

Agency Final Rules Submitted After May 16, 2016, May Be Subject to Disapproval in 2017 Under the Congressional Review Act

February 4, 2016 (IN10437)

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With a change in the occupancy of the White House taking place in 2017, some in Congress are paying renewed attention to a parliamentary mechanism that might enable a new Congress and new President to overturn agency final rules of the Obama Administration issued after mid-May 2016.

The [Congressional Review Act](#) (5 U.S.C. §§801-808), enacted as part of the 104th Congress's (1995-1996) "Contract with America," established a special parliamentary mechanism

whereby Congress can disapprove a final rule promulgated by a federal agency. While Congress has considered several CRA joint resolutions of disapproval since 1996, the CRA mechanism has successfully overturned only [one agency final rule](#): a 2000 Occupational Safety and Health Administration (OSHA) rule related to workplace ergonomics standards.

Perhaps the most widely cited reason why the CRA has overturned only one agency rule in 20 years is the de facto supermajority vote required to enact a CRA resolution of disapproval. While all of the congressional votes related to a CRA disapproval resolution are simple majority votes, the way the mechanism is structured all but assures that a veto override—requiring a two-thirds majority of both houses of Congress—will be necessary to enact the disapproval resolution. This is because a President is most likely to veto a joint resolution that attempts to strike down a rule proposed by his or her own Administration. For example, in the 114th Congress (2015-2016), President Barack Obama [has vetoed](#) four CRA disapproval resolutions presented to him by Congress.

Some argue that the inauguration of a new President in 2017 may present a finite window during which the congressional-executive dynamics described above may be different and the CRA disapproval mechanism might be used more successfully. This is because under the terms of the act, there is a brief period at the beginning of a new Administration during which rules issued toward the end of the previous Administration are eligible for CRA disapproval. Such late-issued agency rules are sometimes called "[midnight rules](#)." This is exactly the situation that led to the only successful use of the CRA mentioned above, where newly inaugurated President George W. Bush signed a CRA disapproval resolution invalidating the OSHA ergonomics rule issued by the Clinton Administration. Such circumstances could repeat in 2017 if the nation elects a President and Congress that oppose some late-issued final rules of the Obama Administration.

Here is how such a scenario might play out. The CRA establishes several time periods during which Congress might review and act to disapprove a final rule, including these:

- An "initiation" period, which begins on the date a final rule is submitted to Congress and lasts for 60 days thereafter (excluding days on which either house is in recess), during which joint resolutions disapproving the agency rule can be introduced by any Member of either chamber.
- A "discharge" period, which begins the day after a final rule is submitted to Congress and is published in the *Federal Register* and lasts for 20 calendar days thereafter. After the conclusion of this period, a petition signed by 30 Senators can be filed to discharge a Senate committee from the further consideration of a CRA joint resolution of disapproval.
- A "Senate action" period, which begins on the date a final rule is submitted to Congress and is published in the *Federal Register* and lasts for 60 days on which the Senate is in session thereafter, during which a disapproval resolution can be considered in the Senate under "fast track" parliamentary procedures that permit a simple majority of that chamber to reach a final vote on the resolution.

[Section 801\(d\)](#) of the CRA provides that, if a final rule is submitted to Congress either less than 60 days of session in the Senate or less than 60 legislative days in the House of Representatives before Congress adjourns a session sine die, a new period for congressional review of that rule becomes available in the next session of Congress. (Legislative days in the House are normally equal to its days of session.) For this purpose, the rule is treated as if it had been submitted to Congress and published in the *Federal Register* on the 15th

legislative day (House) or session day (Senate) of the new session for purposes of calculating the time periods described above.

Said another way, final rules submitted to Congress earlier than both the 60th day of Senate session and the 60th House legislative day before the day of the adjournment will not be subject to the additional periods for review in the following congressional session. Rules submitted on or after the 60th day before sine die adjournment in at least one chamber will be subject to the renewed periods for congressional review. These "reset" provisions are applied in the same way regardless of whether the session in question is the first or second session of a Congress and have particular significance in the second session of a Congress that corresponds with an outgoing presidential Administration for the reasons discussed above. These provisions ensure that an Administration cannot deny Congress the full periods for review and action contemplated by the CRA simply by submitting a final rule to Congress shortly before it adjourns for the year.

The projected second-session meeting schedules of the [House](#) and [Senate](#) issued by each chamber's majority leader may be used to estimate the date in 2016 after which final rules submitted to Congress will be subject to the renewed review periods in 2017 described above.

The estimated start of the reset period for all rules was determined by counting back from the projected sine die adjournment in the respective chambers—60 days of session in the Senate and 60 legislative days in the House—then taking the earlier of the two dates.

Under this calculation, agency final rules submitted to Congress after May 16, 2016, will be subject to renewed review periods in 2017 by a new President and a new Congress.

If the chambers deviate from the schedule projected by the party leaders, these estimates will necessarily change. Also, CRS day count estimates are unofficial and non-binding. The House and Senate Parliamentarians are the sole definitive arbiters of the operation of the CRA mechanism and should be consulted if a formal opinion is desired. For more on the Congressional Review Act, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress* and CRS Report R43992, *The Congressional Review Act: Frequently Asked Questions*.