

## What CRA Deadline Means For Biden Admin. Rulemaking

By **Holly Fechner, Matthew Shapanka and Abby Rickeman** (May 10, 2024, 4:18 PM EDT)

With the 2024 election rapidly approaching, the Biden administration must race to finalize proposed agency actions as early as mid-May to avoid facing legislative nullification of certain rules if the Republican Party gains control of both chambers of Congress and the White House next year — or if select Democrats cross the aisle to support overturning Biden administration rules in the months leading up to Election Day.

The Congressional Review Act allows Congress to overturn rules issued by the executive branch by enacting a joint resolution of disapproval that cancels the rule and prohibits the agency from issuing a "rule that is substantially the same."<sup>[1]</sup>

One of the CRA's most unique features — a 60-day look-back period — allows the next Congress 60 days to review rules issued near the end of the last Congress.

This means that the administration must finalize and publish certain rules long before Election Day to avoid being eligible for CRA review in the new year.

As a result, some controversial rules may take effect this year and will not be subject to congressional disapproval after the new Congress takes office in 2025.

Industries and businesses affected by rules that take effect before the look-back period should therefore prepare to comply — or formulate their litigation strategies — rather than wait and see if Congress will cancel the rule.

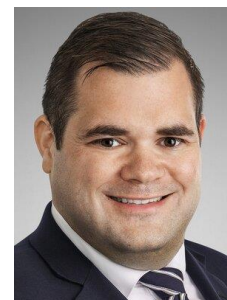
In addition to the threat that a future Republican Congress and administration would deploy the CRA to revoke Biden administration rules during the look-back period, some U.S. Senate Democrats have joined their Republican colleagues this Congress to cancel rules under the CRA.

Since the beginning of this Congress in 2023, more than a quarter of the 39 CRA resolutions introduced have passed with bipartisan support in the closely divided U.S. House of Representatives and Senate.

So far, none have become law this Congress: President Joe Biden has vetoed 9 CRA resolutions so far, and Congress did not override those vetoes.



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## **Overview of the CRA**

The CRA requires federal agencies to submit all final rules to Congress before the rule may take effect. It provides the House 60 legislative days, and the Senate 60 session days, to introduce a joint resolution of disapproval to overturn the rule.

This 60-day period counts every calendar day, including weekends and holidays, but excludes days that either chamber is out of session for more than three days pursuant to an adjournment resolution.

In the Senate, a joint resolution of disapproval receives only limited debate and may not be filibustered. Moreover, if it has been more than 20 calendar days since Congress received a final rule and a joint resolution has not been reported out of the appropriate committee, a group of 30 senators can file a petition to force a floor vote on the petition.

If a CRA resolution receives a simple majority in both chambers and is signed by the president, or if Congress overrides a presidential veto, the rule cannot go into effect, and is "treated as though such rule had never taken effect."<sup>[2]</sup> The agency is also barred from reissuing a rule that is "substantially the same," unless authorized by future law.<sup>[3]</sup>

Successful CRA resolutions are relatively rare — in the nearly 30-year history of the CRA, only 20 of the more than 200 CRA resolutions targeting more than 125 rules have become law.<sup>[4]</sup>

From the CRA's enactment in 1996 until January 2017, the CRA was successfully invoked only once, in March 2001, when a Republican Congress and a new Republican president — President George W. Bush — successfully nullified the ergonomics rules issued by the Occupational Safety and Health Administration during former President Bill Clinton's administration.

At the beginning of then-President Donald Trump's administration, the Republican Congress invoked the CRA to overturn 16 rules issued by the Obama administration, and at the beginning of the Biden administration, the Democratic Congress overturned 3 rules issued by the Trump administration.<sup>[5]</sup>

## **The CRA in the 118th Congress**

In a narrowly divided Congress, members of the president's own party can, even in small numbers, cross party lines to pass CRA resolutions that nullify the administration's rules. So far, since the 118th Congress convened in January 2023, 39 CRA resolutions have been introduced in Congress.

Of those 39 CRA resolutions, 10 have passed both chambers, and 15 have passed at least one chamber. The Senate, where Democrats hold a 51-49 majority, has voted to cancel a Biden administration rule 11 times so far this Congress.

Biden has vetoed each CRA resolution to reach his desk this Congress. Each Senate-passed CRA petition has secured the support of at least one Democratic senator — Sen. Joe Manchin, D-W.Va.

And other Democrats, including Sens. Jon Tester, D-Mont., and Sherrod Brown, D-Ohio, who are facing significant reelection campaigns also joined to overrule multiple rules. Sen. Kyrsten Sinema, I-Ariz. — who was first elected as a Democrat and who, like Manchin, is retiring — has likewise joined to overrule multiple rules.

Other Democrats — including Sens. Tammy Baldwin, D-Wis.; Bob Casey, D-Pa.; John Fetterman, D-Pa.; John Hickenlooper, D-Colo.; Amy Klobuchar, D-Minn; and Jacky Rosen, D-Nev. — as well as Sen. Angus King, I-Maine, have each supported one CRA resolution so far this Congress.

A sufficient number of Senate Democrats have joined with Republicans to pass CRA resolutions that would have overturned 10 rules, including:

- The U.S. Environmental Protection Agency and U.S. Department of Defense's rule expanding the scope of federal waters covered by the Clean Water Act;[6]
- The U.S. Department of Education rule suspending and discharging student loans;[7]
- The U.S. Fish and Wildlife Service rules adding **certain species** of lesser prairie chicken to the threatened and endangered species list,[8] and reclassifying the northern long-eared bat as an endangered species;[9] and
- The Federal Highway Administration rule waiving "Buy America" requirements for certain materials used in electric vehicle chargers.[10]

### **Election Year Threat: CRA Look-Back Period**

Although no CRA resolutions have canceled a rule yet this Congress, the CRA's special procedures pose unique challenges for federal agencies in an election year.

If a rule is submitted to Congress within 60 days before adjournment, the CRA's look-back provision allows the 60-day timeline to introduce a CRA resolution to start over in the next session of Congress.

This procedure ultimately requires the current administration to assess the threat of a CRA resolution and determine whether to issue the rule safely before the deadline or risk a potential CRA challenge in the new Congress.

### **Mid-May Deadline Estimated for Biden Agency Actions**

Calculating the CRA deadline is exceedingly difficult for the administration because it is a moving target. The House and Senate may each cancel or add days to their legislative calendar right up until adjournment, making it impossible to calculate the deadline with precision.

Moreover, the look-back period starts on the date that is 60 days before adjournment, regardless of which chamber reaches that threshold first. In other words, if the date that is 60 House legislative days before adjournment falls on a date that is 65 Senate session days prior to adjournment, that date starts the look-back window, even though the Senate is not within 60 session days of adjournment.

While only the House and Senate parliamentarians can determine the look-back window with authority, based on the currently released House and Senate calendars, agency rules submitted to Congress before May 22 will not be subject to CRA review by the new 119th Congress in 2025.

However, since this deadline is based on the House calendar, it would be pushed later if the House were to add legislative days to the calendar to complete legislative work.

## Administration Preparations

Agency leaders are working to finalize rules in time to meet this deadline. At a recent American Law Institute Continuing Legal Education conference, EPA Associate Administrator for Policy Vicki Arroyo explained that the deadline is "something that [the EPA is] very focused on."<sup>[11]</sup>

Although the deadline is uncertain, she noted that to be cautious, agencies may submit rules as "early as the end of April or May."<sup>[12]</sup>

Federal agencies have already submitted, or plan to submit, a flurry of rules to Congress before the late May deadline, including:

- An EPA rule<sup>[13]</sup> that sets new standards to reduce air pollutant emissions from cars, and a rule<sup>[14]</sup> that requires fossil fuel plants to rely on new technologies to reduce pollution levels;
- A U.S. Department of Labor rule<sup>[15]</sup> that modifies wage and hour regulations to clarify the criteria for classifying workers as independent contractors as opposed to employees, and a rule<sup>[16]</sup> that narrows the standards to classify as exempt from the Fair Labor Standards Act's minimum pay and overtime requirements;
- A U.S. Department of Justice rule that takes additional steps to implement the Bipartisan Safer Communities Act, which makes various changes to federal firearm laws, including expanding background check requirements and broadening the scope of existing restrictions;<sup>[17]</sup>
- The U.S. Department of Energy's regulations setting consumer water heater energy efficiency standards to lower utility costs for American families and increase energy savings;<sup>[18]</sup>
- An Office of Personnel Management rule that would implement stronger guardrails for career employees, allowing them to keep civil service protections unless they voluntarily accept a political appointee position, and adding requirements when reclassifying career positions as political appointments;<sup>[19]</sup>
- A Bureau of Land Management rule setting management standards that put conservation on par with resource extraction to protect public lands and restore degraded habitats;<sup>[20]</sup>
- A U.S. Department of Health and Human Services rule that establishes comprehensive minimum staffing standards for nursing homes;<sup>[21]</sup> and
- A U.S. Department of Housing and Urban Development rule proposing a framework to ensure that federal funding is used in a systematic way to affirmatively support the goals of the Fair Housing Act.<sup>[22]</sup>

Some rules will not be finalized by the deadline, which could signal that agency leaders view these rules as less vulnerable to the CRA, either because they enjoy bipartisan support or because they are not politically polarizing.

For example, the EPA plans to finalize a rule in October that would mandate actions to reduce lead exposure, including replacing lead pipes within the next 10 years.<sup>[23]</sup>

In addition, several rules were recently submitted to the Office of Information and Regulatory Affairs, which generally has 90 days to review a rule before it is sent to Congress. It is possible that OIRA's 90-day review period will push these rules past the May deadline for submission to Congress.

Examples of these rules include:

- An Education Department rule that establishes a negotiated rulemaking committee to prepare regulations for the federal student aid programs related to the modification, waiver, release or compromise of student loans under the Higher Education Act;<sup>[24]</sup>
- A Social Security Administration rule that expands the definition of a public assistance household to reduce administrative burdens for low-income households participating in public assistance programs;<sup>[25]</sup> and
- A U.S. Department of Agriculture rule that sets standards for labeling meat and poultry products produced using animal cell culture technology — a process that involves taking a small number of cells from living animals and growing them in a controlled environment to generate food.<sup>[26]</sup>

The fate of these rules may depend on how soon the administration can finish these rulemakings and submit them to Congress. Otherwise, the outcome of the 2024 election may determine whether these rules ever take effect.

For regulated industries and businesses, or other stakeholders that might support a particular rule, rules finalized before the deadline will likely be shielded from the CRA by Biden's veto.

Conversely, for opponents of a particular rule, the CRA offers a legislative path for overturning those rules without litigation.

The rapidly approaching CRA deadline gives opponents of certain rules a second chance to attempt to nullify regulatory actions of this administration in a new Congress.

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[1] <https://uscode.house.gov/view.xhtml?path=/prelim@title5/part1/chapter8&edition=prelim>.

[2] 5 U.S.C. § 801(f).

[3] Id. § 801(b).

[4] <https://www.ncsl.org/state-federal/congressional-review-act-overview-and-tracking>.

[5] <https://www.globalpolicywatch.com/2021/02/democrats-expected-to-invoke-congressional-review-act-to-repeal-trump-era-regulations/>.

[6] H.J. Res. 27, <https://www.congress.gov/bill/118th-congress/house-joint-resolution/27>.

[7] H.J. Res. 45, <https://www.congress.gov/bill/118th-congress/house-joint-resolution/45>.

[8] S.J. Res. 9, <https://www.congress.gov/bill/118th-congress/senate-joint-resolution/9>.

[9] S.J. Res. 24, <https://www.congress.gov/bill/118th-congress/senate-joint-resolution/24>.

[10] S.J. Res. 38, <https://www.congress.gov/bill/118th-congress/senate-joint-resolution/38>.

[11] Kevin Bogardus, Murky Deadline Looms for Biden's Regs, E&E News by Politico (Mar. 21, 2024).

<https://www.eenews.net/articles/murky-deadline-looms-for-bidens-regs/>.

[12] Kevin Bogardus, Murky Deadline looms for Biden's Regs, E&E News by Politico (Mar. 21, 2024), <https://www.eenews.net/articles/murky-deadline-looms-for-bidens-regs/>.

[13] <https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-multi-pollutant-emissions-standards-model>.

[14] <https://www.federalregister.gov/documents/2023/05/23/2023-10141/new-source-performance-standards-for-greenhouse-gas-emissions-from-new-modified-and-reconstructed>.

[15] <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>.

[16] <https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>.

[17] <https://www.federalregister.gov/documents/2023/09/08/2023-19177/definition-of-engaged-in-the-business-as-a-dealer-in-firearms>.

[18] <https://www.federalregister.gov/documents/2023/07/28/2023-15306/energy-conservation-program-energy-conservation-standards-for-consumer-water-heaters>.

[19] <https://www.federalregister.gov/documents/2023/09/18/2023-19806/upholding-civil-service-protections-and-merit-system-principles#:~:text=OPM%20proposes%20this%20rule%20to,created%20the%20competitive%20civil%20service>.

[20] <https://www.federalregister.gov/documents/2023/04/03/2023-06310/conservation-and-landscape-health>.

[21] <https://www.federalregister.gov/documents/2023/09/06/2023-18781/medicare-and-medicaid-programs-minimum-staffing-standards-for-long-term-care-facilities-and-medicaid>.

[22] <https://www.federalregister.gov/documents/2023/02/09/2023-00625/affirmatively-furthering-fair-housing>.

[23] <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2040-AG16>.

[24] <https://www.federalregister.gov/documents/2023/08/31/2023-18853/negotiated-rulemaking-committee-negotiator-nominations-and-schedule-of-committee-meetings>.

[25] [https://www.federalregister.gov/documents/2023/09/29/2023-21550/expand-the-definition-of-a-public-assistance-household#:~:text=SUMMARY%3A,income%20maintenance%20\(PIM\)%20program](https://www.federalregister.gov/documents/2023/09/29/2023-21550/expand-the-definition-of-a-public-assistance-household#:~:text=SUMMARY%3A,income%20maintenance%20(PIM)%20program).

[26] <https://www.federalregister.gov/documents/2021/09/03/2021-19057/labeling-of-meat-or-poultry-products-comprised-of-or-containing-cultured-animal-cells>.