Congressional Research Service
Informing the legislative debate since 1914

IN FOCUS

Updated August 25, 2026

Defining *Final Agency Action* for APA and CRA Review

Executive branch action may be subject to both judicial and congressional review. Two federal statutes authorizing such review are the Administrative Procedure Act (APA), which generally governs judicial review of agency action, and the Congressional Review Act (CRA), which provides an avenue for Congress to review agency rules. Both statutes authorize review only of *final* actions taken by *agencies*. This In Focus discusses these two requirements for APA or CRA review.

Background: APA and CRA Review

The APA outlines procedures agencies usually must follow to promulgate rules, adjudicate cases, or take other actions. When agencies propose rules known as *substantive* or *legislative rules*, the APA generally requires agencies to offer public notice and opportunity to comment on the rule. These requirements are often referred to as *notice-and-comment procedures*. The APA also provides an avenue for injured parties to challenge final agency actions, including rules, in court. For more information on judicial review under the APA, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Daniel T. Shedd and Jared P. Cole (2025).

The CRA is a tool for *congressional* oversight. It requires agencies to submit covered rules to Congress and the Government Accountability Office (GAO). The law establishes fast-track procedures to enact a joint resolution of disapproval that, if passed in both houses and signed by the President, will nullify a rule. In contrast to the APA, the CRA explicitly bars judicial review and in practice, GAO, rather than the judicial branch, has been asked to resolve certain legal questions under the CRA. Notwithstanding these differences, the CRA incorporates certain language from the APA. The CRA, 5 U.S.C. § 804, adopts the APA's definition of *agency* and references the APA's definition of *rule*. GAO has thus concluded that the CRA also applies only to final agency actions. For more information on the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis (2021).

"Agency" Action

Both the APA and CRA apply to actions of *agencies*, a term defined in 5 U.S.C. § 551. (The Freedom of Information Act also uses this definition, while some other federal laws use different definitions.) The APA definition of *agency* is relatively broad, encompassing "each authority of the Government of the United States." However, the definition expressly excludes Congress, courts, and the governments of U.S. territories and the District of Columbia, as well as—for most purposes—certain military authorities. Courts have held the exclusions of Congress and the courts also exclude legislative- and judicial-branch agencies such as the Government Publishing Office and the United States Sentencing Commission. The Supreme Court has also ruled that the APA does not apply to the President, although lower courts have held that 5 U.S.C. § 551 can sweep in some entities within the Executive Office of the President, as discussed below. GAO has similarly concluded that the CRA does not encompass presidential actions such as executive orders, though it can sometimes include agency actions implementing presidential directives.

5 U.S.C. § 551 does not define an *agency* as being located within a specific executive-branch department, and thus the term may include independent agencies. For instance, GAO concluded a bulletin from the Securities and Exchange Commission met the definition of a covered rule and should have been submitted under the CRA. Court cases interpreting the APA have addressed whether entities like the Smithsonian Institution or advisory committees fall within the definition.

To resolve these challenges, courts have asked whether the entity exercises "substantial independent authority." The first piece of this inquiry asks whether an entity exercises *substantial* authority. Logically, as one court explained, "for an entity to *be* an authority of the government it must *exercise* some governmental authority." Applying this standard, that court concluded the Smithsonian Institution did not qualify as an agency because it did not perform any regulatory functions or control the allocation of federal dollars. In another ruling, a trial court highlighted two key ways an entity may exercise substantial authority: "investigative power and authority to make final and binding decisions." GAO has concluded, for instance, that Fannie Mae and Freddie Mac "are private entities, not authorities of the government."

The second aspect of the inquiry looks to *independence*. The question of independence has come up, for example, when courts evaluate whether advisory committees are independent of the President, or whether they fall within the APA's presidential exemption. Courts look to whether a committee merely advises and assists the President, or whether it performs significant nonadvisory functions. As part of this inquiry, courts may use a three-factor analysis that looks to "how close operationally the group is to the President, what the nature of its delegation from the President is, and whether it has a self-contained structure." GAO has adopted this analysis to determine whether agency actions are attributable to the President and therefore excluded from the scope of the CRA. GAO has also looked to whether the governing statute expressly grants authority to the President.

"Final" Action

In 5 U.S.C. § 704, the APA states that judicial review is available for "final agency action." The statute does not define when an agency action qualifies as *final*, but the Supreme Court has said a final action must satisfy two criteria: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." As one example, an agency notice of proposed rulemaking will generally not be reviewable, but the final rule an agency adopts after notice-and-comment procedures will be subject to review. A document's label as "final" will not necessarily be dispositive, though. Courts look to the substance of an agency action.

GAO has suggested this two-part test is "inapposite" to the CRA, citing the distinct contexts of congressional oversight versus a private party's ability to challenge an action in court. Nonetheless, GAO has concluded the CRA also contains a finality requirement. GAO has asked whether the agency must take additional steps before the action is finalized, an inquiry that arguably overlaps with at least the first prong of the test above. As under the APA, GAO has said "proposed rules are not rules for CRA purposes" because they do not "impose certain and final requirements" and will not be binding until "issuance of a final rule."

Outside of the notice-and-comment rulemaking process, it can be difficult to determine whether an action represents a decision's consummation. GAO has looked to whether an agency has made a "final determination" or instead whether an action is "an interim step in an ongoing process." One factor courts have considered under the APA is whether a statement was issued by a subordinate official and subject to additional administrative review. A conditional or tentative document such as an agency recommendation usually will not be considered final to the extent it is merely advisory and preliminary. However, the mere possibility of later agency revision of a decision does not render an action nonfinal. Accordingly, for instance, courts have said an interim final rule can qualify as final even though an agency invites comment and leaves open the possibility of future amendment. In contrast, one court said a direct final rule was not final until the end of the comment period, where the agency was required to withdraw the rule if it received any adverse comments.

Even if an agency action is not subject to further agency review, it will be "final" under 5 U.S.C. § 704 only if it also determines rights or obligations or has legal consequences. For example, the Supreme Court concluded an agency determination was final where the agency agreed it was binding, and the determination prevented the agency from acting and created a partial safe harbor from liability.

This second aspect of the test for finality has sometimes led courts to conclude they cannot review guidance documents. The APA distinguishes substantive rules from guidance documents, as it expressly excludes interpretive rules and general policy statements from notice-and-comment rulemaking proceedings. To determine whether a rule is substantive and must go through notice-and-comment procedures, courts ask whether the agency statement binds private parties or the agency itself with the force of law. By definition, then, under APA classifications, interpretive rules and general policy statements are not legally binding. Accordingly, one federal appeals court held that a document labeled "Final Guidance" was not a final agency action reviewable in court because covered entities were free to ignore the guidance without facing any legal consequences.

Other cases indicate, in contrast, that informal pressure to conform to agency standards can sometimes constitute final action. A later case from the same federal appeals court concluded that where "the writing was . . . on the wall" about how an agency would act, an agency's findings could be treated as final. In addition, a number of cases suggest courts should look to a decision's "practical effect." As one court explained, looking to an action's "concrete consequences" differentiates the finality inquiry from the test for whether a rule is substantive. One opinion held that "an interpretive rule . . . can constitute final action" if an agency treats it as binding, "even though, standing alone," the rule does not have the force of law. Another court clarified that agencies' legal interpretations may "occasion sufficient 'legal consequences' to make them reviewable" even if they are "not directly binding" on regulated entities, depending in part on the authoritativeness of the interpretation.

GAO has concluded that nonbinding guidance documents, including general policy statements, can qualify as rules subject to the CRA. The CRA uses a broad definition of *rule* that encompasses both substantive rules and guidance. As such, by design, the CRA applies to some rules without the force of law. Following the structure of the statute, GAO has concluded that although the CRA applies only to final rules, it includes rules that are nonbinding. GAO has said, for instance, the CRA includes "coercive" guidance documents that induce regulated entities to "exercise rights or obligations in a certain way."

For more information on guidance documents, see CRS Legal Sidebar LSB10591, *Agency Use of Guidance Documents*, by Kate R. Bowers (2021). For more information on the applicability of the CRA, including the law's definition of covered rules and application to guidance documents, see CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey (2024).

Valerie C. Brannon, Legislative Attorney

IF12386

Disclaimer