



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)¹ 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

¹ 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16 that it is inefficient and outdated **and results in exorbitant costs to federal agencies**.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.² 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*

² *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.³ 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.⁴ 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

³ *Id.* § 801(d)(1).

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), 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.⁵

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

⁵ 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.