

# **Congressional Review Act Issues for the 117<sup>th</sup> Congress: The Lookback Mechanism and Effects of Disapproval**

February 19, 2021

**Congressional Research Service**  
<https://crsreports.congress.gov>

R46690



# Congressional Review Act Issues for the 117<sup>th</sup> Congress: The Lookback Mechanism and Effects of Disapproval

The Congressional Review Act (CRA) (codified at 5 U.S.C. §§801-808) is a tool that Congress may use to pass legislation overturning a final rule issued by a federal agency. The CRA's definition of *rule* is broad, meaning the CRA may be used to overturn other agency actions in addition to rules promulgated under the typical notice-and-comment rulemaking process, including, for example, some agency guidance documents. Additionally, although the CRA imposes specific requirements on a category of rules known as "major" rules, it can be used to disapprove rules regardless of whether they are major.

Under the CRA, before a rule can take effect, an agency must submit the rule to both houses of Congress and the Government Accountability Office (GAO). Upon receipt and publication of the rule, Members of Congress have a limited time period specified by the act to submit joint resolutions of disapproval overturning the rule. CRA resolutions of disapproval, like other laws, must be passed by both houses of Congress and signed by the President. However, the CRA provides Congress with special "fast track" parliamentary procedures—applying primarily in the Senate—to consider such a joint resolution of disapproval. These fast-track procedures allow a simple majority of the Senate to call up and pass a disapproval resolution should it choose to do so. Generally speaking, the CRA fast-track procedures are available in the Senate for a period of 60 days of Senate session after a final rule is received and published.

If a final rule is submitted to Congress so late in the year that the adjournment of the session prevents either chamber from enjoying this full 60-day review period, the time periods for introduction and action on a joint resolution of disapproval begin again in their entirety the following year on the 15<sup>th</sup> meeting day in each chamber. This provision is referred to as the CRA "lookback" mechanism. This lookback provision is intended to ensure that an Administration cannot deny Congress the full periods for review and action contemplated by the CRA simply by submitting a final rule to Congress shortly before it adjourns for the year.

The CRA disapproval process is most likely to be used following the inauguration of a new President, particularly when the new President is of a different party than the outgoing President and shares a party affiliation with the majority in both houses of Congress. Generally, if Congress were to send the President a joint resolution of disapproval that overturns a rule issued by his or her own Administration, he or she would be very likely to veto it, and Congress would need a two-thirds majority in both houses to override the veto. However, the CRA's lookback mechanism permits a new Congress and a new President to review and potentially overturn rules issued near the end of the previous Administration. CRS unofficially estimates that Trump Administration final rules submitted to the House or Senate after August 21, 2020, until the end of the 116<sup>th</sup> Congress on January 3, 2021, are subject to the CRA lookback provisions and will qualify for additional periods of CRA review in the first few months of the 117<sup>th</sup> Congress (2021-2022). These renewed periods of fast-track review are likely to last until early to mid-May 2021.

Enactment of a CRA joint resolution disapproving a rule has two primary effects. First, a disapproved rule will not take effect or, if a rule has already taken effect, it is not to continue in effect and "shall be treated as though such rule had never taken effect." Second, the CRA provides that an 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." Because the CRA does not define *substantially the same*, it may be open to debate whether a newly issued rule is substantially similar to a disapproved rule. To date, two rules have been reissued following disapproval under the CRA: a rule from the Department of Labor reissued in October 2019 and a rule from the Securities and Exchange Commission in January 2021.

This report discusses issues related to the CRA for the 117<sup>th</sup> Congress in a frequently asked questions (FAQs) format. Issues discussed include the scope of the CRA; its disapproval mechanism, including the time periods for introduction and action on joint resolutions of disapproval and the lookback provisions; the effects of disapproving rules under the CRA, including the prohibition on issuing a rule in "substantially the same form;" and links to additional CRS written materials on the subject.

**R46690**

February 19, 2021

**Maeve P. Carey**

Specialist in Government  
Organization and  
Management

**Christopher M. Davis**

Analyst on Congress and  
the Legislative Process

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## What Is the Congressional Review Act?

The Congressional Review Act (CRA) (codified at 5 U.S.C. §§801-808) is an oversight tool that Congress may use to pass legislation overturning a rule issued by a federal agency or other qualifying agency action.<sup>1</sup> The CRA was enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act.<sup>2</sup>

Under the CRA, before a rule can take effect, an agency must submit the rule to Congress and the Government Accountability Office (GAO).<sup>3</sup> Upon receipt of the rule by Congress, Members of Congress have specified time periods during which to submit and take action on a joint resolution of disapproval overturning the rule. The CRA provides Congress with special “fast track” parliamentary procedures—applying primarily in the Senate—to consider such a joint resolution of disapproval overturning a rule. If both houses pass the joint 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. Enactment of the resolution would take the rule out of effect or prevent it from going into effect, and the agency would be prohibited from issuing a rule that is “substantially the same” without further authorization from Congress.<sup>4</sup>

## What Is a Covered Rule Under the CRA?

The category of rules covered by the CRA’s definition is broader than the category of rules that are subject to the notice-and-comment requirements for federal rulemaking under the Administrative Procedure Act (APA).<sup>5</sup> The CRA generally incorporates the broad definition of *rule* contained in Section 551 of the APA, which includes both rules subject to the APA’s aforementioned rulemaking requirements and general statements of policy and interpretive rules that are otherwise excluded from these procedural requirements.<sup>6</sup> Therefore, some agency actions that are not subject to the APA’s notice-and-comment rulemaking procedures, including some

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<sup>1</sup> See generally, CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis; and CRS In Focus IF10023, *The Congressional Review Act (CRA)*, by Maeve P. Carey and Christopher M. Davis.

<sup>2</sup> Title II, Subtitle E, P.L. 104-121, 5 U.S.C. §§601 et seq.

<sup>3</sup> 5 U.S.C. §801(a)(1)(A).

<sup>4</sup> 5 U.S.C. §801(b)(2). If a rule had already taken effect when it is disapproved, the rule “shall be treated as though such rule had never taken effect” (5 U.S.C. §801(f)).

<sup>5</sup> 5 U.S.C. §553. Among other exceptions, the requirements for notice-and-comment rulemaking procedures generally do 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.”

<sup>6</sup> More specifically, the CRA (5 U.S.C. §804(3)) incorporates the definition of *rule* that appears in Section 551 of the APA, with three exceptions. Section 551 of the APA defines *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” (5 U.S.C. §551(4)). The first CRA exception is for rules 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.” Second, the CRA excludes “any rule relating to agency management or personnel.” Finally, the CRA also excludes “any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”

agency guidance documents, may still be considered rules under the CRA, and, therefore, eligible to be overturned under the CRA's fast-track procedures.<sup>7</sup>

As discussed more in depth below, under the text of the CRA, the fast-track procedures for considering a joint resolution of disapproval become available only when the agency submits the rule to Congress. In practice, agencies are fairly consistent in submitting rules to Congress that have undergone APA notice-and-comment rulemaking procedures and have been published as final rules in the *Federal Register*.<sup>8</sup> Agencies are less consistent, however, about submitting actions to Congress that did not go through notice-and-comment but nonetheless fall under the broad scope of the CRA's definition of *rule*. Thus, questions have arisen as to how Members can avail themselves of the CRA's special procedures if the agency has not submitted an action, despite the action being covered by the CRA's definition of *rule*. In recent years, Congress has developed a means through which the CRA's procedures can still be accessed despite a rule not having been submitted.<sup>9</sup> This aspect of the CRA is discussed in more detail below.

## Applicability of the CRA to Major Rules

The CRA imposes specific requirements on "major" rules, which it defines to include rules that have an annual effect on the economy of at least \$100 million, among other effects.<sup>10</sup> However, the availability of the CRA to overturn a rule does not depend on whether a rule is major. The CRA can be used to overturn major or non-major rules.

The CRA contains two provisions for which designation as a major rule is relevant. First, the CRA has provisions that may affect the effective date of major rules, generally by requiring a delay of at least 60 days.<sup>11</sup> This delay effectively gives Congress more time to consider using the CRA before major rules, the most economically impactful rules issued by federal agencies, take effect. Second, the CRA requires the GAO to write a report to Congress on each major rule within 15 calendar days of its submission or publication.<sup>12</sup>

Regardless of these two provisions, however, the CRA can be used to overturn any final agency action that meets its definition of *rule*, regardless of whether the rule is major.

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<sup>7</sup> For an in-depth discussion of what agency actions are considered rules under the CRA, see CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey.

<sup>8</sup> For information on how to find if a rule was submitted, see "How Can I Identify Rules Subject to the CRA?" below.

<sup>9</sup> For more information on this process, see CRS In Focus IF11096, *The Congressional Review Act: Defining a "Rule" and Overturning a Rule an Agency Did Not Submit to Congress*, by Maeve P. Carey and Valerie C. Brannon.

<sup>10</sup> The CRA defines *major rule* as "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget 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."

<sup>11</sup> 5 U.S.C. §801(a)(3).

<sup>12</sup> 5 U.S.C. §801(a)(2)(A). The major rule reports are posted on GAO's website at <https://www.gao.gov/legal/other-legal-work/congressional-review-act#reports> and are required to contain "an assessment of the agency's compliance with procedural steps" followed in issuing the rule.

## What Are the Time Periods for CRA Review?

Both the introduction and consideration of CRA disapproval resolutions are governed by three specific time periods established by the act. Generally speaking, all of these time periods begin when an agency final rule has been published in the *Federal Register* and submitted to both chambers of Congress. All three periods run at the same time. These time periods include the following:

- An “introduction” period, which applies in both chambers, which lasts for 60 calendar days (excluding days on which either house has adjourned by concurrent resolution), during which joint resolutions disapproving the agency rule can be introduced by any Member of either chamber.
- A “discharge” period, applying only in the Senate, which lasts for 20 calendar days following receipt and publication of the rule. After the conclusion of this period, a petition signed by 30 Senators can be filed to discharge a Senate committee from the further consideration of a Senate CRA joint resolution of disapproval.
- A “Senate action” period, lasting for 60 days of Senate session (that is, 60 calendar days on which the Senate meets), during which a disapproval resolution can be considered in the Senate under fast-track parliamentary procedures that permit a simple majority of that chamber to call up and reach a final vote on the measure.

## “Fast Track” Parliamentary Procedures for Considering a CRA Joint Resolution of Disapproval

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.<sup>13</sup>

The CRA does not establish fast-track procedures for committee and initial floor consideration of a joint resolution of disapproval in the House of Representatives. In every case in which the House has considered a CRA disapproval resolution on the floor, it has done so under the terms of a closed special rule reported by the Rules Committee and adopted by the House.<sup>14</sup> When considered under the terms of a special rule, the House minority leader or his or her designee is guaranteed the opportunity to offer a nondebatable motion to recommit the joint resolution. The CRA also provides procedures that govern the consideration by either the House or Senate of a disapproval resolution received from the other chamber.

### Procedures for Senate Committee Consideration

As noted above, any time after the expiration of a 20-calendar-day period that begins after a final rule is received by Congress and published in the *Federal Register* (if it is required to be published), a Senate committee can be discharged from the further consideration of a Senate CRA

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<sup>13</sup> 5 U.S.C. §802(c), (d).

<sup>14</sup> When a measure is considered under the terms of a closed special rule, no floor amendments are in order.

joint resolution disapproving the rule.<sup>15</sup> This discharge occurs upon the filing on the Senate floor of a petition signed by at least 30 Senators.<sup>16</sup> 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 seeking to bring debate to a close:

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.<sup>17</sup>

## Procedures for Senate Floor Consideration

Once a Senate CRA joint resolution of disapproval is reported or the committee of jurisdiction is discharged, any Senator may make a nondebatable motion to proceed to consider the disapproval resolution on the floor.<sup>18</sup> This motion to proceed requires a simple majority for adoption. If the motion to proceed is successful, the CRA disapproval resolution would then be pending and subject to up to 10 hours of debate.<sup>19</sup> A nondebatable motion to limit debate to fewer than 10 hours is in order. Neither amendments nor motions to recommit are permitted.<sup>20</sup> Upon the using or yielding back of the allotted time, the Senate would vote on the measure. ACRA disapproval resolution requires a simple majority in order to pass. Because the measure is debate-limited, cloture (and its accompanying requirement for supermajority support) is unnecessary.

The Senate may also, instead of considering a Senate-introduced joint resolution, move to directly consider a CRA disapproval resolution received from the House of Representatives. In the cases in which the CRA has been used in the past, this “House to Senate” path has been the more common order of action taken. If a joint resolution of disapproval is received from the House, it is not referred to Senate committee but is instead placed directly on the Senate Calendar of Business, where it would be available to be called up by unanimous consent or by nondebatable motion.

## What Is the CRA “Lookback” Period?

As described above, whenever a rule is finalized and submitted to Congress, under the CRA, it is subject to an overall period of congressional fast-track review that lasts for a period of 60 days of

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<sup>15</sup> 5 U.S.C. §802(c). The 20-day period after which a discharge petition may be presented in the Senate is calculated from the receipt and publication of the rule, not from the submission of a disapproval resolution aimed at the rule. Accordingly, if a disapproval resolution is introduced on or after the 21<sup>st</sup> day following publication and submission of the rule, it would be ripe for immediate discharge, as the Senate committee of jurisdiction may have no time to consider the measure even if it wanted to do so.

<sup>16</sup> 5 U.S.C. §802(c).

<sup>17</sup> *Congressional Record*, daily edition, vol. 157 (November 3, 2011), p. S7141.

<sup>18</sup> 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 practice, however, with rare exception, Senators generally defer to the majority leader or his or her designee to make such scheduling motions or consult closely with him or her on the timing of such actions.

<sup>19</sup> 5 U.S.C. §802(d)(2).

<sup>20</sup> 5 U.S.C. §802(d)(2).



Senate session. If a final rule is submitted to Congress so late in the year, however, that the adjournment of the session prevents either chamber from enjoying this full 60-day review period, the review period begins again in its entirety the following year. This mechanism is referred to as the CRA “lookback” mechanism.

Specifically, Section 801(d) of the CRA provides that, if a final rule is submitted to Congress with either fewer than 60 days of session in the Senate or fewer than 60 legislative days in the House of Representatives before Congress adjourns a session *sine die*, a new period for congressional review of that rule becomes available in the next session of Congress.<sup>21</sup> For this purpose, the rule is treated as if it had been submitted to Congress and published in the *Federal Register* on the 15<sup>th</sup> legislative day (House) or 15<sup>th</sup> session day (Senate) of the new session for purposes of calculating the time periods described above.

Said another way, final rules submitted to Congress prior to both the 60<sup>th</sup> day of Senate session and the 60<sup>th</sup> House legislative day before the day of the adjournment *will not be* subject to the additional periods for review in the following congressional session. Rules submitted on or after the 60<sup>th</sup> day before *sine die* adjournment in at least one chamber *will be* subject to the renewed periods for congressional review. These lookback provisions are applied in the same way regardless of whether the session in question is the first or second session of a Congress, but (as is discussed below) they have particular significance in the second session of a Congress that corresponds with an outgoing presidential Administration. These provisions of the act ensure that an Administration cannot deny Congress the full periods for review and action contemplated by the CRA simply by submitting a final rule to Congress shortly before it adjourns for the year.

## Why Is the Lookback Period Relevant in the Early Days of the 117<sup>th</sup> Congress?

One of the biggest challenges for using the CRA to overturn rules is that a President can generally be expected to veto a joint resolution of disapproval attempting to overturn a rule issued by the President’s own Administration. A joint resolution of disapproval requires the signature of the President to become law—an unlikely prospect if the President’s 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 in most cases, assuming that Congress would usually need a veto-override majority to disapprove a rule under the CRA.

During a transition period following the inauguration of a new President of a different party than the outgoing President, however, the CRA is more likely to be used successfully. Because of the structure of the time periods during which Congress can take action under the CRA, there is a period at the beginning of each new Administration—known as the “lookback period”—during which rules issued near the end of the previous Administration are eligible for consideration under the CRA.<sup>22</sup> These circumstances are present in the first session of the 117<sup>th</sup> Congress

<sup>21</sup> An adjournment *sine die* simply means “an adjournment that ends an annual session.” The literal meaning of *sine die* is “without day.” The implication is that the session is adjourning without having set any day for a subsequent meeting. Legislative days in the House are normally equal to its days of session. A session day in the Senate includes any day on which the Senate meets, including in *pro forma* session.

<sup>22</sup> The rules issued near the end of an Administration are often referred to as “midnight rules.” See CRS Insight IN11539, *Presidential Transitions: Midnight Rulemaking*, by Maeve P. Carey; and CRS Report R42612, *Midnight*



(2021). The vast majority of the instances in which the CRA was used to overturn a rule took place during such a period.<sup>23</sup>

## **What Trump Administration Rules Are Covered by the CRA Lookback Mechanism?**

CRS unofficially estimates that final rules submitted to the House or Senate after August 21, 2020, until the end of the 116<sup>th</sup> Congress on January 3, 2021, are subject to the CRA lookback provisions and will qualify for additional periods of CRA review in the first few months of the 117<sup>th</sup> Congress (2021-2022). The House and Senate Parliamentarians are the sole definitive arbiters of the CRA parliamentary mechanism, however, including time periods involved, and should be consulted for authoritative guidance on its operation.

## **Estimated Time Periods for Reviewing Lookback Period Rules in 117<sup>th</sup> Congress**

As noted, rules that fall into the CRA lookback period—that is, rules CRS estimates were submitted in at least one chamber after August 21, 2020, and before the adjournment of the 116<sup>th</sup> Congress on January 3, 2021—qualify for additional full periods of CRA review in 2021, beginning on the 15<sup>th</sup> session day in the Senate and the 15<sup>th</sup> legislative day in the House. The 15<sup>th</sup> day of Senate session of the 117<sup>th</sup> Congress was February 2, 2021. The 15<sup>th</sup> legislative day in the House was February 3, 2021.

As described above, Members will have no fewer than 60 calendar days from this 15<sup>th</sup> day in their chamber (lasting until early April 2021) to introduce disapproval resolutions aimed at any rule submitted in the lookback period. Qualifying disapproval resolutions could be considered in the Senate under the CRA fast-track procedures described above for 60 days of Senate session, a period that appears likely to extend until early to mid-May 2021. Finally, it appears that petitions signed by 30 Senators could first be presented to discharge a Senate committee of a qualifying Senate disapproval resolution during the week of February 22, 2021.

This unofficial estimate is based on the projected meeting schedules of the chambers and an assumption that neither chamber will adjourn by concurrent resolution going forward. Should these stipulations change, the estimate of the CRA time periods will also change. The estimate is discussed here to provide general context of the likely time frames involved in acting on CRA joint resolutions aimed at lookback period rules. The Senate and House Parliamentarians are the sole definitive arbiters of the time periods for review.

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*Rulemaking: Background and Options for Congress*, by Maeve P. Carey, for more information about the history, practice, and oversight of midnight rulemaking.

<sup>23</sup> For a list of rules overturned under the CRA to date, see Appendix A of CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

## What Other Trump Administration Rules or Agency Actions May Also Be Subject to CRA Review?

There were Trump Administration rules finalized and submitted during the early days of the 117<sup>th</sup> Congress (2021-2022), that is, between January 3 and January 20, 2021. These rules also qualify for review under CRA but have a slightly different review clock than the periods described above applying to lookback period rules. In short, the periods for congressional review of these rules start from the submission and publication date of each specific rule.

Additionally, as noted above, there may be other agency actions that meet the broad definition of *rule* under the CRA and should have been submitted but were not. In the past, such cases have generally occurred when an agency has failed to submit a rule to Congress because the agency apparently did not consider the action to be covered by the CRA. On occasion, when this has occurred, Members of Congress have asked GAO for a formal opinion as to whether an unsubmitted action satisfies the CRA definition of *rule* such that the agency should have submitted the rule to Congress under the CRA.<sup>24</sup> GAO has issued several opinions of this type at the request of Members. These opinions are available on GAO's website.<sup>25</sup>

Although the CRA states that a joint resolution of disapproval can be introduced only after a rule is received by Congress, Members have sometimes had success in getting resolutions recognized as eligible for the CRA's special procedures using these GAO opinions.<sup>26</sup> Specifically, the Senate has developed a practice in which the publication in the *Congressional Record* of a GAO opinion concluding that an agency action is a rule can trigger the CRA's special procedures for a joint resolution of disapproval.<sup>27</sup> In this way, a GAO opinion affirming that an action is covered by the act and should have been submitted essentially substitutes for the agency having submitted the action, thereby facilitating Congress's use of the CRA.<sup>28</sup> These GAO opinions do not have legal effect on their own and are merely advisory as to whether GAO considers an agency action to meet the definition of *rule* under the CRA.<sup>29</sup> The question these GAO opinions inform is a parliamentary one: Should Congress consider a joint resolution of disapproval using the CRA's

<sup>24</sup> GAO has a document containing information on procedures and practices for obtaining legal opinions, including these opinions under the CRA. See GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP, September 2006, <https://www.gao.gov/assets/210/203101.pdf>.

<sup>25</sup> See GAO, "Congressional Review Act," [https://www.gao.gov/legal/other-legal-work/congressional-review-act#legal\\_opinions](https://www.gao.gov/legal/other-legal-work/congressional-review-act#legal_opinions).

<sup>26</sup> For more information on this process, see CRS In Focus IF11096, *The Congressional Review Act: Defining a "Rule" and Overturning a Rule an Agency Did Not Submit to Congress*, by Maeve P. Carey and Valerie C. Brannon.

<sup>27</sup> Normally, when agencies submit their rules to Congress under the CRA, a record of each rule's receipt is published in the Executive Communications portion of the *Congressional Record*. The publication of the GAO opinion in the *Congressional Record* fulfills this same purpose: notifying Congress that a rule is now available for review under the CRA.

<sup>28</sup> As GAO stated in one of its opinions, "Congress has opted to treat the receipt of a GAO opinion concluding that an agency action is a rule as triggering the statutory provisions that otherwise would have been triggered by the agency's submission. Thus, Congress has used GAO opinions to cure the impediment created by the agency's failure to submit the rule, protecting its review and oversight authorities." Letter from GAO to Senator Orrin Hatch, November 30, 2018 (GAO B-330376), p. 2.

<sup>29</sup> See also Bridget C. E. Dooling, "Into the Void: The GAO's Role in the Regulatory State," *American University Law Review*, vol. 70, no. 2 (August 21, 2020), pp. 387-417.

special procedures, or should it consider the joint resolution as a regular bill under its regular procedures?<sup>30</sup>

In 2018, for the first time, Congress followed this process to enact a joint resolution of disapproval overturning an agency guidance document that had not been submitted under the CRA.<sup>31</sup> To date, this is the only instance when Congress used the CRA to disapprove a rule that was not submitted.<sup>32</sup>

## How Can I Identify Rules Subject to the CRA?

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 *Congressional Record* devoted to "Executive Communications." They are also entered into a database that can be searched using the main search page of Congress.gov at <https://www.congress.gov>.<sup>33</sup> The databases are searchable under the links for "House Communications" and "Senate Communications."

As a practical matter, identifying the universe of agency actions that meet the CRA's definition of *rule* but have not been submitted to Congress is not possible. Some agency guidance documents are published in the *Federal Register*, and guidance documents may also be available on agency websites. However, while rules that have been submitted to Congress under the CRA can be identified in a search of the *Congressional Record*, non-submitted rules are generally identified on a case-by-case basis and evaluated individually by GAO, as described above.

## What Happens When a CRA Joint Resolution of Disapproval Is Enacted?

Enactment of a CRA joint resolution disapproving a rule has two primary effects. First, a rule subject to a disapproval resolution will not take effect if it had not taken effect by the time the disapproval was enacted.<sup>34</sup> If a rule has taken effect by the time it is disapproved, it is not to continue in effect and "shall be treated as though such rule had never taken effect."<sup>35</sup>

Second, the CRA provides that an 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

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<sup>30</sup> The CRA does not confer upon Congress any power that Congress does not already have to control agency rules through legislation, and, as a general matter, Congress can always legislate to overturn agency rules. The advantage of the CRA is procedural, simply making it easier for Congress to legislate to overturn rules under the CRA compared to using its regular legislative process. See CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

<sup>31</sup> See P.L. 115-172, which overturned the Bureau of Consumer Financial Protection, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act, March 21, 2013, [https://files.consumerfinance.gov/f/201303\\_cfpb\\_march\\_-Auto-Finance-Bulletin.pdf](https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf).

<sup>32</sup> For a complete list of the disapproved rules, see Appendix A of CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

<sup>33</sup> See the search categories entitled "House Communications" and "Senate Communications" on the left side of the page.

<sup>34</sup> 5 U.S.C. §801(b)(1).

<sup>35</sup> 5 U.S.C. §801(f).

reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”<sup>36</sup>

## What Does *Substantially the Same* Mean?

The CRA does not define the meaning or scope of *substantially the same*.<sup>37</sup> Looking to the ordinary meaning of the text may not provide much guidance for agencies looking to reissue specific rules.<sup>38</sup> The word *substantially* has been defined as “being largely but not wholly that which is specified,”<sup>39</sup> “to a great extent or degree,” or “in essentials.”<sup>40</sup> This leaves ambiguity, however, in how to determine whether a new rule is largely the same as a disapproved rule. Sameness could be determined by a number of factors and would likely depend on the rule in question.<sup>41</sup> Under these definitions, it could be measured simply by comparing the language of the two rules or by attempting to determine which portions of the rule were essential and comparing the rules on that basis. For example, if the legislative history of the joint resolution of disapproval suggests that Congress objected to a specific section of a rule that was ultimately disapproved, would a rule that removed only that language be considered “substantially the same” as the original, even if the text is otherwise the same? If the agency reissued a rule in which it changed one standard listed in the original regulation, would that be “substantially the same”? If it changed the number of categories to which a standard applied, would the rule still be “substantially the same”? These questions highlight the ambiguity in the meaning of *substantially the same*.

The CRA thus seems to contemplate that an agency may reissue a rule related to the rule that was disapproved or within the same policy area so long as the new rule is not substantially similar to the disapproved rule. Section 803 of the CRA stipulates that where an agency is under a statutory, regulatory, or court-imposed deadline to promulgate a rule, the deadline will be extended for one

<sup>36</sup> 5 U.S.C. §801(b)(2).

<sup>37</sup> 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, for example, 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 is also undefined in the text (Federal Trade Commission Improvements Act of 1980, P.L. 96-252, 94 Stat. 391-92).

<sup>38</sup> Courts frequently look to dictionaries to determine a word’s ordinary meaning, although dictionary definitions are generally not conclusive. See, for example, *Yates v. United States*, 574 U.S. 528, 537 (2015) (“Ordinarily, a word’s usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.”).

<sup>39</sup> Merriam Webster, “substantial,” accessed February 11, 2021, at <https://www.merriam-webster.com/dictionary/substantially>.

<sup>40</sup> Oxford English Dictionary, “substantially, *adv.*,” accessed February 11, 2021, at <https://www.oed.com/view/Entry/193055#eid20113890>.

<sup>41</sup> Two scholars have argued that “if a reissued rule has a substantially different cost-benefit equation than the vetoed rule, then it cannot be regarded as ‘substantially similar.’” 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), p. 710. The authors identify a number of other possible interpretations of *substantially the same*, including standards that ask whether external conditions have changed, whether the agency has addressed the “specific problems Congress identified,” or whether the agency has devised “a wholly different regulatory approach.” *Ibid.*, pp. 734-37. Others have suggested that the “legislative history surrounding the disapproval of a rule under the CRA” should be given “predominant weight” in an evaluation of whether a rule is “substantially the same.” See Sam Batkins and Adam J. White, “Should We Fear ‘Zombie’ Regulations?,” *Regulation*, Summer 2017, pp. 16-21.

year from the enactment of the joint resolution of disapproval. This provision strongly suggests that the text of the CRA contemplates that at least some rules would be reissued.

Although the text alone is arguably ambiguous, the legislative history and subsequent agency practice may shed some light on the meaning of *substantially the same*.<sup>42</sup> A statement inserted into the *Congressional Record* by the sponsors of the CRA following its enactment described various factors an agency may take into consideration in deciding whether to reissue a rule, stating that the “substantially the same” prohibition “may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.”<sup>43</sup> Factors the statement identified included the amount of discretion the agency has under the authorizing law to change the substance of the rule and whether the rule was mandatory or discretionary in the first place. The statement also specified, “The committees intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency’s options or lack thereof after enactment of a joint resolution of disapproval.”<sup>44</sup> In other words, the CRA’s sponsors appeared to have envisioned that the debate over a disapproval resolution would provide some guidance to the agency on next steps, helping inform the agency’s decision about whether and how to reissue the rule—among other factors, such as the nature of the authorizing statute. In light of this legislative history, agencies considering reissuing rules may look to the reasons Congress gave, if any, for striking down the rule in the first place.

As mentioned above, two rules that had previously been struck down under the CRA have been reissued. Both overturned rules had been issued in 2016, in the final months of the Barack Obama Administration, and were among the 16 rules Congress overturned in the 115<sup>th</sup> Congress (2017-2018).<sup>45</sup> The first reissued rule was issued by the Department of Labor (DOL) in October 2019, and the second was reissued by the Securities and Exchange Commission (SEC) in January 2021.<sup>46</sup> Both agencies were under a statutory mandate to regulate on the topic of the disapproved rule and had to determine how to draft a rule that fulfilled these separate regulatory requirements but was not substantially similar to the disapproved rule.

<sup>42</sup> For example, in *Pierce v. Underwood*, the Supreme Court looked to a committee report to help define the statutory phrase *substantially justified*, noting “the broad range of interpretations” possible in ordinary usage and given by dictionaries. 487 U.S. 552, 563-66 (1988). Post-enactment agency practice can also inform statutory interpretation inquiries. See, for example, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144-46 (2000).

<sup>43</sup> Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), p. E577. In the *Congressional Record* statement, the sponsors observed that “no formal legislative history was prepared to explain” the CRA and that this statement was “intended to cure this deficiency.” *Ibid.*, pp. E574-575. Courts generally disfavor the use of post-enactment legislative history under the assumption that, by definition, it “could have had no effect on the congressional vote.” *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)) (internal quotation marks omitted). However, this does not preclude Congress or executive agencies from looking to such legislative history if they believe it is persuasive.

<sup>44</sup> Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), p. E577.

<sup>45</sup> The overturned rules were Securities and Exchange Commission, “Disclosure of Payments by Resource Extraction Issuers,” 81 *Federal Register* 49359, July 27, 2016; and U.S. Department of Labor, “Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants,” 81 *Federal Register* 50298, August 1, 2016.

<sup>46</sup> See CRS Insight IN10996, *Reissued Labor Department Rule Tests Congressional Review Act Ban on Promulgating “Substantially the Same” Rules*, by Maeve P. Carey. The two reissued rules were DOL, “Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012,” 84 *Federal Register* 53037, October 4, 2019; and SEC, “Disclosure of Payments by Resource Extraction Issuers,” 86 *Federal Register* 4662, January 15, 2021.



In both of the reissued rules, the agencies provided an explanation of how, in their view, the reissued version of the rule was different enough from the original version that it did not violate this provision of the CRA. For example, DOL stated that in its view, the final rule was not “substantially the same” as the disapproved rule because the new rule had a “substantially different scope and fundamentally different approach” and cited some floor statements from the debate over the joint resolution of disapproval.<sup>47</sup> In its reissued rule, the SEC also cited to some of the statements of Members during the debate over the 2017 disapproval resolution and further explained that in its view, “the agency should exercise its reasoned judgment in shaping new rules, evaluating a reasonable range of potential responses, including by considering the statutory provision that compels the rulemaking, the administrative record, and the CRA’s requirements, among other things.”<sup>48</sup> Both agencies sought to determine the “central” issue at the heart of the disapproved rule and concluded that they had to change that aspect of the rule rather than change solely their original justifications or more ancillary provisions.<sup>49</sup>

## How Is the “Substantially the Same” Prohibition Enforced?

The CRA is also silent on the question of who would make the determination as to whether a new rule is “substantially the same” as a disapproved rule. It is likely that Congress and agencies themselves might be ultimately responsible for making that determination rather than a court. As discussed more in the following section, the CRA contains a prohibition on judicial review, stating that “no determination, finding, action, or omission under this chapter shall be subject to judicial review.”<sup>50</sup> Courts have generally—but not universally—interpreted this provision to mean that they may not consider any claims alleging that an agency has failed to comply with the CRA.<sup>51</sup> As yet, no court has ruled on the precise question of whether an agency’s compliance with the “substantially the same” prohibition could be subject to judicial review.<sup>52</sup> If a court believed that the CRA barred judicial review of the question of whether a rule is “substantially the same,” it would likely not reach a decision on the issue of whether to invalidate a reissued rule on the basis that it violates this “substantially the same” prohibition. As of the date of writing of this report, no litigation has been filed on either of the two reissued rules cited above to challenge the rule on the basis of it being “substantially the same.”

<sup>47</sup> DOL, “Federal-State Unemployment Compensation Program,” p. 53038.

<sup>48</sup> SEC, “Disclosure of Payments by Resource Extraction Issuers,” p. 4664.

<sup>49</sup> DOL, “Federal-State Unemployment Compensation Program,” p. 53038; SEC, “Disclosure of Payments by Resource Extraction Issuers,” p. 4665.

<sup>50</sup> 5 U.S.C. §805. See “Is There Judicial Review Under the CRA?” below.

<sup>51</sup> See, for example, *Tugaw Ranches, LLC v. U.S. Dep’t of Interior*, 362 F. Supp. 3d 879, 884, (D. Idaho 2019) (noting that “numerous” courts have “found that under a plain reading interpretation § 805 precludes judicial review,” but holding that “§ 805 does not clearly prohibit judicial review of agency action under the CRA”).

<sup>52</sup> Some scholars have argued that the question of whether a rule is “substantially the same” is different from other types of questions arising under the CRA because a court would be analyzing the validity of the subsequent rule rather than Congress’s actions reviewing the prior rule. Finkel and Sullivan, “A Cost-Benefit Interpretation,” p. 732, footnote 122. See also, for example, 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*,” *Administrative Law Review*, vol. 70, no. 1 (Winter 2018), pp. 53-108. The post-enactment legislative history may suggest that Congress did not believe that this provision would prohibit courts “from determining whether a rule is in effect.” Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142 (April 19, 1996), p. E577. Some courts have read this statement to support the conclusion that subsequent agency action would be judicially reviewable. See, for example, *Tugaw Ranches, LLC v. U.S. Dep’t of Interior*, 362 F. Supp. 3d 879, 883 (D. Idaho 2019).



If courts continue to bar all judicial challenges under the CRA, Congress itself would arguably be the arbiter of whether a reissued rule clears the “substantially the same” standard. As occurred in the DOL and SEC reissued rules, if an agency decides to reissue a rule, the agency would likely explain the changes it made in light of this CRA provision, providing a justification for why in its view the rule is sufficiently different from the version that was overturned. Such an explanation is not required under the CRA, but it may be in the agency’s interest to do so. Importantly, the agency does not face any other additional requirements under the CRA for a reissued rule—the new rule would be subject to the regular procedural requirements of the federal rulemaking process, including submission to Congress under the CRA, but in reissuing a rule, the fact that the original rule was disapproved under the CRA does not trigger any additional requirements. When the reissued rule is received in Congress, Congress could then disapprove the rule on the basis of it being too similar to the disapproved version (or for other reasons). Thus, the most likely enforcement mechanism for the “substantially the same” question is Congress’s ability to use the CRA again on the reissued rule.

As a practical matter, however, one might argue that the enforcement of the “substantially the same” provision leaves the agency in a fairly strong position to reissue a rule, assuming that the CRA bars judicial review. As noted above, the CRA has its greatest potential for overturning rules during the relatively short period of a presidential transition, when a new President who may be more in favor of disapproving a rule issued during the previous Administration has taken office. Most of the time, if Congress sends a joint resolution of disapproval to a President for signature, the President would likely veto it—and such a scenario is almost guaranteed if the rule was issued by the President’s own Administration. Presidents have fairly strong control over federal agencies’ rulemaking activities, and any President could be expected not to support legislation overturning a rule issued by one of his or her own agencies.<sup>53</sup> If the President did veto a disapproval resolution overturning a reissued rule, Congress would need to override the President’s veto for a resolution of disapproval to become law.<sup>54</sup> Such a veto override would require a two-thirds majority in both houses.

In other words, if an agency chooses to reissue a rule, the agency would likely put the rule into effect. Congress could then take further action to disapprove the rule through the CRA or through other legislative means. However, Congress’s ability to overturn the rule by using the CRA is limited by the fact that most of the time, any CRA joint resolution of disapproval aimed at the reissued rule would likely face a presidential veto. And because it appears that courts may be unlikely to consider a challenge to the rule under the CRA, agencies may generally be in a fairly strong position to reissue rules.

## Is There Judicial Review Under the CRA?<sup>55</sup>

Section 805 of the CRA states: “No determination, finding, action, or omission under this chapter shall be subject to judicial review.”<sup>56</sup> Accordingly, courts will not weigh in on matters falling

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<sup>53</sup> Presidential control over rulemaking is primarily carried out through Executive Order 12866, which requires White House review of regulations in the Office of Management and Budget’s Office of Information and Regulatory Affairs. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by Maeve P. Carey.

<sup>54</sup> To date, Congress has not enacted a CRA resolution of disapproval that was subject to a presidential veto—all of the enacted joint resolutions of disapproval have been signed by the President.

<sup>55</sup> This section was authored by Valerie C. Brannon, Legislative Attorney.

<sup>56</sup> 5 U.S.C. §805.

within the scope of Section 805 but will instead leave the resolution of these CRA-related issues to the political branches. However, there has been some judicial disagreement regarding which CRA-related matters are within Section 805's scope.<sup>57</sup> On its face, this provision appears to bar judicial review of a broad swath of claims.<sup>58</sup> While most reviewing courts have interpreted Section 805 to broadly prohibit judicial review of claims alleging CRA violations, a few courts have taken the view that certain types of CRA-related claims are not barred.<sup>59</sup>

## How Can CRS Assist Congressional Clients?

CRS can provide congressional clients with lists of rules that have been submitted to Congress and appear to be subject to CRA review as well as 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*. We stress that CRS estimates are always unofficial and nonbinding. As noted, the Senate and House Parliamentarians are the sole definitive arbiters of the CRA parliamentary mechanism, including time periods involved, and should be consulted for authoritative guidance on its operation.

## Additional CRS Written Materials on the CRA

CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis

CRS In Focus IF10023, *The Congressional Review Act (CRA)*, by Maeve P. Carey and Christopher M. Davis

CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey

CRS In Focus IF11096, *The Congressional Review Act: Defining a "Rule" and Overturning a Rule an Agency Did Not Submit to Congress*, by Maeve P. Carey and Valerie C. Brannon

CRS Insight IN10660, *What Is the Effect of Enacting a Congressional Review Act Resolution of Disapproval?*, by Maeve P. Carey

CRS Insight IN10996, *Reissued Labor Department Rule Tests Congressional Review Act Ban on Promulgating "Substantially the Same" Rules*, by Maeve P. Carey

CRS Insight IN10808, *GAO Issues Opinions on Applicability of Congressional Review Act to Two Guidance Documents*, by Maeve P. Carey

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<sup>57</sup> Compare, for example, *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561 (9<sup>th</sup> Cir. 2019) ("[W]e join our sister circuits which have ... held that federal courts do not have jurisdiction over statutory claims that arise under the CRA."), with, for example, *Tugaw Ranches, LLC v. U.S. Dep't of Interior*, 362 F. Supp. 3d 879, 884, 889 (D. Idaho 2019) (noting that "numerous" courts have "found that under a plain reading interpretation § 805 precludes judicial review," but ultimately holding that "§ 805 does not clearly prohibit judicial review of agency action under the CRA").

<sup>58</sup> See, for example, *Kan. Nat. Res. Coal. v. U.S. Dep't of Interior*, 971 F.3d 1222, 1235 (10<sup>th</sup> Cir. 2020); *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009).

<sup>59</sup> In particular, a minority of courts have concluded that Section 805 allows review of agencies' compliance with the CRA. See *Tugaw Ranches, LLC v. U.S. Dep't of Interior*, 362 F. Supp. 3d 879, 889 (D. Idaho 2019); *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 U.S. Dist. LEXIS 20936, at \*18 (S.D. Ind. Oct. 24, 2002). For more information on current legal interpretations of the CRA's judicial review provision, contact Valerie C. Brannon, Legislative Attorney.

## Author Information

Maeve P. Carey  
Specialist in Government Organization and  
Management

Christopher M. Davis  
Analyst on Congress and the Legislative Process

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