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IN FOCUS

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The Congressional Review Act: Defining a "Rule" and Overturning a Rule an Agency Did Not Submit to Congress

The Congressional Review Act (CRA) provides Congress with a mechanism to review federal agency actions that meet its definition of *rule*. Enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act, the CRA requires agencies to report the issuance of "rules" to Congress and provides Congress with special fast-track procedures under which to consider legislation that overturns a rule. A joint resolution of disapproval will become effective once both houses of Congress pass a joint resolution and it is signed by the President or if Congress overrides the President's veto.

The category of rules the CRA covers is broader than the category of rules that are subject to the Administrative Procedure Act's (APA) notice-and-comment requirements for federal rulemaking. As such, some agency actions, such as guidance documents, that may not be subject to notice-and-comment rulemaking procedures could still be considered rules under the CRA and thus could be subject to the CRA's fast-track disapproval procedures.

Even if an agency action falls under the definition of *rule*, however, the CRA's expedited procedures for considering legislation to overturn the rule become available only when the agency submits the rule to Congress. In practice, agencies appear to be fairly consistent in submitting rules to Congress that have undergone notice-and-comment rulemaking procedures and have been published in the *Federal Register*. Agencies are less consistent, however, in 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 the action.

This CRS In Focus briefly describes what types of agency actions are subject to the CRA by providing an overview of the statutory definition of *rule*. It then explains how Congress can use the CRA to review rules that agencies did not submit to Congress.

Types of Agency Actions the CRA Covers

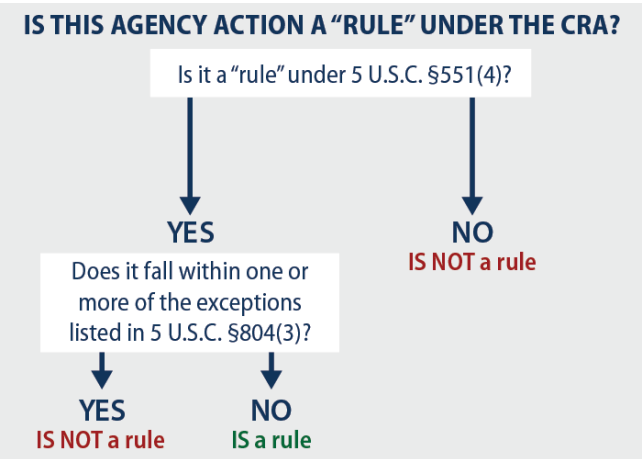
For an agency action to be eligible for review under the CRA, it must qualify as a "rule" as defined in 5 U.S.C. §804(3). The CRA adopts the broad definition of *rule* contained in the APA but creates three exceptions. The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" (5 U.S.C. §551(4)). This definition includes actions that are subject to the APA's notice-and-comment rulemaking procedures, but it also covers interpretive rules and general statements of policy—categories that may encompass agency actions that are sometimes referred to as guidance documents.

The CRA excludes three categories of actions from its broad definition of *rule*:

1. Any rule of particular applicability;
2. Any rule relating to agency management and personnel; and
3. Any rule of agency organization, procedure, or practice that does not substantially affect the rights and obligations of non-agency parties.

In other words, if an agency action falls within the APA definition of *rule* but also falls within one of these three exceptions, it would *not* be covered by the CRA. However, some agency guidance documents that are exempt from notice-and-comment procedures may fall within the APA's broad definition of *rule* and not within any of these exceptions and therefore would be subject to the CRA.

Thus, determining whether a particular agency action is a rule subject to the CRA entails a two-part inquiry: first, whether the statement qualifies as a rule under the APA Section 551 definition and, second, whether the statement falls within any of the CRA's three exceptions.



Source: Congressional Research Service.

Following precedent interpreting the APA, the CRA does not cover actions of the President, such as executive orders and presidential proclamations.

Using the CRA on a Rule That an Agency Did Not Submit

The CRA requires agencies to submit a report containing a copy of the rule and information on the rule to Congress and to the Government Accountability Office (GAO). Once the rule is received, if Members wish to submit and take action on a joint resolution of disapproval, they must do so within certain time periods specified in the CRA.

Under the text of the CRA, the expedited procedures become available only when Congress receives the rule. Because submission of rules is key to Congress's ability to access the CRA's special procedures, an agency's failure to submit a rule to Congress could frustrate Congress's ability to review rules under the act. Furthermore, the CRA states that "no determination, finding, action, or omission under this chapter shall be subject to judicial review," which courts have usually interpreted to prohibit judicial review of a claim that an agency has failed to submit a rule under the CRA. This provision makes it unlikely that a court would compel an agency to submit a rule under the CRA.

To avoid Congress being denied its opportunity to review rules under the CRA, however, a practice has developed that allows Congress to employ the law's review mechanism even when an agency does not submit a rule for review. That practice has involved seeking an opinion from GAO on whether an agency action should have been submitted under the CRA (i.e., whether the action is covered by the CRA's definition of *rule*).

GAO Determinations of Covered Agency Actions

If a Member requests a GAO opinion and GAO concludes that an action should have been submitted, under current practice, Congress can then proceed with consideration of a joint resolution of disapproval. While the House and Senate Parliamentarians are the sole definitive arbiters of procedural matters under the CRA—including the determination of whether a joint resolution of disapproval is privileged under the CRA—it appears that, in recent instances, the chamber Parliamentarians have generally deferred to GAO's opinions on whether an agency action is covered.

Since the CRA was enacted in 1996, Members of Congress have sought such an opinion from GAO on several occasions. Copies of those opinions are available on GAO's website. Those opinions are also listed and summarized in CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*. GAO describes the process for requesting a legal opinion in its publication *Procedures and Practices for Legal Decisions and Opinions*, which is also available on its website.

Publication of GAO Determination in the *Congressional Record*

In recent years, the Senate appears to have considered the publication in the *Congressional Record* of a GAO opinion concluding that an agency action should have been submitted under the CRA as the trigger date for the CRA's fast-track disapproval procedures. By contrast, if agencies submit their rules to Congress under the CRA as they are required to, a record of each rule's receipt is published in the *Congressional Record*. In a sense, then, 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.

Recent Developments Regarding the Scope of the CRA

The 115th Congress was the first to enact a resolution of disapproval overturning an agency guidance document that had neither been promulgated through the APA's notice-and-comment procedures nor submitted to Congress under the CRA. The guidance document, which the Bureau of Consumer Financial Protection issued and was entitled "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act," was subject to the GAO process described above. GAO concluded that the document was a rule under the CRA in December 2017. President Trump signed the resolution of disapproval, S.J.Res. 57, on May 21, 2018.

Effect of Disapproval of Agency Action

If a joint resolution of disapproval is submitted, both houses pass the resolution within the CRA-specified deadlines, and the President signs it (or if Congress overrides the President's veto), the CRA states that the "rule shall not take effect (or continue)." In addition, the CRA provides that after a joint resolution of disapproval is enacted, an agency may not issue the rule in "substantially the same form" as the disapproved rule unless a subsequent law specifically authorizes the reissued rule.

The effect of Congress disapproving a rule that was not subject to notice-and-comment rulemaking procedures is not always clear, however, given that many such rules are generally viewed as lacking legal effect in the first place. Nevertheless, congressional action to overturn such an agency action may communicate that Congress believes the agency has exceeded the intended scope of its authority or otherwise chosen a course of action that conflicts with congressional intent or preferences.

Other CRA Resources

For an in-depth discussion of the issues discussed in this In Focus, see CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey.

For a broad overview of the CRA, including an explanation of the CRA's expedited procedures and associated timelines, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

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