



Congressional Review Act Q & A

Questions from the CSS CRA Forum, 7/30/20 [Updated 1/13/21]

Q: When will the carryover period for the CRA start? What is the date after which finalized rules will be eligible to be repealed by the next Congress?

A: The CRA carryover period started on 8/21/20 – regulatory actions submitted to Congress on or after that date are eligible for repeal under the CRA.

Q: What counts as a session or a legislative day under the CRA?

A: Session days (Senate) and legislative days (House) are not the same as calendar days. A legislative day starts when a chamber reconvenes following an adjournment and ends when the chamber adjourns. So, if the House starts at 10:00 am on Tuesday and remains in session until Wednesday, 2:00 am the next day, that is still considered just one legislative day. (more details in outline below)

Q: Is it possible for Congress to use the CRA to repeal more than one rule at a time? In other words, can Congress pass a CRA omnibus encompassing many rules under one joint resolution of disapproval?

A: It is not procedurally possible to use a joint resolution of disapproval to repeal more than one regulatory action. The text of the CRA specifically dictates that the joint resolution include the words: "That Congress disapproves the rule submitted by the ___ relating to ___, and such rule shall have no force or effect." See 5 U.S.C. Sec 802(a). If resolution deviate from that formula in anyway it would still be an actionable piece of legislation, but it would not receive the benefits of the CRA's expedited procedures. Congressional Republicans have consistently introduced the [Midnight Rules Relief Act](#) to permit bloc repeal of agency rules but it has never passed

Q: Can the CRA be used to repeal a rule that was finalized under an APA waiver from notice and comment?

A: Yes. The CRA can be used on a very wide range of regulatory actions, including interim final rules, rules that did not go through notice and comment, and interpretive rules/agency guidance. The CRA uses the broad APA definition of a [rule](#), "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy..." but makes exemptions for rules that strictly deal with internal agency organization, personnel or particularized decisions.



Q: Can the CRA be used to repeal non-major rules?

A: Yes. A rule does not need to be “major” (i.e., have an + or - economic impact of \$100 million or more) to be eligible for the CRA. Agencies are required to report all rules to Congress under the CRA, regardless of the major/non-major designation. However, the CRA does set out different effective dates for major and non-major rules.

Q: Who can propose a joint resolution of disapproval?

A: Any sitting member of Congress may introduce the resolution, regardless of committee jurisdiction.

Q: What happens if an agency does not submit a regulatory action to Congress or publish it in the *Federal Register*?

A: Since the CRA applies to such a wide range of regulatory actions (including interpretive rules, policy statements etc.) agencies may fail to send certain CRA-eligible actions to Congress as seemingly required by the law on the mistaken belief that the action is not covered by the CRA. Those same regulatory actions may not warrant publication in the *Federal Register* either. In cases where a particular regulatory action has not been submitted to Congress or published in the *Federal Register*, it has become customary for a Member of Congress to request the Government Accountability Office (GAO) decide whether that action is CRA-eligible. If the GAO determines a regulatory action to be CRA-eligible, the 60-day window begins on the date of the GAO opinion. For a list of GAO CRA determinations, visit the [GAO CRA website](#). Significantly, this practice has no explicit basis in the language of the CRA itself.

Q: Is the CRA the only way Congress can repeal a rule?

A: No. Congress can always pass legislation directing an agency to take a specific regulatory action or retract a regulation. Such legislation would not enjoy the time-limited expedited procedures that the CRA provides for eligible resolutions of disapproval. Instead, they would have to go through the ordinary legislative process.

Q: If an organization is planning to advocate for the use of the CRA next Congress, should we begin drafting legislation now?

A: Drafting the actual joint resolution is not very time intensive, the language is prescribed by the text of the CRA. See 5 U.S.C. Sec. 802(a).

Q: What's the impact of the [CRA compliance memo](#) issue by OMB issued last year?

A: To summarize, OMB's CRA memo set out a requirement that all agencies - including independent agencies - submit regulatory actions to OMB (specifically OIRA) so that the office could determine whether the rules qualified as major rules under the CRA. Progressive advocates were and still are concerned that the process could be used to extend industry-friendly regulatory analysis principles to independent agency actions. It is still unclear whether agencies are complying with the memo. If OIRA is receiving CRA submissions from agencies and making regular determinations, those processes could be helpful in determining the CRA eligibility of regulatory actions.

Q: Is an agency failure to submit a rule to Congress grounds for a court to invalidate the rule?

A: No. The D.C. Circuit has made clear that agency failure to submit a rule to Congress is not grounds to invalidate a final rule.

Q: How does one find out if a regulatory action has been submitted to Congress?

A: The [Congressional Record](#) includes a section titled: EXECUTIVE COMMUNICATIONS, ETC. that lists letters from agencies communicating final regulatory actions to the committee of jurisdiction.

Q: If a regulation is repealed using the CRA, what takes their place? Are prior regulations automatically revived?

A: In most cases, yes. The text of the CRA dictates that a repealed rule that was already in effect "shall be treated as though such rule had never taken effect." See 5 U.S.C. 801(f). It's important to keep in mind that a CRA repeal may not automatically revive prior regulations that happened to be subject to litigation when the repealed rule took effect. It remains an open question what would happen if the prior rule in effect is later struck down in court.

Q: What does the substantially the same provision mean? Who decides if a rule is substantially the same?

A: This is perhaps the biggest CRA unknown. The legal effect of the substantially the same provision in 801(b)(2) is very ambiguous. The U.S. code does not include a definition for the phrase. The question of who determines whether a rule is substantially the same is complicated by the limited judicial review under the CRA (see outline



below). Fear and uncertainty on this provision was a factor in Democratic lawmaker's decision to not use the CRA in 2009.

Expert Contacts

Don't hesitate to reach out with questions.

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About CSS

The Coalition for Sensible Safeguards is an alliance of more than 160 consumer, small business, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups — representing millions of Americans.

We are joined in the belief that our country's system of regulatory safeguards should secure our quality of life, pave the way for a sound economy and benefit us all.

For more information, please visit: sensiblesafeguards.org

Congressional Review Act Outline

Content based on presentations from James Goodwin (Center for Progressive Reform) and Amit Narang (Public Citizen) at the CSS CRA Forum, 7/30/20

- a. Major Provisions of the CRA
 - i. Overall; the CRA provides a route for Congress to undo regulations after an agency has finalized.
 - i. Before a rule takes effect, an agency must submit it with a report to Congress.
 - ii. Congress can then pass a joint resolution of disapproval that, with Presidential approval, invalidates the rule.
 - iii. The joint resolution of disapproval benefits from special fast-track Senate procedures, but those procedures expire when 60 legislative/session days have transpired following the rule's submission to Congress.
 - ii. Defining a rule.
 - i. The CRA incorporates the broad APA definition of a rule. There are three narrow exceptions to the definition of a rule (agency organization, personnel and rules of particular applicability).
 - ii. The CRA applies to all rules, regardless of the magnitude of their economic impact.
 - iii. Major rules (\$100 million in economic impact) are subject to additional procedural requirements.
 - iv. Also applies to actions beyond conventional notice and comment rules.
 - i. CRA applies to some but not all interpretive rules (i.e. agency guidance documents).
 - ii. Interim final rules are covered.
 - iii. Starting the 60-day clock.
 - i. The submission date is the later of either (1) when Congress receives the rule or (2) the rule is published in the *Federal Register*
 - ii. Agencies must submit final rules to both houses of Congress and GAO before they take effect. In practice, rules are submitted at the time of publication in the *Federal Register*.

- iii. In cases where the agency has not submitted a rule, GAO has emerged as the *de facto* referee. GAO issues opinions on whether rules ought to be submitted to Congress under the CRA.
- iv. Counting 60 days.
 - i. The CRA counts 60 days as full session days in the Senate and legislative days in the House.
 - ii. House and Senate Parliamentarians have the final call on CRA legislative issues, including counting time periods.
 - iii. **The carryover period;** if either body adjourns before the 60-day review period has ended, the window completely resets for the next Congress.
 - i. The reset period starts on the 15th day of the new session
 - ii. Aka “the lookback period”
- v. Legislative procedure – Senate fast track for the joint resolution of disapproval (JROD)
 - i. The CRA does not detail the House committee procedures for consideration of a JROD. In the past, the Rules Committee has advanced the measure to the floor using a closed special rule, pass by simple majority.
 - ii. In the Senate, the CRA enable Senators to force a JROD onto the floor for a vote by simple majority.
 - iii. Once a JROD has passed one chamber, the other chamber is required to act on that JROD instead of the one, if any, that was introduced there. The practical effect of this requirement is that it preempts conference committee consideration before the JROD can be presented to the president.
- vi. Not Judicially Reviewable?
 - i. The CRA includes a provision (Sec. 805) that bars judicial review of any “determination, finding, action, or omission.” There is debate over the extent of the prohibition on judicial review.
 - ii. Two federal circuit courts have dismissed actions claiming rules were invalid because of agency failure to submit to Congress under the CRA.
 - iii. In 2009, the DC Circuit read Sec 805 broadly, finding the CRA “unequivocal[ly]” denied courts the power to invalidate a rule based

on CRA noncompliance. *Montanans for Multiple Use v. Barbouletos*,
568 F.3d 225, 229 (D.C. Cir. 2009).

- iv. Some federal district courts have found that 805 only precludes review of congressional CRA action, not agency actions.