



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Technical Reform of the Congressional Review

### Committee on Rulemaking

Proposed Recommendation | December 16, 2021

#### Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 The Congressional Review Act (CRA)<sup>1</sup> allows Congress to enact joint resolutions  
2 overturning rules issued by federal agencies. It also establishes special, fast-track procedures  
3 governing such resolutions. This Recommendation aims to address certain technical flaws in the  
4 Act and how it is presently administered.

#### The Hand-Delivery Requirement

5 The CRA provides that, before a rule can take effect, an agency must submit a report (an  
6 801(a) report) to each house of Congress and the Comptroller General, who heads the  
7 Government Accountability Office (GAO). Receipt of the 801(a) report by each house of  
8 Congress and the Comptroller General also triggers the CRA's special, fast-track procedures.

9 The CRA says nothing about how agencies must deliver 801(a) reports to Congress or the  
10 Comptroller General. Congressional rules, however, currently require that 801(a) reports be  
11 hand-delivered to both chambers of Congress. Although the House allows Members to  
12 electronically submit certain legislative documents and the Comptroller General permits agencies

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<sup>1</sup> 5 U.S.C. §§ 801–08.



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13 to electronically submit 801(a) reports, electronic submission is not generally regarded by  
14 Congress as an acceptable means of submitting 801(a) reports to Congress.

15 The hand-delivery requirement has been the subject of persistent criticism on the grounds  
16 that it is inefficient and outdated **and results in exorbitant costs to federal agencies**. Recent events  
17 have also shown that it is sometimes impracticable. For example, staffing disruptions related to  
18 the COVID-19 pandemic have, in some instances, meant that agencies had difficulty delivering  
19 801(a) reports by hand and congressional officials have not been present in the Capitol to receive  
20 801(a) reports via hand-delivery.

**Commented [CMA1]:** Proposed Amendment from  
Government Member Helen Serassio

### **Time Periods for Introducing and Acting on Resolutions Under the CRA**

21 Another source of persistent criticism of the CRA concerns the time periods during which  
22 Members of Congress may introduce and act on joint resolutions overturning agencies' rules.  
23 Under the CRA, Congress's receipt of an 801(a) report begins a period of 60 days, excluding  
24 days when either chamber adjourns for more than three days, during which any Member of either  
25 chamber may introduce a joint resolution disapproving the rule.<sup>2</sup> Only rules submitted during this  
26 period, sometimes called the "introduction period," are eligible for the CRA's special, fast-track  
27 procedures.

28 Calculating the introduction period can be confusing because it runs only on "days of  
29 continuous session"—that is, on every calendar day *except* those falling in periods when,  
30 pursuant to a concurrent resolution, at least one chamber adjourns for more than three days. As a  
31 practical matter, there is seldom a difference between 60 days of continuous session and 60  
32 calendar days because recent Congresses have made regular use of *pro forma* sessions to avoid  
33 adjournments of more than three days. Nevertheless, having to calculate the introduction period  
34 according to days of continuous session rather than calendar days can mislead people unfamiliar  
35 with the concept of days of continuous session or with recent Congresses' uses of *pro forma*

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<sup>2</sup> *Id.* § 802(a).



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36 sessions. Moreover, because modern Congresses invoke *pro forma* sessions in a way that negates  
37 almost any practical difference between days of continuous session and calendar days, the  
38 CRA’s use of days of continuous session to calculate the introduction period accomplishes little  
39 beyond complicating the process of ascertaining the period’s end date.

40 The introduction period is not the only complicated timing provision in the CRA.  
41 Another—sometimes called the “lookback period”—provides that if, within 60 days of session in  
42 the Senate or 60 legislative days in the House after Congress receives a rule, Congress adjourns  
43 its annual session *sine die* (i.e., for an indefinite period), the periods to submit and act on a  
44 disapproval resolution “reset” in their entirety in the next session of Congress.<sup>3</sup> In that next  
45 session, the reset period begins on the 15th day of the session in the Senate and the 15th  
46 legislative day in the House. The lookback period thus ensures that Congress has the full periods  
47 contemplated by the CRA to disapprove a rule, even if the rule is submitted near the end of a  
48 session of Congress.

49 The lookback period is anomalous and difficult to ascertain for several reasons. Whereas  
50 most of the time periods set forth in the CRA are calculated in calendar days, the lookback  
51 period is calculated using Senate session days and House legislative days—terms of art with  
52 which most people are unfamiliar.<sup>4</sup> The lookback period is also unpredictable because House  
53 legislative and Senate session days do not always correspond to each other, and the chambers  
54 regularly modify their anticipated calendar of session or legislative days, often with little  
55 advance notice. In addition, using legislative and session days to calculate the lookback period  
56 means interested Members of Congress can strategically lengthen or shorten the period, either by  
57 having legislative or session days extend for multiple calendar days or cramming several  
58 legislative or session days into a single calendar day. Perhaps most troublesome: Whereas most

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<sup>3</sup> *Id.* § 801(d)(1).

<sup>4</sup> 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), available at <https://crsreports.congress.gov/product/pdf/R/R42977>.



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59 time periods under the CRA are calculated prospectively—that is, by counting forward from an  
60 established starting date—the lookback period is calculated retrospectively—that is, by counting  
61 backward from an end date that is not known until Congress adjourns *sine die*. The lookback  
62 period’s retrospective quality makes it effectively impossible to calculate in real time because the  
63 date on which the lookback period begins is only knowable once the period has closed. For those  
64 and other reasons, the public, Members of Congress, congressional staff, and agencies sometimes  
65 struggle to anticipate when the CRA’s lookback period will commence, or determine when it did  
66 commence, during a given session of Congress.<sup>5</sup>

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

76 At present, problems with synchronizing related CRA time windows are addressed  
77 primarily through interpretations from the Senate and House Parliamentarians. For example, the  
78 Senate Parliamentarian has interpreted the lookback and introduction periods to commence only  
79 after the 801(a) report has been submitted to Congress *and* the rule has been published in the

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<sup>5</sup> 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. See Jesse M. Cross, Technical Reform of the Congressional Review Act 35 (Oct. 8, 2021) (draft report to the Admin. Conf. of the U.S.). In setting a commencement date for the lookback period, Congress may wish to consider the relationship between the CRA and what are sometimes called midnight rules (that is, rules published in the final months of an administration). See Admin. Conf. of the U.S., Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47802 (Aug. 10, 2012).



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80 *Federal Register*, thereby harmonizing the starting dates for those periods with the starting dates  
81 for the discharge and Senate action periods.

82 But relying on the Parliamentarians' interpretations creates its own problems. Chief  
83 among them is that the interpretations are not always easily accessible by the public. Although  
84 some of the Parliamentarians' interpretations are publicly available, many are not. Indeed, the  
85 formal rulings of the Senate Parliamentarian have not been published in decades. In the case of  
86 the interpretations that are collected and published, moreover, most members of the public are  
87 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**

88 Still another criticism of the CRA concerns what Congress should do to enable CRA  
89 review of agency actions for which agencies do not submit 801(a) reports. The CRA itself does  
90 not say what to do in those situations, even though studies show they arise frequently.

91 Absent statutory text addressing the subject, Congress has adopted a process through  
92 which it initiates review of such agency actions by requesting an opinion from the GAO. That  
93 process begins when Members of Congress or committees request a GAO opinion on whether an  
94 agency action qualifies as a "rule" under the CRA. If GAO concludes that it does, a Member or a  
95 committee provides for publication of the GAO opinion in the *Congressional Record*.  
96 Publication in the *Congressional Record* is then deemed to be the date that triggers the time  
97 periods for CRA review of the agency action.

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



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

**RECOMMENDATION**

**Requiring Electronic Submission of Reports Required by 5 U.S.C. § 801(a)(1)(A)**

- 106 1. Congress should amend 5 U.S.C. § 801(a)(1)(A) to provide that the reports required by  
107 that provision (801(a) reports) be submitted to Congress and the Government  
108 Accountability Office (GAO) electronically rather than by hard copy.  
109 2. In the event Congress does not enact the amendment described in Paragraph 1, both  
110 houses of Congress should modify their rules or policies to require electronic submission  
111 of 801(a) reports.  
112 3. In the event that Congress, in some manner, mandates electronic submission of 801(a)  
113 reports, it should establish procedures governing how agencies may electronically submit  
114 801(a) reports.

**Simplifying and Clarifying the Procedures for Determining Relevant Dates Under 5 U.S.C. §§ 801 and 802.**

- 115 4. Congress should simplify 5 U.S.C. § 801(d)(1) by setting a fixed month and day after  
116 which, each year, rules submitted to Congress under the Congressional Review Act  
117 (CRA) will be subject to the CRA’s review process during the following session of  
118 Congress.  
119 5. Congress should amend 5 U.S.C. § 802(a), which establishes the period during which

**Commented [CA2]:** Comment from Council:

The Council requests clarification from the Committee as to the following points:  
(1) Why did the Committee decide that electronic filing should be mandatory rather than permissive?  
(2) Are 801(a) reports publicly accessible? If so, how? Would electronic filing make the reports publicly accessible (or more easily so)?



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- 120 joint resolutions of disapproval under the CRA may be introduced, to either:
- 121 a. Eliminate the requirement that joint resolutions be introduced during a particular
- 122 period;
- 123 b. Align the dates on which the period commences and ends with the period during
- 124 which the Senate may act on a proposed joint resolution of disapproval submitted
- 125 under the CRA; or
- 126 c. Align the date on which the period commences with the period during which the
- 127 Senate may so act and provide that such period ends a fixed number of calendar
- 128 days from such commencement.
- 129 6. Congress should review and, where appropriate, enact Parliamentary interpretations
- 130 that bear on calculating deadlines under the CRA, either as statutory law or as formal
- 131 rules of the houses. If Congress does not enact those interpretations into statutory law, it
- 132 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

- 133 7. If Congress **intends to continue** its current practice for initiating congressional review
- 134 under the CRA of agency rules for which agencies have not submitted 801(a) reports, it
- 135 should provide a transparent mechanism for doing so. To that end, Congress should
- 136 amend Chapter 8 of Title 5 of the *United States Code* to enact the process it currently
- 137 relies on to initiate CRA review in such situations, whereby:
- 138 a. Any Member of Congress or committee may request the opinion of the GAO on
- 139 whether an agency action qualifies as a “rule” under the CRA;
- 140 b. After soliciting views from the agency, GAO responds by issuing an opinion as to
- 141 whether the agency action in question qualifies as a “rule” under the CRA;
- 142 c. If GAO concludes that the action amounts to a rule under the CRA, any Member
- 143 of Congress or committee may provide for publication of the GAO opinion in the
- 144 *Congressional Record*; and

**Commented [CMA3]:** Proposed Amendment from Senior Fellow Alan B. Morrison:

“I would propose that the recommendation as to GAO be changed to eliminate any recommendation that it have a determinative role in the triggering of the Act.” For a more detailed explanation, see Prof. Morrison’s Comment on the project’s webpage.



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- 145 d. Publication of the GAO opinion in the *Congressional Record* is deemed to be the  
146 date that triggers the time periods for CRA review of the agency rule.
- 147 8. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should  
148 impose a “statute of limitations” on the eligibility of rules for review under such  
149 procedure.
- 150 9. Congress should consider imposing a deadline on GAO for issuing requested opinions on  
151 whether a particular agency action is a rule for purposes of the CRA.