that the Senate Committee on Commerce, Science, and Transportation be discharged of further consideration of S.J. Res. 6, a resolution on providing for congressional disapproval of a rule submitted by the Federal Communications Commission relating to the matter of preserving the open Internet and broadband industry practices, and, further, that the resolution be immediately placed upon the Legislative Calendar under General Orders.[69]

What Are the CRA "Fast Track" Procedures for Senate Floor Consideration?

Once a CRA joint resolution of disapproval is reported or discharged from Senate committee, any Senator may make a nondebatable motion to proceed to consider the disapproval resolution.[70] This motion to proceed requires a simple majority for adoption. If the motion to proceed is successful, the CRA disapproval resolution would be subject to up to 10 hours of debate, and then voted upon.[71] A nondebatable motion to limit debate below 10 hours is in order. No amendments are permitted.[72] A CRA disapproval resolution requires a simple majority in order to pass.

For How Long Are the "Fast Track" Procedures Available?

In order to be eligible for the "fast track" procedures for Senate consideration, that body has to act on a disapproval resolution during a period of 60 days of Senate session which begins when the rule is received by Congress and published in the *Federal Register*. After that period, the measure would have to be considered under normal Senate rules. There is no deadline on House consideration except the life of the two-year Congress.

Do Disapproval Resolutions Have to Be Submitted in Both Chambers of Congress?

No. The CRA does not require that "companion" disapproval resolutions be submitted in both the House and Senate. Under certain circumstances, however, doing so may be advisable.

Under the terms of the CRA "fast track" procedure, if one chamber receives a disapproval resolution passed by the other chamber, the receiving chamber may take up and debate its own disapproval resolution, but at the point of disposition, is to take the final vote not on its own measure, but on the disapproval resolution received from the other house. This automatic "hookup" provision guarantees that both chambers are acting on the same joint resolution, and as such, it can be sent directly to the President following second-chamber passage. The mechanism also ensures that there will be no need to resolve legislative differences between the chambers even in cases where the House and Senate disapproval resolutions have slightly different texts.[73]

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[69] *Congressional Record*, daily edition, vol. 157, November 3, 2011, p. S7141.

[70] 5 U.S.C. § 802(d)(1). The motion to proceed to consider contained in the CRA, like the motion to proceed to consider, contained in the Standing Rules of the Senate, can be made by any Senator. In modern practice, however, with rare exceptions, Senators defer to the Majority Leader or his designee to make such scheduling motions.

[71] 5 U.S.C. § 802(d)(2).

[72] Ibid.

[73] While, as discussed, the CRA stipulates the text of the joint resolution after the resolving clause, it is possible that each chamber could submit companion resolutions which have filled in the "blanks" in the stipulated text with slightly different language.

If the House passes a joint resolution of disapproval, for example, and messages it to the Senate, the Senate would apparently be able to consider the House measure under the fast track procedures only by first taking up its own disapproval resolution.[74] If there is no Senate companion resolution, taking up the House measure could potentially require unanimous consent. As such, House sponsors who want the Senate to be able to consider the House resolution under the CRA "fast track" procedures should ensure that a companion Senate disapproval resolution is submitted during the 60-day initiation period.

If the Senate acts first, the House can take up the measure, should it choose to do so, under its normal parliamentary mechanisms without having a companion resolution submitted in the House.

What Happens if Congress Adjourns Before the CRA Initiation or Action Periods Conclude?

If, within 60 days of session in the Senate or 60 legislative days in the House after the receipt by Congress of a rule,[75] Congress adjourns its session *sine die*, the periods to submit and act on a disapproval resolution "reset" in their entirety in the next session of Congress.[76]

In the new session, the reset periods begin on the 15th day of session in the Senate and the 15th legislative day in the House. If these two dates do not coincide, it appears that both houses would regard the reset period of 60 days of continuous session for submitting a disapproval resolution as beginning on the later of the two, similarly to the way in which the date of initial receipt by Congress is calculated, so that the new initiation period will be the same for both chambers. If the new session is the second session of the same Congress, a disapproval resolution submitted in the first session remains available for expedited action in the Senate during its new action period of 60 days of session.[77] This "carryover" provision is intended to ensure that Congress will have the full periods contemplated by the act to disapprove a rule regardless of when it is received.

Is it Possible to Ascertain When the Periods for Submission, Discharge, and Action on a Resolution to Disapprove a Given Rule Begin and End?

Yes. CRS can provide congressional clients with unofficial estimates of the periods to submit, discharge, and act on a joint resolution of disapproval under the CRA once a given rule has been received by Congress and published in the *Federal Register*. It is important to note, however, that CRS estimates are unofficial and nonbinding. The House and Senate Parliamentarians are the sole definitive arbiter of the CRA parliamentary mechanism, including day count calculations, and should be consulted for authoritative guidance on its operation.

[74] 5 U.S.C. § 802(f).

[75] A legislative day begins when the House or Senate reconvenes following an adjournment (of whatever length) and concludes when that chamber next adjourns.

[76] 5 U.S.C. § 801(d)(1).

[77] 5 U.S.C. § 801(d)(2)(A).

Effect of a Resolution of Disapproval

What Is the Effect of Enacting a CRA Joint Resolution of Disapproval?

Enactment of a CRA joint resolution disapproving a rule has two primary effects. First, a rule subject to a disapproval resolution would not take effect.[78] If a rule has previously taken effect, it is not to continue in effect and "shall be treated as though such rule had never taken effect."[79] Second, the agency may not reissue the rule in "substantially the same form" or issue a "new rule that is substantially the same" as the disapproved rule, "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[80]

When Is a New Rule "Substantially the Same" as a Disapproved Rule?

The CRA does not define the meaning or scope of "substantially the same," what criteria should be considered, or who should make such a determination.[81] Since the CRA does not define "substantially the same," sameness could be determined by scope, penalty level, textual similarity, or administrative policy, among other factors. For example, if Congress objected to a specific section of language in a rule that was ultimately disapproved, would a rule that only removed that language be considered "substantially the same" as the original? If the agency reissued a rule in which it changed one standard listed in the original regulation, would that be substantially similar? If it changed the number of categories to which a standard applied would the rule still be "substantially the same"? These questions, for which no definitive answer is available, highlight the ambiguity in the meaning of "substantially the same."

The statute is also silent on the question of who would make the determination as to whether an amended rule or new rule is "substantially the same" as a disapproved rule. It appears that Congress could take action if it determined that a reissued or new rule was substantially the same as a disapproved rule, given that any reissued or new rule would also be subject to the CRA.[82] Given that the statute precludes judicial review of any "determination, finding, action, or omission" under the CRA,[83] one could argue that evaluating whether the "substantially the same"

[78] 5 U.S.C. § 801(b)(1).

[79] 5 U.S.C. §801(f).

[80] 5 U.S.C. § 801(b)(2). Nevertheless, it does not appear that Congress intended that all disapproved rules would require additional statutory authorization before further agency action on the same subject could take place. For example, where a statute or court order establishes a deadline for promulgating rules, an enacted CRA joint resolution of disapproval will not prohibit the agency from future issuance of rules governed by the deadline. Instead, the CRA extends the deadline for one year from the enactment of the joint resolution of disapproval (5 U.S.C. § 803).

[81] Even the post-enactment legislative history, which is of limited legal value in interpreting a statute, does not shed light on the meaning of "substantially the same." Nor is there a particular definition of "substantially the same" in the U.S. Code that would apply to this section. The Code contains over 270 provisions that include the terms "substantially similar" or "substantially the same." See, e.g., 15 U.S.C. § 57a; 26 U.S.C. §§ 83, 168, 246; 49 U.S.C. §§ 30141, 30166. At least one other law has prohibited an agency from issuing "substantially similar" regulations, which also remains undefined in the text (Federal Trade Commission Improvements Act of 1980, P.L. 96-252, 94 Stat. 391-92).

[82] Congress could also revoke a rule and/or prevent an agency from promulgating future rules by statute through the regular legislative process.

[83] 5 U.S.C. § 805. The CRA also provides that if Congress does not enact a joint resolution of disapproval, "no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, (continued...)

prohibition has been violated may be a matter for Congress alone to decide. See "Is There Judicial Review Under the CRA?" below.

What Is the Effect of a CRA Joint Resolution Disapproving an Amendment to a Previously Issued Rule?

Agencies often promulgate rules that substantively amend or make technical corrections to a previously issued rule. An amendment to a rule, if substantive or even if simply a technical correction, is considered to be a "rule" under the APA and the CRA. If a CRA joint resolution of disapproval were enacted regarding such an amendment, it would prevent the amendment from going into effect or continuing in effect. However, this CRA joint resolution of disapproval would have no effect on the previously existing rule that was being amended.

How Does the CRA Affect the Effective Date of a Rule?

As the first step in the congressional disapproval process, the CRA generally requires federal agencies to submit their covered rules to both houses of Congress and GAO "before a rule can take effect."[84] Currently, the APA requires that agencies generally wait at least 30 days after issuance in the *Federal Register* before a rule can become effective.[85] As explained above (see "What Happens When a Rule Is Designated as Major?"), the CRA extends that required period for *major* rules, providing that major rules "shall take effect on the latest of" three dates:

- 60 days after the date that the rule is published in the *Federal Register* or submitted to Congress, whichever is later;
- if Congress passes a joint resolution of disapproval and the President vetoes it, the date on which either house of Congress votes and fails to override the veto or 30 session days after the date Congress received the veto, whichever is earlier; or
- the date the rule would have otherwise taken effect, unless a joint resolution of disapproval is enacted.[86]

Non-major rules "shall take effect as otherwise provided by law after submission to Congress."[87]

For certain types of rules, these effective date requirements may not apply. The CRA contains a provision stating that the following rules will take effect on the date the promulgating agency chooses:

(...continued)

related statute, or joint resolution of disapproval" (5 U.S.C. § 801(g)).

[84] 5 U.S.C. § 801 (a)(1)(A).

[85] 5 U.S.C. § 553(d). The APA provides three exceptions to this requirement: "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule." If a rule meets one of these conditions, it may become effective immediately (or after a period of less than 30 days).

[86] 5 U.S.C. § 801(a)(3). Under 5 U.S.C. § 801(a)(5), notwithstanding 5 U.S.C. § 801(a)(3), "the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802." Additionally, under 5 U.S.C. § 801(b)(1), "[a] rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under [5 U.S.C. § 802], of the rule."

[87] 5 U.S.C. § 801(a)(4).

> (1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or
>
> (2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest ...[88]

What Happens if a Rule that Is Already Effective Is Overturned?

If a rule has already taken effect, the CRA provides that the rule shall not continue in effect[89] and "shall be treated as though such rule had never taken effect."[90]

Is There Judicial Review Under the CRA?

Section 805 of the CRA states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[91] Two federal appeals courts and several federal district courts have examined this section and determined that it unambiguously prohibits judicial review of any question arising under the CRA.[92] One court, a federal district court, has reached the contrary conclusion, ruling that it could review a claim based on noncompliance with the CRA.[93]

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[88] 5 U.S.C. § 808. The "good cause" language in the second category of rules in § 808 refers to an exception to the notice and comment rulemaking requirements of the APA. That exception, known as the "good cause" exception, allows agencies to publish final rules without seeking comments from the public on an earlier proposed rule (5 U.S.C. § 553(b)(B)). When agencies invoke this good cause exception, the APA requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. A federal agency's invocation of the good cause exception is subject to judicial review.

[89] 5 U.S.C. § 801(b)(1).

[90] 5 U.S.C. § 801(f).

[91] 5 U.S.C. § 805.

[92] Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009); Via Christi Reg'l Med. Ctr. v. Leavitt, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007). *See, e.g.*, United States v. Carlson, 2013 U.S. Dist. LEXIS 130893 (D. Minn. 2013); United States v. Ameren Mo., 2012 U.S. Dist. LEXIS 95065 (E.D. Mo. 2012); Forsyth Mem'l Hosp. v. Seblius, 667 F. Supp. 2d 143, 150 (D.D.C. 2009); Provena Hosps. v. Sebelius, 662 F. Supp. 2d 140, 154-55 (D.D.C. 2009); New York v. Am. Elec. Power Serv. Corp., 2006 U.S. Dist. LEXIS 32829 (S.D. Ohio 2006); United States v. Am. Elec. Power Serv. Corp., 218 F. Supp. 2d 931, 949 (S.D. Ohio 2002); Tex. Savings & Cmty. Bankers Assoc. v. Fed. Hous. Fin. Bd., 1998 U.S. Dist. LEXIS 13470, *27 (W.D. Tex. 1998) [hereinafter *Texas Savings*].

[93] United States v. S. Ind. Gas & Elec. Comp., 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. 2002). In March 2013, another court, the U.S. District Court for the Western District of Louisiana, considered a motion to dismiss filed by a criminal defendant based partially on an argument that the Drug Enforcement Administration (DEA) failed to comply with the CRA. United States v. Reece, 2013 U.S. Dist. LEXIS 92372 (W.D. La. 2013) [*hereinafter Reece* Order]. The motion argued that a DEA temporary scheduling order did not comply with the procedural requirements of the CRA and, therefore, the drug at issue in the case was never properly scheduled. United States v. Reece, 2013 U.S. Dist. LEXIS 92292, *5-7 (W.D. La. 2013) [*hereinafter Reece* Magistrate Report and Recommendation]. A magistrate judge evaluating the motion to dismiss determined that the defendants were entitled to judicial review despite § 805, in part due to a Supreme Court precedent finding that criminal defendants may bring a challenge to a temporary scheduling order as a defense to prosecution under a provision of the Controlled Substances Act. *Id*. at *18-19; *see* Touby v. United States, 500 U.S. 160, 168 (1991) (holding that 21 U.S.C. § 811(h)(6) "does not preclude an individual facing criminal charges from bringing a challenge to a temporary scheduling order as a defense to prosecution."). The magistrate then proceeded to analyze the applicability of the CRA to the DEA's temporary scheduling order. *Reece* Magistrate Report and Recommendation at *19-25. The district court adopted the magistrate's recommendation but did not specifically address the CRA judicial review provision. *Reece* Order at *2. Rather, the court states that "in meeting the requirements of [21 U.S.C.] § 811(h) [in the Controlled Substances Act], the DEA was not required to further (continued...)

In the first case to consider the CRA's judicial review provision, a federal district court in *Texas Savings & Community Bankers Association v. Federal Housing Finance Board* rejected the plaintiff's argument that "§ 805 only forecloses review of any 'determination, finding, action, or omission' by Congress."[94] Instead, it concluded that the "[c]ourt must follow the plain English" of the statute, which barred review of actions "'*under this chapter*' not '*by Congress under this chapter*.'"[95] In the court's words, "the language could not be plainer" and the alleged failure to comply with the CRA "is not subject to review by this [c]ourt."[96] The D.C. Circuit Court of Appeals, in *Montanans for Multiple Use v. Barbouletos*, confronted a similar assertion that an agency action should be invalidated because of the agency's failure to comply with the submission requirements in the CRA.[97] The court ruled that the CRA judicial review provision "denies courts the power to void rules on the basis of agency noncompliance with the [CRA]."[98] Therefore, "the language in § 805 is unequivocal and precludes review of this claim ... "[99]

It appears that only one court, a federal district court in Indiana, has ruled that the Section 805 language is ambiguous and may allow a court to adjudicate claims arising from the CRA.[100] In *United States v. Southern Indiana Gas and Electric Company*, the court concluded that the statute could be reasonably interpreted two ways. First, the statute could prohibit any judicial review of an agency's compliance with the CRA. This interpretation was adopted in the cases discussed above. Second, the statute could "preclude judicial review of Congress' own determinations, findings, actions, or omissions made under the CRA after a rule has been submitted to it for review."[101] Under this interpretation, the bar on judicial review would not extend to claims challenging an agency's action, such as whether an agency should have submitted a rule to Congress under the CRA. Ultimately, the court rejected the first interpretation because it would allow agencies to "evade the strictures of the CRA by simply not reporting new rules," which it argued was at odds with the statute's purpose to prevent agencies from "essentially legislating without Congressional oversight."[102] It adopted the second interpretation and concluded "that it has jurisdiction to review whether an agency rule is in effect that should have been reported to

(...continued)

comply with the general notice requirements of Title 5 U.S.C. § 801." *Id*. at *3. Further discussion of CRA compliance was "pretermitted" by the court's finding that the DEA complied with 21 U.S.C. § 811(h). *Id*. The U.S. District Court for the Eastern District of Kentucky confronted the same argument in a motion to dismiss an indictment related to the same drug in September 2013. United States v. Nasir, 2013 U.S. Dist. LEXIS 138622, *2 (E.D. Ky. 2013). That court found that the DEA had complied with the CRA and, therefore, choosing "to decide the issue on the most narrow ground possible," declined to determine if the DEA was required to comply with the CRA or if § 805 prohibited judicial review of the issue. *Id*. at *10.

[94] *Texas Savings*, 1998 U.S. Dist. LEXIS 13470 at *27 n.15.

[95] *Id*. (emphasis in original).

[96] *Id*. The Fifth Circuit Court of Appeals affirmed the district court's decision, but did not discuss the CRA judicial review provision. Tex. Savings & Cmty Bankers Assoc. v. Fed. Hous. Fin. Bd., 201 F.3d 551 (5th Cir. 2000).

[97] *Montanans for Multiple Use*, 568 F.3d at 229.

[98] *Id*.

[99] *Id*. The Tenth Circuit Court of Appeals also rejected a challenge to an agency action based on the CRA, stating in a footnote that "[t]he Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms." *Via Christi Reg'l Med. Ctr.*, 509 F.3d at 1271.

[100] *S. Ind. Gas & Elec. Comp.*, 2002 U.S. Dist. LEXIS 20936. *See also Reece* Order, *supra* note 45.

[101] *Id.* at *13.

[102] *Id*. at *13-*14. The court also briefly discussed the CRA's legislative history, stating that it "confirm[ed] the limited reach of the preclusion of judicial review." *Id*. at *15. However, it also noted that its conclusion about the meaning of the judicial review provision was "based on the text of the statute and overall purpose of the Act. The legislative history only serves to further reinforce the Court's conclusion." *Id*. at *16 n.3.

Congress pursuant to the CRA."[103] This conclusion appears to be a minority view among the federal courts.[104]

Concluding Questions

What Other Tools Are Available To Congress for Conducting Oversight of Federal Regulations?

Although the CRA offers a number of advantages to Congress, as discussed above, Congress also has a number of other tools available to conduct oversight of federal agency rulemaking.[105] These tools include general legislative powers, oversight hearings, meetings with agency officials, and appropriations language. Each of these is briefly discussed below.

Every rule issued by a federal agency must be based upon a grant of authority given to that agency by Congress in statute, and it is Congress's prerogative to ensure that agencies issue rules in a manner consistent with congressional intent. As such, Congress can use its legislative power to oversee the issuance and implementation of rules, or even require that an agency repeal a rule. For example, Congress can make a change to the underlying statute authorizing a rule or enact legislation that simply overrides the rule. Such a change could remove or change the agency's authority to issue the rule, or it could prescribe more specifically in law what the rule should contain. The advantage of using the CRA is that the procedures it provides for, particularly in the Senate, can make it easier to pass a joint resolution of disapproval than to pass a regular bill. However, as discussed in detail below, Members must submit and act on a CRA resolution within a particular time period following issuance of a rule, whereas Congress can use its general legislative power to act on a rule at any time.

Hearings are another method of conducting oversight of federal rules. Congressional committees can hold oversight hearings at any time that focus on the development or implementation of a particular rule or set of rules that fall under their jurisdiction. Oversight hearings can give Members a chance to ask agency officials questions about rules and communicate their views to agency officials.

A Member of Congress also can request a meeting with the rulemaking agency while a rule is under development to communicate his or her views to the agency. In addition, a Member can request to meet with the Office of Information and Regulatory Affairs (OIRA), the entity within OMB that reviews most agency regulations prior to their publication. Such meetings are sometimes referred to as "12866 meetings," a reference to Executive Order 12866, which governs OIRA review of agency rulemaking. During the review process, OIRA can play a significant role in the content of a proposed or final rule.[106] Therefore, Members may want to make their views known to OIRA while the rule is under review.

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[103] *Id*. at *18.

[104] *See supra* note 91.

[105] For a more detailed discussion of oversight tools that are available to Congress, see CRS Report RL30240, *Congressional Oversight Manual*, by (name redacted) et al.

[106] For more information about the role of OIRA review in the rulemaking process, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by (name redacted).

Finally, Congress has frequently used appropriations legislation to restrict an agency's use of funds to promulgate or implement particular regulations.[107] However, unlike CRA joint resolutions of disapproval, provisions of this type do not nullify an existing regulation, nor do they remove the agency's underlying statutory authority to issue a regulation. Therefore, any final rule that has taken effect will continue to be binding law—even if an appropriations restriction prohibits the agency from using funds to enforce the rule. In addition, restrictions on the use of funds in appropriations acts, unless otherwise specified, are binding only for the period of time covered by the measure (i.e., a fiscal year or a portion of a fiscal year). In these instances, any restriction that is not repeated in the next relevant appropriations act or enacted as part of another measure no longer binds the relevant agency or agencies.[108]

Has Legislation Been Proposed to Amend the CRA?

The Regulations from the Executive In Need of Scrutiny (REINS) Act (H.R. 427 and S. 226 in the 114th Congress) is one legislative proposal that would amend the CRA. The REINS Act would keep the current requirements of the CRA in place for non-major rules, but for any rule deemed to be major, it would require Congress to vote to approve the rule before it can take effect. As is currently the case under the CRA for a resolution of disapproval, the REINS Act provides a certain set of procedures under which a resolution of approval would be considered in each chamber. Earlier versions of the REINS Act passed the House in the 113th and the 112th Congresses (H.R. 367 and H.R. 10, respectively).

[107] For example, Congress used appropriations legislation to delay the issuance of the ergonomics rule that was later overturned using the CRA. Such provisions were put into place after OSHA issued the proposed rule in 1995 and expired on September 30, 1998. See, for example, P.L. 104-134, which contained the following provision: "None of the funds made available in this Act may be used by the Occupational Safety and Health Administration to promulgate or issue any proposed or final standard regarding ergonomic protection before September 30, 1998." See also Julie A. Parks, Comment: Lessons in Politics: Initial Use of the Congressional Review Act, *Administrative Law Review*, vol. 55 (2003), pp. 192-94.

[108] Rules in each chamber restrict the use of provisions in appropriations bills that include language causing them to be effective for more than one fiscal year or permanently (e.g., the use of the term "hereafter" or other words of futurity). For additional information on the use of appropriations language to control agency actions, see CRS Report R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues*, by (name redacted) .

Appendix. Government Accountability Office (GAO) Opinions on Whether Certain Agency Actions Are "Rules" Under the CRA

Agency Action	GAO Citation	Date	Requested By	GAO Determination
Department of Agriculture memorandum concerning the Emergency Salvage Timber Sale Program	B-274505	September 16, 1996	Senator Larry Craig	Agency action is a rule under the CRA.
U.S. Forest Service Tongass National Forest Land and Resource Management Plan	B-275178	July 3, 1997	Senator Ted Stevens Senator Frank Murkowski Representative Don Young	Agency action is a rule under the CRA.
American Heritage River Initiative, created by Executive Order 13061	B-278224	November 10, 1997	Senator Conrad Burns	Action is not a rule under the CRA because the President is not an agency under the CRA.
Environmental Protection Agency "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits"	B-281575	January 20, 1999	Representative David McIntosh	Agency action is a rule under the CRA.
Farm Credit Administration's national charter initiative	B-289338	October 17, 2000	Representative James Leach	Agency action is a rule under the CRA.
Department of the Interior Record of Decision "Trinity River Mainstem Fishery Restoration"	B-287557	May 14, 2001	Representative Doug Ose	Agency action is a rule under the CRA.
Department of Veterans Affairs memorandum regarding the VA's marketing activities to enroll new veterans in the VA health care system	B-291906	February 28, 2003	Representative Ted Strickland	Agency action is not a rule under the CRA because it falls under the exception in 5 U.S.C. § 804(3)(C).
Department of Veterans Affairs memorandum terminating Vendee Loan Program	B-292045	May 19, 2003	Representative Lane Evans	Agency action is not a rule under the CRA because it falls under the exception in 5 U.S.C. § 804(3)(B) or (C).
Center for Medicare & Medicaid Services Letter on the State Children's Health Insurance Program	B-316048	April 17, 2008	Senator John D. Rockefeller, IV Senator Olympia Snowe	Agency action is a rule under the CRA.

Agency Action	GAO Citation	Date	Requested By	GAO Determination
Department of Health and Human Services Information Memorandum concerning the Temporary Assistance to Needy Families Program	B-323772	September 4, 2012	Senator Orrin Hatch Representative Dave Camp	Agency action is a rule under the CRA.
Environmental Protection Agency's proposed rule on Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units	B-325553	May 29, 2014	Senator Mitch McConnell	"[T]he precedent provided in our prior opinions underscores that proposed rules are not rules for CRA purposes, and GAO has no role with respect to them."

Source: Government Accountability Office website.

Note: This table lists agency actions that were not submitted to Congress under the CRA, but for which Members of Congress asked GAO's opinion as to whether the action falls under the definition of "rule" under the CRA.

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