



**UNRIG THE RULES**

# EXPLAINER



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## **Congressional Review Act Resolutions Overturning Recent Trump Administration Rulemakings**

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Congress is fast-tracking reversal of rulemakings from the Trump Administration under the Congressional Review Act (CRA). However, only certain rules are eligible for this process, and the window to use the CRA on Trump Administration rules is nearly shut. Three Trump-era rules are currently teed up for reversal under the CRA.

### **History of the CRA**

Congress enacted the Congressional Review Act 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.<sup>1</sup>

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<sup>1</sup> 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*<sup>2</sup> within 60 legislative days before the 116th Congress adjourned *sine die* (at the beginning of January 2021), then the 117th Congress has an opportunity to review those rules. **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 were eligible for consideration under the CRA.**<sup>3</sup>

Resolutions overturning those rules could be filed starting on the 15th legislative day of the 117th Congress and up to 60 calendar days thereafter. Congress then has 60 legislative days to act on a JROD once it is filed. Members of Congress had until April 4, 2021 to introduce JRODs to be eligible for CRA purposes. **The Senate had until May 27, 2021 to pass JRODs under expedited Senate procedures.** The House is able to pass a JROD at any time during the 117th Congress.

## Process

The CRA provides Congress with special procedures to consider JRODs to overturn a rule eligible for consideration. Any sitting member can 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).

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<sup>2</sup> 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.

<sup>3</sup> [The Application of the Congressional Review Act to Recent Trump Administration Rulemakings](#)

## 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 the discretion of the party in power.

A recent CRS [report](#) on the Congressional Review Act pointed to two rules<sup>4</sup> issued under the Trump Administration where previous versions of the rules were repealed under the CRA and concluded that “agencies may generally be in a fairly strong position to reissue rules.”

## Current JRODs in the 117th Congress

Six Trump-era rules could potentially be overturned by JRODs in the 117th Congress. No others were filed by the April 4, 2021 deadline. Three JRODs have passed the Senate but have not yet been passed in the House. To be considered under expedited procedure, a JROD had to pass the Senate by May 27, 2021.

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<sup>4</sup> The two reissued rules included: Department of Labor, “Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012,” 84 Federal Register 53037, October 4, 2019; and Securities and Exchange Commission, “Disclosure of Payments by Resource Extraction Issuers,” 86 Federal Register 4662, January 15, 2021.

<b>Rule</b>	<b>Agency</b>	<b>Summary</b>	<b>Federal Register Submission Date</b>	<b>Bill Number<sup>5</sup></b>	<b>Floor Action</b>
Methane (Review Rule)	Environmental Protection Agency	Rolls back legal rationale for EPA to regulate methane under Clean Air Act.	9/14/20	H.J.Res.34, S.J.Res.14	Passed Senate 4/28/21, awaiting House action
True Lender Rule	Treasury-Office of the Comptroller of the Currency	Allows financial institutions to get around state laws on interest rate caps.	10/30/20	H.J.Res.35, S.J.Res.15	Passed Senate 5/11/21, awaiting House action
Federal Contractor Nondiscrimination Revisions	Equal Employment Opportunity Commission	Makes it harder for workers that have faced discrimination to hold employers accountable.	11/10/20	H.J.Res.33, S.J.Res.13	Passed Senate 5/19/21, awaiting House action
Shareholder Proposal Procedure	Securities and Exchange Commission	Makes it harder for shareholders to hold corporate management accountable.	11/4/20	H.J.Res.36, S.J.Res.16	No floor action in either chamber before Senate deadline
Hearings Held by Administrative Appeals Judges	Social Security Administration	Makes it harder to access Social Security disability benefits.	11/16/20	H.J.Res.38	No floor action in either chamber before Senate deadline
HHS Sunset Rule	Department of Health and Human Services	Forces HHS to review thousands of existing rules to avoid those rules being “sunset” which distracts HHS from fighting the pandemic.	1/19/21	H.J.Res.37	No floor action in either chamber before Senate deadline

<sup>5</sup> For the two JRODs that have been introduced in the House but not the Senate, the House would have had to pass the JROD first in order to allow for Senate consideration of the House JROD, all prior to the CRA deadline in the Senate.