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What Is the Effect of Enacting a Congressional Review Act Resolution of Disapproval?

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The Congressional Review Act (CRA) provides Congress with a set of special parliamentary procedures to consider legislation to overturn federal regulations. Thus far, the 115th Congress has disapproved a total of 16 regulations that had been issued by the Obama Administration, leading to questions about the effects of enactment of a CRA disapproval resolution.

Enactment of a CRA joint resolution of disapproval has two primary effects—one immediate and one more long-term. The immediate effect is that a rule subject to a disapproval resolution may not go into effect, or, if the rule has already taken effect, it is treated as though it had never taken effect.

Second, the agency may not reissue the rule in "substantially the same form" or issue a "new rule that is substantially the same" as the disapproved rule "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." There is no time limit on this provision: The prohibition on any agency issuing a "substantially the same" rule without further authorization appears indefinite.

The CRA does not define the phrase *substantially the same*, nor does it identify what criteria should be considered in evaluating whether a rule falls into this category. The relevant factors would likely depend on the specific rule at hand, as well as the underlying statutory authority or requirement for the rule. For example, if the underlying statute authorizing the promulgation of the regulation gave the agency broad discretion as to whether and how to issue the rule, the agency would likely have a wide amount of discretion in responding to a disapproval resolution. The agency could, for example, choose not to reissue the rule, as was the case with the Clinton Administration's ergonomics rule that was disapproved in 2001, or the agency could choose to reissue a rule that was not substantially the same. If, on the other hand, the underlying statute contained a specific requirement or instruction for the rule, the agency may have less discretion moving forward. It should be noted, however, that enactment of a CRA resolution does not remove any underlying statutory requirement that an agency may have to issue the rule. Presumably, therefore, it would be incumbent upon the agency to make the initial determination of how to meet its statutory obligation to issue a rule while not violating the CRA's "substantially the same" provision.

Following enactment of the CRA, its sponsors inserted into the *Congressional Record* a joint explanatory statement, in which they observed that "no formal legislative history was prepared to explain" the CRA and that the statement was "intended to cure this deficiency." Even this post-enactment legislative history,

which may be of limited legal value in interpreting a statute, does not provide a definition of *substantially the same*. The statement did, however, acknowledge that the provision "may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule." The sponsors indicated in the statement that Congress should, when considering a joint resolution of disapproval, provide guidance to the agency on how to proceed following enactment of the joint resolution, including with regard to the "substantially the same" provision: "The committees [that wrote the CRA] intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval." Because the CRA stipulates the text of a disapproval resolution, however, such direction could not be provided in the text of the disapproval resolution itself: It would have to be given through legislative history, as the quote suggests, or enactment of separate legislation.

The CRA is also silent on the question of who determines whether an amended rule or new rule is "substantially the same" as a disapproved rule. Because a subsequent rule would also be subject to the CRA, however, Congress would have the opportunity to take action under the CRA again if Congress determined that a reissued rule was substantially the same as the disapproved rule.

Importantly, Section 805 of the CRA states that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." Most courts have concluded that this provision does not allow courts to consider any claims under the CRA. (For a complete discussion of the relevant cases on the CRA's judicial review provision, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*.)

Given this prevailing interpretation of the CRA's judicial review provision, one could argue that evaluating whether the "substantially the same" prohibition has been violated may be a matter for Congress alone to decide. To the extent that courts have interpreted the CRA as limiting their role in reviewing the law's requirements, Congress would appear to be the sole arbiter of whether a reissued version was substantially similar and should be struck down again under the CRA, or whether it should be allowed to go into effect.

Despite the CRA's prohibition on the issuance of rules that are "substantially the same," it does not appear that all disapproved rules would require specific authorization for the agency to reissue a different version of the rules. For example, when Congress or a court has established a deadline for promulgating a rule, and an agency promulgates that rule, Section 803 of the CRA provides that, in the event Congress disapproves the rule, the deadline for the agency to promulgate a new rule under the same statutory authority is extended for one year from the date that Congress enacted the disapproval resolution. This language indicates that Congress contemplated that agencies could continue to issue rules in the same issue area and under the same statutory authority, even following the enactment of a joint resolution of disapproval.