The Congressional Review Act (“CRA”) allows Congress to enact joint resolutions overturning rules issued by federal agencies. It also establishes special, fast-track procedures governing such resolutions. This Recommendation aims to address certain technical flaws in the Act and how it is presently administered.

The Hand-Delivery Requirement

The CRA provides that, before a rule can take effect, an agency must submit a report (an “801(a) report”) to each house of Congress and the Comptroller General, who heads the Government Accountability Office (“GAO”). Receipt of the 801(a) report by each house of Congress and the Comptroller General also triggers the CRA’s special, fast-track procedures.

The CRA says nothing about how agencies must deliver 801(a) reports to Congress or the Comptroller General. Congressional rules, however, currently require that 801(a) reports be hand-delivered to both chambers of Congress. Although the House allows Members to electronically submit certain legislative documents and the Comptroller General permits agencies to electronically submit 801(a) reports, electronic submission currently not a valid means of submitting 801(a) reports to Congress.

The hand-delivery requirement has been the subject of persistent criticism on the grounds that it is inefficient and outdated. Recent events have also shown that it is sometimes impracticable. For example, staffing disruptions related to the COVID-19 pandemic have, in some instances, meant that congressional officials have not been present in the Capitol to receive 801(a) reports via hand-delivery.

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Another source of persistent criticism of the CRA concerns the time periods during which Members of Congress may introduce and act on joint resolutions overturning agencies’ rules. Under the CRA, Congress’s receipt of an 801(a) report begins a period of 60 days, excluding days when either chamber adjourns for more than three days, during which any Member of either chamber may introduce a joint resolution disapproving the rule. Only rules submitted during this period, sometimes called the “introduction period,” are eligible for the CRA’s special, fast-track procedures.

Calculating the introduction period can be confusing because it runs only on “days of continuous session”—that is, on every calendar day except those falling in periods when, pursuant to a concurrent resolution, at least one chamber adjourns for more than three days. As a practical matter, there is seldom a difference between 60 days of continuous session and 60 calendar days because recent Congresses have made regular use of pro forma sessions to avoid adjournments of more than three days. Nevertheless, having to calculate the introduction period according to days of continuous session rather than calendar days can mislead people unfamiliar with the concept of days of continuous session or with recent Congresses’ uses of pro forma sessions. Moreover, because modern Congresses invoke pro forma sessions in a way that negates almost any practical difference between days of continuous session and calendar days, the CRA’s use of days of continuous session to calculate the introduction period accomplishes little beyond complicating the process of ascertaining the period’s end date.

The introduction period is not the only complicated timing provision in the CRA. Another—sometimes called the “lookback period”—provides that if, within 60 days of session in the Senate or 60 legislative days in the House after Congress receives a rule, Congress adjourns its annual session sine die (i.e., for an indefinite period), the periods to submit and act on a disapproval resolution “reset” in their entirety in the next session of Congress. In that next session, the reset period begins on the 15th day of the session in the Senate and the 15th

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2 Id. § 802(a).
3 Id. § 801(d)(1).
legislative day in the House. The lookback period thus ensures that Congress has the full periods contemplated by the CRA to disapprove a rule, even if the rule is submitted near the end of a session of Congress.

The lookback period is anomalous and difficult to ascertain for several reasons. Whereas most of the time periods set forth in the CRA are calculated in calendar days, the lookback period is calculated using Senate session days and House legislative days—terms of art with which most people are unfamiliar. The lookback period is also unpredictable because House legislative and Senate session days do not always correspond to each other, and the chambers regularly modify their anticipated calendar of session or legislative days, often with little advance notice. In addition, using legislative and session days to calculate the lookback period means interested Members of Congress can strategically lengthen or shorten the period, either by having legislative or session days extend for multiple calendar days or cramming several legislative or session days into a single calendar day. Perhaps most troublesome: Whereas most time periods under the CRA are calculated prospectively—that is, by counting forward from an established starting date—the lookback period is calculated retrospectively—that is, by counting backward from an end date that is not known until Congress adjourns sine die. The lookback period’s retrospective quality makes it effectively impossible to calculate in real time because the date on which the lookback period begins is only knowable once the period has closed. For those and other reasons, the public, Members of Congress, congressional staff, and agencies sometimes struggle to anticipate when the CRA’s lookback period will commence, or when it did commence, during a given session of Congress. In recent years, the lookback period has tended to commence between mid-July and early August, with the precise date varying from year to year.4

4 A Senate session day is “[a] calendar day on which [the Senate] convenes and then adjourns or recesses until a later calendar day,” while a House legislative day commences when the House convenes and continues until the House adjourns. See Richard S. Beth & Valerie Heitshusen, Cong. Rsch. Serv., R42977, Sessions, Adjournments, and Recesses of Congress 2, 6 (2016), https://crsreports.congress.gov/product/pdf/R/R42977.

Complicating matters still further, the CRA’s key dates do not necessarily align in ways that make sense. For instance, the CRA expressly provides that the introduction and lookback periods commence when an 801(a) report is submitted to Congress. But other, related CRA time periods—such as the periods for discharging a joint resolution from committee (the “discharge period”) and for fast-tracking a rule through the Senate (the “Senate action period”)—commence running only after Congress receives the report and the rule is published in the Federal Register. This can lead to anomalous situations. Members might, for instance, timely introduce joint resolutions of disapproval under the CRA and yet be unable to avail themselves of the CRA’s fast-track procedures.

At present, problems with synchronizing related CRA time windows are addressed primarily through interpretations from the Senate and House parliamentarians. For example, the Senate parliamentarian has interpreted the lookback and introduction periods to commence only after the 801(a) report has been submitted to Congress and the rule has been published in the Federal Register, thereby harmonizing the starting dates for those periods with the starting dates for the discharge and Senate action periods.

But relying on the parliamentarians’ interpretations creates its own problems. Chief among them is that the interpretations are not always easily accessible by the public. Although some of the parliamentarians’ interpretations are publicly available, many are not. Indeed, the formal rulings of the Senate parliamentarian have not been published in decades. In the case of the interpretations that are collected and published, moreover, most members of the public are either unaware of the interpretations’ existence or unsure how to access them.

Initiating CRA Review of Actions for Which Agencies Do Not Submit 801(a) Reports
Still another criticism of the CRA concerns what Congress should do to enable CRA review of agency actions for which agencies do not submit 801(a) reports. The CRA itself does not say what to do in those situations, even though studies show they arise frequently. Absent statutory text addressing the subject, Congress has adopted a process through which it initiates review of such agency actions by requesting an opinion from the Government Accountability Office (“GAO”). That process begins when Members or committees request a GAO opinion on whether an agency action qualifies as “rule” under the CRA. If GAO concludes...
that the action amounts to a rule under the CRA, a Member of Congress or a committee provides for publication of the GAO opinion in the *Congressional Record*. Publication in the *Congressional Record* is then deemed to be the date that triggers the time periods for CRA review of the agency action.

Although that process has worked tolerably well as a response to the problem of unreported rules, it lacks a clear basis in the CRA’s text. There are also aspects of it that warrant revisiting. For example, there is no time limit for using the current, *de facto* procedure, meaning Congress might use it to subject a decades-old action to CRA review.

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This Recommendation provides targeted, technical reforms to address many of the criticisms just identified—including criticisms of the hand-delivery requirement, criticisms prompted by the confusion surrounding key dates under CRA, and criticisms of the process for initiating CRA review of agency actions for which agencies do not submit 801(a) reports.

**RECOMMENDATION**


1. Congress should amend 5 U.S.C. § 801(a)(1)(A) to provide that the reports required by that provision (“801(a) reports”) be submitted to Congress and the Government Accountability Office (GAO) electronically rather than by hard copy.

2. In the event Congress does not enact the amendment described in Paragraph 1, both houses of Congress should modify their rules or policies to require electronic submission of 801(a) reports.

3. In the event that Congress, in some manner, mandates electronic submission of 801(a) reports, it should establish procedures governing how agencies may electronically submit 801(a) reports.

**Simplifying and Clarifying the Procedures for Determining Relevant Dates Under 5**

4. Congress should amend 5 U.S.C. § 801(d)(1) to set a fixed date after which, each year, rules submitted to Congress under the Congressional Review Act (“CRA”) will be subject to the CRA’s review process during the following session of Congress.

5. Congress should amend 5 U.S.C. § 802(a), which establishes the period during which joint resolutions of disapproval under the CRA may be introduced, to either:
   a. Eliminate the requirement that joint resolutions be introduced during a particular period; or
   b. Align the dates on which the period commences and ends with the period during which the Senate may act on a proposed joint resolution of disapproval submitted under the CRA.

6. Congress should review and, where appropriate, enact Parliamentarian interpretations that bear on calculating deadlines under the CRA, either as statutory law or as formal rules of the houses. If Congress does not enact those interpretations as statutory law, it should ensure that they are published in a manner that is accessible to the public.

Initiating Review of Agency Actions for Which Agencies Do Not Submit 801(a) Reports

7. Congress should amend Chapter 8 of Title 5 of the United States Code to provide a mechanism for initiating congressional review under the CRA of agency actions for which agencies do not submit 801(a) reports. In particular, Congress should enact the process it currently relies on to initiate CRA review of such agency actions, whereby:
   a. A Member or committee requests the opinion of the GAO on whether an agency action qualifies as a “rule” under the CRA;
   b. GAO issues an opinion as to whether the agency action in question qualifies as a “rule” under the CRA;
   c. If GAO concludes that the action amounts to a rule under the CRA, a Member of Congress or a committee provides for publication of the GAO opinion in the
Congressional Record; and

d. Publication of the GAO opinion in the Congressional Record is deemed to be the
date that triggers the time periods for CRA review of the agency action.

8. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should
   impose a time limit on its own use of that procedure.

9. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should
   permit legislators in both chambers to solicit a GAO opinion on whether a particular
   agency action is a rule.

10. Congress should consider imposing a deadline on GAO for issuing requested opinions on
    whether a particular agency action is a rule for purposes of the CRA.