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The Congressional Review Act: The Lookback Mechanism and Presidential Transitions

The Congressional Review Act (CRA, 5 U.S.C. §§801-808) is a tool that Congress can use to overturn federal regulations. Enacted in 1996, the CRA requires that agencies submit covered rules to Congress and the Government Accountability Office (GAO) before they may take effect. Congress then has a limited period of time to use special fast-track procedures to consider legislation overturning those rules. If a joint resolution of disapproval is enacted, it has the effect of overturning the rule—either by taking the rule out of effect immediately or by preventing it from taking effect at all. If the rule had already gone into effect, it is to be treated as though it was never in effect. Furthermore, the agency is prohibited from reissuing the rule in "substantially the same form" unless Congress provides additional statutory authorization.

The CRA also has a feature that is sometimes referred to as its "lookback mechanism." The lookback mechanism provides Congress with additional time to review rules that were submitted toward the end of the previous session. This feature is most relevant as the end or potential end of a President's Administration approaches, because a new Congress and new President might be able to more easily overturn rules issued by the outgoing Administration.

This In Focus describes why the lookback mechanism is most relevant during a presidential transition, describes how the lookback date is calculated, and makes a general estimate about when the lookback date might fall in 2024 under certain assumptions.

Relevance of the CRA in Presidential Transitions

Like regular legislation, a CRA joint resolution of disapproval requires passage in both chambers of Congress and signature by the President to become law. Obtaining the President's support to overturn a rule issued by his own Administration is an unlikely prospect, however, and creates a practical challenge for using the CRA: Most of the time, when presented with a joint resolution of disapproval, a President can be expected to veto it. Congress could attempt to override a presidential veto, but that requires a two-thirds majority of each house of Congress. This creates a de facto supermajority requirement for a CRA joint resolution of disapproval to be enacted in most cases.

The exception to this, however, is the first few months of a new presidential Administration, particularly if the new President is of a different party and therefore has different policy preferences than the previous President. Due to 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 during which rules issued near the end of the previous Administration—sometimes referred to as "midnight rules"—are eligible for review under the CRA. If Congress were to consider a joint resolution of disapproval to overturn a rule issued by the prior Administration, a new President may be more willing to sign the joint resolution into law. (For more information on midnight rulemaking, see CRS Insight IN11539, *Presidential Transitions: Midnight Rulemaking*.)

The vast majority of the instances in which the CRA was used to overturn rules took place during such a period. Of the 20 rules that have been overturned by the CRA, 18 were issued by prior, outgoing Administrations.

CRA Time Periods for Review

Under the CRA, before a final rule can take effect, an agency must submit that rule to both houses of Congress. After a rule is received in both chambers and published in the *Federal Register*, the CRA establishes specific time periods during which Congress can introduce and act on a joint resolution that, if enacted, would disapprove the rule. Specifically, the CRA creates:

- an "introduction" period, which lasts for 60 calendar days (excluding days on which either house has adjourned pursuant to a concurrent resolution), during which joint resolutions disapproving the rule can be introduced in either chamber;
- a "discharge" period, which lasts for 20 calendar days, after which a petition signed by 30 Senators can be filed to discharge a Senate committee from the further consideration of a CRA joint resolution of disapproval; and
- a "Senate action" period, which lasts for 60 days of Senate session, during which a disapproval resolution can be considered in the Senate under "fast track" parliamentary procedures that permit a simple majority to call up and reach a final vote on the joint resolution without a cloture process.

All three of these time periods begin upon receipt and publication of the rule, and they run simultaneously.

For rules not submitted to Congress but nevertheless determined by GAO to be covered by the CRA's definition of *rule*, under current practice, the three time periods begin to run once the GAO opinion has been published in the *Congressional Record*.

The Lookback Mechanism

Section 801(d) of the CRA provides that if a rule is submitted to Congress either less than 60 days of session in the Senate or less than 60 legislative days in the House of Representatives before Congress adjourns a session of Congress *sine die*, a new period for congressional review of that rule becomes available in the next session of Congress.

For this purpose, the "lookback" rule is treated as if it had been submitted to Congress and published in the *Federal Register* on the 15th legislative day (House) or session day (Senate) of the succeeding session for purposes of calculating the time periods described above. This 15th day is sometimes referred to as the date of "constructive resubmission" of the rule. That is, the lookback period rule is treated as if the 15th day of the new session was the first time the rule had ever been received and published for purposes of CRA oversight, and that is the day the "introduction," "discharge," and "action" periods begin anew on that rule.

The idea behind the lookback provision is that, if a rule is submitted to Congress so late in a session that the House or Senate do not get the full period contemplated by the law to review it, the periods for CRA review are available again in their entirety the next session. The provision is intended to prevent any Administration from waiting until just before Congress adjourns a session to submit rules to the House and Senate, denying them the full period contemplated by the CRA to review those rules.

Accordingly, rules submitted to Congress prior to both the 60th day of Senate session and the 60th 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 60th such 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 two-year Congress, but, as noted above, they have particular relevance in a second session that coincides with a presidential election.

Estimating the 2024 Lookback Date

It is not possible to know with certainty what date the 2024 lookback period will begin until the end of the 118th Congress. This is because to properly calculate the lookback period, one must know the exact date of *sine die* adjournment and know exactly how many days each chamber met prior to adjourning. Specifically, to calculate the start of the CRA lookback period, one would count backward from the date of *sine die* adjournment 60 days of session in the Senate and 60 legislative days in the House. The earlier of the two dates arrived at by this calculation would mark the beginning of the lookback period.

However, one can estimate when in the year the lookback date is likely to fall. CRS unofficially estimates that Biden Administration rules submitted to the House or Senate on or after August 1, 2024, until the end of the second session of the 118th Congress are likely to be subject to the CRA lookback provisions and will qualify for additional periods of CRA review in the first few months of the first session of the 119th Congress (2025). These renewed periods of review are likely to permit disapproval resolutions aimed at such rules until late March 2025 and make the CRA "fast track" procedures available to consider such joint resolutions in the Senate until late May or early June 2025.

This unofficial estimate of the general start of the CRA lookback period for 2024 was determined by counting back from an estimated *sine die* adjournment of the second session in the respective chambers—assumed to be January 3, 2025—60 days of session in the Senate and 60 legislative days in the House, as projected by the 2024 announced calendars, then taking the earlier of the two dates. This unofficial estimate assumes that the chambers will meet exactly as projected by these House and Senate announced calendars and that no adjournment resolutions will be adopted. Should these assumptions change, the lookback date estimate will also necessarily change.

It is important to note that CRS day count estimates are unofficial and nonbinding. The Senate and House Parliamentarians are the sole definitive arbiters of the operation of the CRA mechanism, including its associated time periods, and should be consulted if a formal opinion is desired. CRS can, however, provide congressional clients with unofficial day count estimates of the action windows for specific rules and identify submitted rules that appear likely to be in the CRA lookback period.

Other Mechanisms for Overturning Rules During a Presidential Transition

The CRA is one way in which Congress can use its legislative power to overturn a rule. However, Congress can always use its legislative power to consider regular legislation to overturn a rule. Regular legislation can be considered at any time, unlike the CRA, although it would not be considered under fast-track procedures. Congress can also use the appropriations process to prevent a rule from being finalized or implemented.

New presidential Administrations also have additional means to overturn or halt regulations issued by the prior Administration. A new Administration may be able to amend or rescind regulations using the federal rulemaking process. In addition, all recent Administrations have issued memoranda to agencies immediately following inauguration calling for agencies to halt progress on regulations that were underway during the prior Administration so that the new Administration may take stock and decide which regulations to proceed with and which regulations it will no longer continue to pursue.

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