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EXPLAINER



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The Application of the Congressional Review Act to Recent Trump Administration Rulemakings

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Congress can fast-track reversal of rulemakings from the Trump Administration under the Congressional Review Act. However, only certain rules are eligible for this process, and Congress has a narrow window to use it. Moreover, the Congressional Review Act includes a prohibition on the promulgation of rules that are substantially similar to those that are overturned through the Congressional Review Act process. Therefore, whether to deploy the Congressional Review Act in any individual case calls for careful consideration.

History of the CRA

The Congressional Review Act (CRA) was enacted in 1996 as a component of the Small Business Regulatory Enforcement Fairness Act. Under the CRA, agencies are required to submit to Congress and the Government Accountability Office (GAO) notice of a finalized rule. Once notified, Congress has the option of passing a joint resolution of disapproval (JROD) to overturn the rule. If the JROD passes both chambers of Congress and is signed into law by the President, the rule is immediately overturned and has no effect both proactively and retroactively. Importantly, the JROD need only pass by a simple majority in both chambers.

Since its enactment, the CRA has been used by Congress to overturn 17 rules total: one in 2001 (107th Congress) and 16 in 2017 (115th Congress). In the 107th Congress (under Republican control and with President George W. Bush in office), the CRA was used to reverse a Clinton Administration rule issued by the Occupational Safety and Health Administration (OSHA) to implement ergonomic standards to reduce workplace injuries.

In 2017, President Trump and the Republican Congress overturned 16 rules issued by the Obama Administration, including rules regarding labor protections, ensuring internet users' privacy is protected from marketing companies, safe drinking water regulations, and oil and natural gas production leak abatement, among others.¹

¹ Maeve P. Carey and Christopher M. Davis. "The Congressional Review Act (CRA): Frequently Asked Questions." Congressional Research Service. 14 January 2020.
<https://crsreports.congress.gov/product/pdf/IF/IF10023>

Timing

For the purposes of overturning Trump Administration rules, Congress has a limited period to pass and enact joint resolutions under the CRA. If a rule was submitted to Congress or published in the *Federal Register*² within 60 legislative days before the 116th Congress adjourned *sine die* (at the beginning of January 2021), then the 117th Congress now has an opportunity to review those rules.³

Under the CRA, rules submitted to the 116th Congress on or after 60 legislative days prior to adjournment will be eligible for Congressional action in the new Congress. This is also known as the “lookback period.” **In the first months of the 117th**

Congress, rules that were sent to Congress or published in the *Federal Register* on or after August 21, 2020 will be eligible for consideration under the CRA.

Resolutions overturning CRAs in the lookback period can be filed starting on the 15th legislative day of the new Congress and up to 60 calendar days thereafter. Congress will then have 60 legislative days to act on a JROD once it is filed.

Process

The CRA provides Congress with special procedures to consider JRODs to overturn a rule eligible for consideration. Any sitting member is able to introduce a JROD, yet the CRA dictates that the legislative text must adhere to the following language: “That Congress disapproves the rule submitted by the [agency] relating to [name of the rule], and such rule shall have no force or effect.”

While the House considers a JROD similar to other legislation, the CRA permits “fast track” procedures in the Senate. If the JROD is acted upon within the 60 legislative day period of review in the Senate, then it cannot be filibustered. A JROD must be reported from the relevant Senate committee if at least 30 Senators sign a discharge petition 20 calendar days after a rule has been submitted. After the JROD has been reported by committee, any Senator can make a non-debatable motion to proceed to consider the JROD on the Senate floor with a vote occurring after 10 hours of debate. All votes taken under CRA procedures only require a simple majority.

Once passed by both chambers of Congress, the JROD is signed or vetoed by the President. Given that a President is unlikely to veto his own Administration’s rules, the CRA usually comes into play only when at the beginning of a new Administration when both chambers of Congress are also controlled by the President’s party (e.g. 2001 and 2017).

² Under the CRA, major rules “shall take effect on the latest of” 60 days after a rule has been notified to Congress or published in the *Federal Register*. If notice to Congress and publication in the *Federal Register* are on separate days, then whichever is the latest date is used for calculating when a rule takes effect.

³ On January 20, 2021, White House Chief of Staff Ron Klain [issued a memo](#) to federal agencies and departments ordering a regulatory freeze on new rules and regulations proposed by the Trump administration. Those rules would still be eligible for consideration under the CRA if the rule has been published in the Federal Register and submitted to Congress.

Disadvantages of Using the CRA

Policy experts have been critical of the CRA, and many have argued that the law should be repealed altogether. If a rule is successfully overturned using the CRA, the statute also prevents the agency from reissuing a rule in “substantially the same form.” In effect, once a rule is repealed using the CRA, the agency cannot issue similar rules in perpetuity. For example, since the OSHA standard on ergonomics was overturned using the CRA, OSHA has not issued a similar rule for ergonomic worker safety standards. Therefore, some scholars argue that it is better to use the rulemaking process to overturn rules rather than using the CRA.

Section 830 of the CRA also prohibits judicial review: “No determination, finding, action, or omission under this chapter shall be subject to judicial review.” This means that courts generally are unable to take up cases that are based on the interpretation or enforcement of the CRA, though there is some debate to the scope of the Section 830 language.

Lack of judicial review has implications for determining which rules are considered substantially the same. Because courts are unable to make rulings on matters under the purview of the CRA, the authority to conclude what constitutes a substantially similar rule may fall to Congress and federal agencies. In effect, deeming rules substantially the same may be left to discretion of the party in power.

Trump Administration Rules Subject to CRA

The Trump administration issued a significant number of rules toward the end of its term that are now subject to the CRA. Under the “lookback” rule, any rule issued by the executive branch on or after August 21, 2020, is eligible to be overturned using the CRA. Below is a list of rules issued by the Trump administration that could be subject to the CRA under the lookback period:

Rule	Agency ⁴	Federal Register Submission Date
Beryllium: Shipyard & Construction	DOL-OSHA	8/31/20
Proxy Advisor Rule	SEC	9/3/20
Cross Border Swaps	CFTC	9/14/20
Methane (Review Rule)	EPA	9/14/20
Methane (Reconsideration Rule)	EPA	9/15/20
Faith-based Title IX Discrimination	ED	9/23/20
Fair Housing Act Disparate Impact	HUD	9/24/20
H-1B Visa Amendments	DHS	10/8/20
Steam Electric Reconsideration	EPA	10/13/20
Asylum: Eligibility Restrictions	DOJ, DHS	10/21/20
Mineral Extraction Royalties	DOI	10/26/20
Alaska Roadless Rule - Tongass Timber	EPA	10/29/20
True Lender Rule	Treasury-OCC	10/30/20
Pesticide Worker Protection Standard	EPA	10/30/20
Dishwasher Energy Efficiency Standard Exemption	DOE	10/30/20
Gray Wolf Endangered Species Delist	DOI-FWS	11/3/20
Shareholder Proposal Procedure	SEC	11/4/20
Adverse Effect Wage Rates for H-2A Workers	DOL	11/5/20
Amendment to Margin Requirements for Uncleared Swaps	CFTC	11/9/20
Federal Contractor Nondiscrimination Revisions	DOL	11/10/20
Coal Ash Rule	EPA	11/12/20
Environmental, Social, and Corporate Governance (ESG) Investing Rule	DOL	11/13/20
Clean Air Act Once In, Always In	EPA	11/19/20
NEPA Implementation (Forest Service)	USDA	11/19/20
Federal Executions	DOJ	11/27/20
Communications by Debt Collectors	CFPB	11/30/20
Pharma Discounts Under Anti-Kickback Law	HHS	11/30/20
Amendments to Safe-Harbors Under Anti-Kickback Law	HHS, OIG	12/2/20

⁴ A list of agency acronyms can be found in Appendix A

Rule	Agency	Federal Register Submission Date
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Cleanup	EPA	12/2/20
Disability Criteria	SSA	12/3/20
CFPB Advisory Opinions Policy	CFPB	12/3/20
NEPA Natural Gas Exemption	DOE	12/4/20
Airlines Unfair/Deceptive Practices	DOT	12/7/20
Federal Contractor Religious Exemption	DOL	12/9/20
Bank Licensing Procedures, Mergers	Treasury-OCC	12/11/20
Journalism Firewall at US Agency for Global Media	USAGM	12/10/20
Asylum Procedures: Credible Fear Claims	DHS, DOJ	12/11/20
Preferences & Advantages Under Packers & Stockyards Act	USDA	12/11/20
Energy Efficiency Test Procedures Interim Waiver	DOE	12/11/20
Oil Anti-Corruption Rule (Dodd-Frank 1504)	SEC	12/16/20
Immigration Appeals	DOJ	12/16/20
Asylum Procedures: Application Withholding of Removal	DOJ	12/16/20
Short Cycle Clothes Washer/Dryer	DOE	12/16/20
Proxy Advisor Rule	DOL	12/16/20
Faith-Based Right to Discriminate (EO 13831)	DOJ, ED, DHS, Ag, USAID, HUD, DOL, VA, HHS	12/17/20
Showerhead Rule	DOE	12/16/20
Air Quality Standards PM (Soot)	EPA	12/18/20
Endangered Species Critical Habitat	FWS/NOAA	12/18/20
Investment Advice for Workers & Retirees Rule	DOL	12/18/20
Timber Sale Process Changes	DOI	12/18/20
PFAS Interim Guidance	EPA	12/22/20
Clean Air Act Cost-Benefit Analysis Rule	EPA	12/23/20
Tip Pooling	DOL	12/30/20
Ozone Standards	EPA	12/31/20
Censored Science Rule	EPA	1/6/21
Independent Contractor Redefinition	DOL	1/7/21
Migratory Birds	DOI	1/7/21
Airplane Greenhouse Gas Emissions	EPA	1/11/21
Grants (Anti-LGBTQ, Religious Exemption)	HHS	1/12/21
Position Limits for Derivatives	CFTC	1/14/21

Appendix A - Glossary of Agency Acronyms

CFPB - Consumer Financial Protection Bureau

CFTC - Commodity Futures Trading Commission

DHS - Department of Homeland Security

DOE - Department of Energy

DOI - Department of the Interior

DOJ - Department of Justice

DOL - Department of Labor

DOT - Department of Transportation

ED - Department of Education

EPA - Environmental Protection Agency

FWS - Fish and Wildlife Service

HHS - Department of Health and Human Services

HUD - Department of Housing and Urban Development

NOAA - National Oceanic and Atmospheric Administration

OCC - Office of the Comptroller of the Currency

OIG - Office of Inspector General

OSHA - Occupational Safety and Health Administration

SEC - Securities and Exchange Commission

SSA - Social Security Administration

USAGM - United States Agency for Global Media

USAID - United States Agency for International Development

USDA - Department of Agriculture

VA - Department of Veterans Affairs