

**GAO**

Testimony

Before the Subcommittee on Commercial  
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# FEDERAL RULEMAKING

## Perspectives on 10 Years of Congressional Review Act Implementation

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Highlights of [GAO-06-601T](#), testimony to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

## Why GAO Did This Study

This year marks the 10<sup>th</sup> anniversary of the Congressional Review Act (CRA). Congressional oversight of rulemaking using the CRA can be an important and useful tool for monitoring the regulatory process and balancing and accommodating the concerns of American citizens and businesses with the effects of federal agencies' rules. This statement provides an overview of the purpose and provisions of CRA; GAO's role and activities in fulfilling its responsibilities under the Act; and trends on CRA within the broader context of developments in presidential and congressional oversight of federal agencies' rulemaking.

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## FEDERAL RULEMAKING

# Perspectives on 10 Years of Congressional Review Act Implementation

## What GAO Found

CRA gives Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable. Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget specifies which rules are designated as major rules based on criteria set out in the CRA. Major rules cannot be effective until 60 days after publication in the *Federal Register* or submission to Congress and GAO, whichever is later. Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. Members of Congress seldom have attempted to use this process.

GAO's role under CRA is to provide Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's compliance with the procedural steps required by various acts and executive orders governing the regulatory process. GAO compiles information on the rules it receives under CRA in a database containing basic information about major and nonmajor rules. GAO also conducts an annual review to determine whether all final rules covered by the Act and published in the *Federal Register* have been filed with the Congress and GAO. Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after CRA's enactment, compliance improved over time.

There have been a limited number of CRA joint resolutions, but the benefits of compiling and making information available on potential federal actions should not be underestimated. The procedures for congressional disapproval also may have some deterrent effect. Efforts to enhance presidential oversight of agencies' rulemaking appear to have been more significant and widely employed in recent years than similar efforts to enhance congressional oversight. Some recent legislative proposals have focused on expanding the information and analysis available to Congress on pending rules, while others focus on enhancing the mechanisms that Congress could employ for its own review—and potential disapproval—of agencies' rules.

### Facts on CRA since Its Enactment on March 29, 1996

- 37 Joint Resolutions of Disapproval introduced affecting 28 rules
- 1 rule nullified by Congress through Joint Resolution procedures
- 610 major rules received and reported on by GAO
- 41,218 nonmajor rules entered into GAO database
- About 200 nonmajor rules per year not filed with GAO
- All 610 major rules filed with GAO in a timely fashion
- 71 of 610 major rules—effective date not delayed for required 60 days

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Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today on the 10th anniversary of the enactment of the Congressional Review Act (CRA).<sup>1</sup> As you know, CRA was enacted to ensure that Congress has an opportunity to review, and possibly reject, rules before they become effective. Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. We are required to provide Congress with a report on each major rule concerning our assessment of the promulgating federal agency's compliance with the procedural steps required by various acts and executive orders governing the regulatory process.

Over the past 10 years, agencies have submitted information on thousands of rules as required by the CRA. Although we generally found that agencies complied with CRA's requirements, one main area of noncompliance has been that agencies have not always delayed the effective date of their major rules for 60 days, as required by the Act. While considerable information on agencies' rules has been reported under CRA, to date Congress has used the Act to disapprove only one rule, the Department of Labor's rule on ergonomics in 2001. In contrast, our reviews indicated that efforts to increase presidential influence and authority over the regulatory process have become more significant and widely used over the years.

In my statement today, I will focus on three topics. First, I will provide a quick overview of the purpose and provisions of CRA. Second, I will discuss GAO's role in fulfilling its responsibilities under the Act and summarize our CRA activities over the years. Finally, I will address CRA within the broader context of developments in presidential and congressional oversight of federal agencies' rulemaking. My statement is based on our activities and observations implementing our responsibilities under CRA over the past decade and our related body of work reviewing federal regulatory issues.

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<sup>1</sup>5 U.S.C. §§ 801-808. CRA was enacted as Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, on March 29, 1996.

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## Overview of CRA Purpose, Procedures, and Requirements

Congressional oversight of rulemaking using the CRA can be an important and useful tool for monitoring the regulatory process and balancing and accommodating the concerns of American citizens and businesses with the effects of federal agencies' rules. As we noted early in the implementation of CRA, it is important to assure that executive branch agencies are responsive to citizens and businesses about the reach, cost, and impact of regulations, without compromising the statutory mission given to those agencies.<sup>2</sup> CRA seeks to accomplish this by giving Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable.

With certain exceptions, CRA applies to most rules issued by federal agencies, including the independent regulatory agencies.<sup>3</sup> Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. CRA defines a "major" rule as one which results or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. CRA specifies that the determination of what rules are major is to be made by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB). Major rules cannot be effective until 60 days after publication in the Federal Register or submission to Congress and GAO, whichever is later. Nonmajor rules become effective when specified by the agency, but not before they are filed with Congress and GAO.

CRA established a procedure by which members of Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. If such a resolution becomes law, the rule then

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<sup>2</sup>GAO, *Congressional Review Act*, [GAO/T-OGC-97-29](#) (Washington, D.C.: Mar. 6, 1997).

<sup>3</sup>In addition to some general exceptions, such as one regarding any rule relating to agency management or personnel, CRA does not apply to any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act. Nor does CRA apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

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cannot take effect or continue in effect. In addition, CRA prohibits an agency from reissuing such a rule in substantially the same form, or 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. Members of Congress seldom have attempted to use this disapproval process. Over the past decade, 37 joint resolutions of disapproval have been introduced regarding 28 rules. Only once has Congress used this disapproval process to nullify a rule, when it disapproved the Department of Labor's rule on ergonomics in 2001.<sup>4</sup>

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## GAO's Role and Activities under CRA

GAO's only stated role under CRA is to provide Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's "compliance with the procedural steps" required by various acts and executive orders governing the regulatory process. These include preparation of a cost-benefit analysis, when required, and compliance with the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995 (UMRA), the Administrative Procedure Act (APA), the Paperwork Reduction Act, and Executive Order 12866. GAO's report must be sent to the congressional committees of jurisdiction within 15 calendar days of the publication of the rule or submission of the rule by the agency, whichever is later. While the CRA is silent with regard to GAO's role concerning nonmajor rules, we found that basic information about those rules also should be collected in a manner that can be of use to Congress and the public.

To compile information on all the rules submitted to us under CRA, we established a database, available to the public on the Internet.<sup>5</sup> Our database gathers basic information about the 15–20 major and nonmajor rules that we receive each day, including the title, the agency, the Regulation Identification Number, the type of rule, the proposed effective date, the date published in the Federal Register, the congressional review trigger date, and any joint resolutions of disapproval that may have been introduced. We created a standardized submission form available on the Internet, which is used by almost all the agencies, to allow more consistent

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<sup>4</sup>Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

<sup>5</sup>GAO's Federal Rules Database is publicly available at [www.gao.gov](http://www.gao.gov) under the "Legal Products" link. The reports we prepare on major rules under CRA are also available on that site.

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information collection. Since CRA was enacted on March 29, 1996, we have received and submitted timely reports on 610 major rules and entered 41,218 nonmajor rules into the database.<sup>6</sup>

As noted earlier, before a rule can become effective, it must be filed in accordance with CRA. We conduct an annual review to determine whether all final rules covered by the Act and published in the Federal Register have been filed with the Congress and us. We perform the review to both verify the accuracy of our database and to ascertain the degree of agency compliance with CRA. We forward a list of unfiled rules to OIRA for their handling, and, in the past, they have disseminated the list to the agencies, most of which file the rules or offer an explanation of why they do not believe a rule is covered by CRA.

Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after CRA's enactment, compliance improved over time. In general, we have found the degree of compliance to have remained fairly constant, with roughly 200 nonmajor rules per year not filed with our office. In the 10 years since CRA was enacted, all major rules have been filed in a timely fashion.

In the past 10 years, we also have issued eight opinions regarding what constitutes a "rule" under CRA in response to requests from congressional committees and members concerning various agency pronouncements and memorandums. CRA contains a broad definition of the term "rule," including more than the usual notice and comment rulemakings published in the Federal Register under APA. Under CRA, "rule" means the whole or part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy. For example, in 1996 we concluded that a memorandum issued by the Secretary of Agriculture in connection with the Emergency Salvage Timber Sale Program constituted a rule under CRA and should have been submitted to Congress and GAO before it could become effective.<sup>7</sup> Similarly, in 2001, we concluded that a Fish and Wildlife Service Record of Decision entitled "Trinity River Mainstem Fishery Restoration" was a rule covered by CRA.<sup>8</sup> We believe these opinions have strengthened the reach of CRA by insuring

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<sup>6</sup>Number of major and nonmajor rules are as of March 24, 2006.

<sup>7</sup>See B-274505, Sept. 16, 1996.

<sup>8</sup>See B-287557, May 14, 2001.

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compliance with the main thrust of the Act, which was to insure that agency actions, whether labeled a “rule” by the agency or not, are subject to congressional review. We have noted that certain congressional committees, such as the Joint Committee on Taxation, were taking an active role in overseeing agency compliance with CRA. As a result, for example, Internal Revenue Service procedures, rulings, regulations, notices, and announcements are forwarded as CRA submittals.

The one major area of noncompliance with the requirements of the Act has been that agencies have not always delayed the effective date of major rules for 60 days as required by the Act.<sup>9</sup> Agencies have filed 610 major rules with our office, and, for 71 of those rules, the agencies did not delay the effective date for the required 60 days.

One reason for noncompliance with the 60-day delay is that the agencies have misapplied the “good cause” exception which waives the delay of the rule if it would be impracticable, unnecessary, or contrary to the public interest.<sup>10</sup> Since the enactment of CRA, our office has consistently held that the “good cause” exception is only available if a notice of proposed rulemaking was not published and public comments were not received.<sup>11</sup> Many agencies, following a notice of proposed rulemaking and receipt of comments, have stated in the preamble to the final major rule that “good cause” existed for not providing the 60-day delay.

The other reason for noncompliance is that the statute that an agency is implementing by issuing the final major rule contains a date by which the Secretary or Administrator must issue the regulation, and the date, in many instances, does not permit the 60-day delay. However, the CRA states that it shall apply notwithstanding any other provision of law.<sup>12</sup>

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<sup>9</sup>5 U.S.C. § 801(a)(3)(A).

<sup>10</sup>5 U.S.C. § 808(2).

<sup>11</sup>See B-275549; B-275552, Dec. 9, 1996.

<sup>12</sup>5 U.S.C. § 806(a).

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## Trends in Presidential and Congressional Review of Rulemaking

Agencies and GAO have provided Congress a considerable amount of information about forthcoming rules in response to CRA. The limited number of CRA joint resolutions introduced might suggest that this information generates little additional oversight of rulemaking. However, as we found in our review of the information generated on federal mandates under UMRA, the benefits of compiling and making information available on potential federal actions should not be underestimated.<sup>13</sup> Further, as we also found regarding UMRA, the availability of procedures for congressional disapproval may have some deterrent effect. The Congressional Research Service has reported that several rules have been affected by the presence of the review mechanism, suggesting that the CRA review scheme has had some influence.

Still, as I noted in my testimony before this Subcommittee last November, efforts to enhance presidential oversight of agencies' rulemaking appear to have been more significant and widely employed in recent years than similar efforts to enhance congressional oversight.<sup>14</sup> In particular, our reviews have noted the growing influence and authority of OIRA in the oversight of the regulatory process.<sup>15</sup> Some of this increased activity reflects administration initiatives, but it also includes some new responsibilities assigned by Congress through statute, such as the requirement for OMB to issue governmentwide guidance to implement the Information Quality Act.<sup>16</sup>

In contrast, there does not appear to have been a similar expansion of direct congressional influence and authority over the regulatory process, although bills have been introduced over the years to enhance the mechanisms available for congressional oversight of agencies' rulemaking. Some recent legislative proposals have focused on expanding the information and analysis available to Congress on pending rules, while

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<sup>13</sup>See GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, [GAO-04-637](#) (Washington, D.C.: May 12, 2004) and *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, [GAO-05-454](#) (Washington, D.C.: Mar. 31, 2005).

<sup>14</sup>See GAO, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, [GAO-06-228T](#) (Washington, D.C.: Nov. 1, 2005).

<sup>15</sup>See GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, [GAO-03-929](#) (Washington, D.C.: Sept. 22, 2003).

<sup>16</sup>The Information Quality Act is also known as the Data Quality Act. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (Dec. 21, 2000).



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others focus on enhancing the mechanisms that Congress could employ for its own review—and potential disapproval—of agencies’ rules.

As the major example of the first category of proposals, Congress passed the Truth in Regulating Act (TIRA) in 2000 to provide a mechanism for it to obtain more information about certain rules.<sup>17</sup> In contrast to the essentially procedural reviews that GAO now conducts under CRA, TIRA contemplated a 3-year pilot project during which GAO would perform independent evaluations of “economically significant” agency rules when requested by a chairman or ranking member of a committee of jurisdiction of either House of Congress. However, during the 3-year period contemplated for the pilot project, Congress did not enact any specific appropriation to cover TIRA evaluations, as called for in the Act, and the authority for the 3-year pilot project expired on January 15, 2004. Therefore, we have no information on the potential effectiveness of this mechanism.

Congress has considered reauthorizing TIRA, and we have strongly urged that any reauthorization of TIRA continue to contain language requiring a specific annual appropriation for GAO before we are required to undertake independent evaluations of major rulemakings. Such an expansion of GAO’s current lines of business without additional dedicated resources would pose a serious problem for us, especially in light of what will likely be increasing budgetary constraints in the years ahead. It would also likely serve to adversely affect our ability to provide the same level of service to the Congress in connection with our existing statutory authorities. We have also recommended that TIRA evaluations be conducted under a pilot project basis.

Members of Congress have also introduced several bills over the past year that would provide additional mechanisms for direct review and approval (or disapproval) of agencies’ rules.<sup>18</sup> Some of these proposals would modify how Congress reviews information submitted under CRA and how the disapproval procedures would work. These bills could, for example, create a joint committee that would be tasked with reviewing all rules to determine whether a disapproval resolution under CRA should be introduced. We have conducted no work that would provide information on the potential effectiveness of such changes.

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<sup>17</sup>Pub. L. No. 106-312, 114 Stat. 1248 (Oct. 17, 2000), 5 U.S.C. § 801 note.

<sup>18</sup>See, for example, H.R. 576, H.R. 931, and H.R. 3148.

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Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other Members of the Subcommittee might have at this time.

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6806 or [mihmj@gao.gov](mailto:mihmj@gao.gov).

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