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The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress

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Summary

The Congressional Review Act (CRA) allows Congress to review certain types of federal agency actions that fall under the statutory category of "rules." The CRA requires that agencies report their rules to Congress and provides special procedures under which Congress can consider legislation to overturn those rules. A joint resolution of disapproval will become effective once both houses of Congress pass a joint resolution and it is signed by the President, or if Congress overrides the President's veto.

The CRA generally adopts a broad definition of the word "rule" from the Administrative Procedure Act (APA), defining a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."

The CRA, however, provides three exceptions to this broad definition:

- any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;
- any rule relating to agency management or personnel; or
- any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

The class of rules the CRA covers is broader than the category of rules that are subject to the APA's notice-and-comment requirements. As such, some agency actions, such as guidance documents, that are not subject to notice-and-comment rulemaking procedures may still be considered rules under the CRA and thus could be overturned using the CRA's procedures. The effect of Congress disapproving a rule that is not subject to notice-and-comment rulemaking may be subject to debate, given that such rules are generally viewed to lack any legal effect in the first place. Nonetheless, the CRA does encompass some such rules, as highlighted by the recent enactment of a CRA resolution overturning a bulletin from the Consumer Financial Protection Bureau that was not subject to the notice-and-comment procedures.

Even if an agency action falls under the CRA's definition of "rule," however, the expedited procedures for considering legislation to overturn the rule only become available when the agency submits the rule to Congress. In many cases in which agencies take actions that fall under the scope of a "rule" but have not gone through notice-and-comment rulemaking procedures, agencies fail to submit those rules. Thus, questions have arisen as to how Members can avail themselves of the CRA's special fast-track procedures if the agency has not submitted the action to Congress.

To protect its prerogative to review agency rules under the CRA, Congress and the Government Accountability Office (GAO) have developed an ad hoc process in which Members can request that GAO provide a formal legal opinion on whether a particular agency action qualifies as a rule under the CRA. If GAO concludes that the action in question can be considered a rule under the CRA, Congress has treated the publication of the GAO opinion in the *Congressional Record* as constructive submission of the rule. In other words, an affirmative opinion from GAO can allow Congress to use the CRA procedures to consider legislation overturning an agency action despite the agency not submitting that action to Congress.

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The Congressional Review Act (CRA) allows Congress to review certain types of federal agency actions that fall under the statutory category of "rules."[1] Enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act, the CRA requires agencies to report the issuance of "rules" to Congress and provides Congress with special procedures under which to consider legislation to overturn those rules.[2] A joint resolution of disapproval will become effective once both houses of Congress pass a joint resolution and it is signed by the President, or if Congress overrides the President's veto.[3]

For an agency's action to be eligible for review under the CRA, it must qualify as a "rule" as defined by the statute.[4] The class of rules covered by the CRA is broader than the category of rules that are subject to the Administrative Procedure Act's (APA's) notice-and-comment requirements.[5] As such, some agency actions, such as guidance documents, that are not subject to notice-and-comment rulemaking procedures may still be considered rules under the CRA and thus could be overturned using the CRA's procedures.

The 115th Congress used the CRA to pass, for the first time, a resolution of disapproval overturning an agency guidance document that had not been promulgated through notice-and-comment procedures.[6] The resolution was signed into law by the President on May 21, 2018.[7] In all of the previous instances in which the CRA was used to overturn agency actions, the disapproved actions were regulations that had been adopted through APA rulemaking processes.[8] This recent congressional action has raised questions about the scope of the CRA and Congress's ability to use the CRA to overturn agency actions that were not promulgated through APA notice-and-comment procedures.

Under the CRA, the expedited procedures for considering legislation to overturn rules become available only when agencies submit their rules to Congress.[9] In many cases in which agencies take actions that meet the legal definition of a "rule" but have not gone through notice-and-comment rulemaking procedures, however, agencies fail to submit those rules.[10] Thus, questions have arisen as to how Members can use the CRA's procedures to overturn agency actions when an agency does not submit the action to Congress.

This report first describes what types of agency actions can be overturned using the CRA by providing a close examination and discussion of the statutory definition of "rule." The report then

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[1] 5 U.S.C. §§801-808.

[2] For a more detailed overview of the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[3] In other words, a CRA resolution disapproving a particular rule must fulfill constitutional requirements for the passage of legislation: either the President must sign the legislation, or Congress must override the President's veto of the resolution. See U.S. CONST. art. I, § 7, cl. 3. See also INS v. Chadha, 462 U.S. 919, 956-58 (1983) (holding that statutory legislative veto procedure violated constitutional requirements of bicameralism and presentment).

[4] 5 U.S.C. §804(3).

[5] Compare 5 U.S.C. §553 with 5 U.S.C. §804(3).

[6] See S.J.Res. 57, which became P.L. 115-172. P.L. 115-172 overturned the Bureau of Consumer Financial Protection, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act, CFPB Bulletin 2013-02, March 21, 2013, at https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[7] P.L. 115-172.

[8] U.S. Government Accountability Office, *Congressional Review Act FAQs*, at https://www.gao.gov/legal/other-legal-work/congressional-review-act#faqs.

[9] See 5 U.S.C. §801(a)(1)(A), which requires agencies to submit their rules to Congress and the Government Accountability Office (GAO).

[10] See discussion below in "Agency Compliance with Submission Requirement."

explains how Members can use the CRA to overturn agency rules that have not been submitted to Congress.

Overview of the CRA

Under the CRA, before a rule can take effect, an agency must submit to both houses of Congress and the Government Accountability Office (GAO) a report containing a copy of the rule and information on the rule, including a summary of the rule, a designation of whether the rule is "major," and the proposed effective date of the rule.[11] For most rules determined to be "major," the agency must allow for an additional period to elapse before the rule can take effect—primarily to give Congress additional time to consider taking action on the most economically impactful rules—and GAO must write a report on each major rule to the House and Senate committees of jurisdiction within 15 days.[12] The report is to contain GAO's assessment of the agency's compliance with various procedural steps in the rulemaking process.

After a rule is received by Congress, Members have the opportunity to use expedited procedures to overturn the rule.[13] A Member must submit the resolution of disapproval and Congress must take action on it within certain time periods specified in the CRA to take advantage of the expedited procedures, which exist primarily in the Senate.[14] Those expedited, or "fast track," procedures include the following:

- a Senate committee can be discharged from the further consideration of a CRA joint resolution disapproving the rule by a petition signed by at least 30 Senators;
- any Senator may make a nondebatable motion to proceed to consider the disapproval resolution, and the motion to proceed requires a simple majority for adoption; and
- if the motion to proceed is successful, the CRA disapproval resolution would be subject to up to 10 hours of debate, and then voted upon. No amendments are permitted and the disapproval resolution requires a simple majority to pass.[15]

If both houses pass the joint resolution, it is sent to the President for signature or veto. If the President were to veto the resolution, Congress could vote to override the veto under normal veto override procedures.[16]

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[11] 5 U.S.C. §801(a)(1)(A).

The CRA defines a major rule as

> "any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget [OMB] finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act." 5 U.S.C. §804(2).

[12] 5 U.S.C. §§801(a)(3), 801(a)(2)(A).

[13] 5 U.S.C. §§801(a)(1)(A), 802.

[14] For a step-by-step discussion of these time periods and deadlines, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[15] 5 U.S.C. §§802(c), 802(d)(1), 802(d)(2).

[16] See CRS Report RS22654, *Veto Override Procedure in the House and Senate*, by Elizabeth Rybicki, for details

If a joint resolution of disapproval is submitted and acted upon within the CRA-specified deadlines[17] and signed by the President (or if Congress overrides the President's veto), the CRA states that the "rule shall not take effect (or continue)."[18] In other words, if part or all of the rule had already taken effect, the rule would be deemed not to have had any effect at any time.[19] If a rule is disapproved, the status quo that was in place prior to the issuance of the rule would be reinstated.

In addition, when a joint resolution of disapproval is enacted, the CRA provides that a rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law. The CRA does not define what would constitute a rule that is "substantially the same" as a nullified rule.[20]

Types of Agency Actions Covered by the CRA

The CRA governs "rules" promulgated by a "federal agency," using the definition of "agency" provided in the APA.[21] That APA definition broadly defines an agency as "each authority of the Government of the United States, ... but does not include ... Congress; ... the courts of the United States; ... courts martial and military commissions."[22] Accordingly, the CRA generally covers rules issued by most executive branch entities.[23] In the context of the APA, however, courts have held that this definition excludes actions of the President.[24]

The more difficult interpretive issue is what types of agency actions should be considered "rules" under the CRA.[25] The CRA adopts a broad definition of the word "rule" from the APA, but then creates three exceptions to that definition.[26] This APA definition of "rule" encompasses a wide range of agency action, including certain agency statements that are not subject to the notice-and-comment rulemaking requirements outlined elsewhere in the APA:

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about these procedures.

[17] See CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis, for a discussion of the timelines under which a resolution of disapproval must be submitted and acted upon.

[18] 5 U.S.C. §801(b).

[19] 5 U.S.C. §801(f) provides that "any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect."

[20] For a discussion of what "substantially the same" means, see CRS Insight IN10660, *What Is the Effect of Enacting a Congressional Review Act Resolution of Disapproval?*, by Maeve P. Carey (available from the author upon request).

[21] See 5 U.S.C. §§801(a)(1)(A), 804(1).

[22] 5 U.S.C. §551(1).

[23] See *id.*

[24] See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that the President's actions may not be reviewed under the APA and declining to hold that the President is an "agency" within the APA's definition). See also Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Senator Conrad Burns on whether the American Heritage River Initiative, created by Executive Order 13061, is a "rule" under the CRA, November 10, 1997 (GAO B-278224), p. 3 (concluding that an executive order "need not have been submitted to Congress" because the President is not an "agency" under the CRA). In the context of litigation under the Freedom of Information Act, 5 U.S.C. §552, which also uses the definition of agency from 5 U.S.C. §551(1), courts have clarified that the term "agency" excludes any staff in the Executive Office of the President who do not exercise substantial authority independent of the President, or whose sole function is to advise the President. E.g. Armstrong v. Exec. Office of the President, 90 F.3d 553, 558 (D.C. Cir. 1996).

[25] See 5. U.S.C. §804(3).

[26] See *id.* ("The term 'rule' has the meaning given such term in section 551.... ").

> "[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.][27]

The CRA narrows this definition by providing that the term "rule" does not include

> (A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;
>
> (B) any rule relating to agency management or personnel; or
>
> (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.[28]

Determining whether any particular agency action is a rule subject to the CRA therefore entails a two-part inquiry: first, asking whether the statement qualifies as a rule under the APA definition and, second, asking whether the statement falls within any of the exceptions noted above to the CRA's definition of rule. This section of the report walks through these two inquiries in more detail. First, while the APA's definition of "rule" is expansive, courts have held that "Congress did not intend that the ... definition ... be construed so broadly that every agency action" should be encompassed under this provision.[29] As a preliminary matter, courts have distinguished agency rulemaking actions from adjudicatory and investigatory functions.[30] And under the statutory text, to qualify as a rule, an agency statement must meet three requirements: it must be "of general ... applicability," have "future effect," and be "designed to implement, interpret, or prescribe law or policy."[31] Second, even if an agency statement does qualify as an APA "rule," the CRA expressly exempts three categories of rules from its provisions: rules "of particular applicability," rules "relating to agency management or personnel," and "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."[32] Both inquiries are heavily fact specific, and require looking beyond a document's label to the substance of the agency's action.[33]

Determining Whether an Agency Action Is an APA Rule

The CRA defines the word "rule" by incorporating in part the APA's definition of that term.[34] Although there is very little case law interpreting the meaning of "rule" under the CRA,[35] cases

[27] 5 U.S.C. §551(4).

[28] 5 U.S.C. §804(3).

[29] Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1120 (D.C. Cir. 1988).

[30] See, e.g., United States v. W.H. Hodges & Co., 533 F.2d 276, 278 (5th Cir. 1976) (per curiam).

[31] 5 U.S.C. §§551(4), 804(3).

[32] *Id.* §804(3).

[33] Cf., e.g., Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 416 (1942). See also, e.g., Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("Determining whether a given agency action is interpretive or legislative is an extraordinarily case-specific endeavor.").

[34] 5 U.S.C. §804(3).

[35] This lack of case law is likely due in part to the fact that 5 U.S.C. §805 provides that "[n]o determination, finding,

interpreting the APA's definition of "rule" may provide persuasive authority for interpreting the CRA because the CRA explicitly relies on that provision as the basis for its own definition of the term "rule."[36] The APA provides a general framework governing most agency action—not only agency rulemaking,[37] but also administrative adjudications.[38] The APA accordingly distinguishes different types of agency actions, separating rules from orders and investigatory acts.[39] These distinctions may also be relevant when deciding whether an agency action is a rule subject to the CRA.

Differentiating "Rules," "Orders," and "Investigative Acts" under the APA

The APA distinguishes a "rule" from an "order," defining an "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[40] Orders are the product of agency adjudication, in contrast to rules, which result from rulemaking.[41] To determine whether an agency action is a rule or an order in the context of the APA, courts look beyond the document's label to the substance of the action.[42] One federal court of appeals described the distinction between rulemaking and adjudication as follows:

> First, adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals.... Second, because adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.[43]

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action, or omission under this chapter shall be subject to judicial review." See, e.g., Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., No. 17-5110, 2018 U.S. App. LEXIS 15472, at *26 (D.C. Cir. June 8, 2018) (declining to consider whether agency rule "took effect" in violation of the CRA because 5 U.S.C. §805 precluded review); Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009) (declining to adjudicate claim that agency "failed to satisfy the reporting requirement" of the CRA because 5 U.S.C. §805 precluded review); Via Christi Reg'l Med. Ctr. v. Leavitt, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) ("The Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms."); but see United States v. S. Ind. Gas & Elec. Co., No. IP99-1692-C-M/S, 2002 U.S. Dist. LEXIS 20936, at *18 (S.D. Ind. Oct. 24, 2002) (holding 5 U.S.C. §805 precludes review of Congress's determinations but not of agencies' determinations, and proceeding to review whether agency rule should have been reported under the CRA). Cf. Ctr. for Biological Diversity v. Zinke, No. 3:17-cv-00091-SLG, 2018 U.S. Dist. LEXIS 78136, at *25 n.89 (D. Alaska May 9, 2018) (holding 5 U.S.C. §805 did not preclude review of claim that agency acted unlawfully when, following the enactment of a joint resolution of disapproval, the agency treated its rule as though it had never taken effect).

[36] See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 86 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well.'" (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)) (second alteration in original))

[37] See 5 U.S.C. §553.

[38] See *id.* at §§554, 556-558.

[39] See *id.* at §§551, 555.

[40] 5 U.S.C. §551(6).

[41] See *id.* at §551(4)-(7).

[42] E.g., Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 416 (1942) ("The particular label placed upon [the action] by the [Federal Communications] Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."); *id.* at 417 (holding document labeled "order" was in fact a rule under the relevant statute). But cf. Am. Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 797 (5th Cir. 2000) ("We ... accord significant deference to an agency's characterization of its own action.").

[43] Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994).

Courts have also distinguished rules from agency investigations.[44] A separate provision of the APA addresses an agency's authority to compel the submission of information and perform "investigative act[s] or demand[s]."[45] When agencies conduct investigative actions such as requiring regulated parties to submit informational reports, courts have held that they are not subject to the APA's rulemaking requirements.[46] However, courts have also noted that some actions related to investigations may qualify as rules.[47] For instance, in one case, a federal court of appeals observed that the procedures governing an agency's decision to investigate "are separate from and precede the agency's ultimate act," concluding that the procedures at issue constituted a rule.[48]

"Rules" under the APA

An agency statement will qualify as a "rule" under the APA definition if it (1) is "of general or particular applicability,"[49] (2) has "future effect," and (3) is "designed to implement, interpret, or prescribe law or policy."[50] With regard to the first requirement, as the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has noted, most agency statements will be "of general or particular applicability" and will fulfill this condition.[51]

The second requirement—that a rule be "of ... future effect"[52]—is the subject of some ambiguity. Courts have largely agreed that this requirement is likely intended to distinguish agency rulemaking from agency adjudication.[53] Courts often differentiate rules and orders by noting that orders are retrospective, while rules have "future effect."[54] Rules operate prospectively,[55] in the sense that they are intended to "inform the future conduct" of those subject to the rules.[56]

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[44] See, e.g., *In re* FTC Line of Bus. Report Litig., 595 F.2d 685, 695 (D.C. Cir. 1978) (per curiam).

[45] 5 U.S.C. §555.

[46] See *In re FTC Line of Bus. Report Litig.*, 595 F.2d at 696; United States v. W.H. Hodges & Co., 533 F.2d 276, 278 (5th Cir. 1976) (per curiam).

[47] See U.S. Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1150 (5th Cir. 1984) ("To state that a line exists between investigative activity that anticipates the promulgation of a rule (or the initiation of enforcement proceedings) and the rule itself demarcates only a vague result—it does not illumine the content of the distinction.").

[48] *Id.* at 1151-52.

[49] As discussed in more detail *infra*, "Rules of Particular Applicability," the CRA exempts rules of particular applicability and accordingly applies only to rules of general applicability. 5 U.S.C. §804(3).

[50] 5 U.S.C. §551(4).

[51] See Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 428 (D. C. Cir. 2004) ("[T]he [Environmental Protection Agency] Letter is certainly a statement of 'general or particular applicability'—what isn't?.... ").

[52] 5 U.S.C. §551(4).

[53] Colyer v. Harris, 519 F. Supp. 692, 699 (S.D. Ohio 1981). See also *supra*, "Differentiating "Rules," "Orders," and "Investigative Acts"."

[54] See, e.g., Goodman v. FCC, 182 F.3d 987, 994 (D.C. Cir. 1999) (quoting 5 U.S.C. §551(4)) (internal quotation mark omitted). Cf. Neustar Inc. v. FCC, 857 F.3d 886, 895 (D.C. Cir. 2017) ("[A]lthough adjudication is by its nature retroactive, it may be proper to enter an adjudicatory order without retroactive effect.").

[55] See, e.g., *Neustar Inc.*, 857 F.3d at 896. See also Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423-24 (D.C. Cir. 1994) (holding that both prescriptive and interpretive rules must be of future effect and not retroactive).

[56] See *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428. See also Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative Doug Ose on whether the Department of the Interior Record of Decision "Trinity River Mainstem Fishery Restoration" is a "rule" under the CRA, May 14, 2001 (GAO B-287557). p. 16 ("[T]he [agency action] clearly constitutes a 'rule' [subject to the CRA] since its essential purpose is to set policy for the future. It is in no way concerned with the evaluation of past conduct based on evidentiary facts.").

Additionally, courts have sometimes said that the "future effect" requirement excludes any agency statements that do not "bind the agency."[57] Thus, for example, in a concurring opinion in a 1988 Supreme Court case, Justice Scalia suggested that the "future effect" requirement must be read to mean "that rules have legal consequences only for the future."[58] He argued that the only way to distinguish rules from orders—which can have both future and past legal consequences—was to define rules as having *only* prospective operation.[59] Judge Silberman of the D.C. Circuit, concurring in an opinion from that court, drew on Justice Scalia's interpretation of this requirement to argue that it would be unreasonable to conclude that every single agency statement with future effect is a rule under the APA.[60] Instead, he argued that only agency statements that "seek to authoritatively answer an underlying policy or legal issue" should be considered rules.[61]

These opinions raise several unanswered questions, which could suggest some hesitation before reading the phrase "future effect" in the APA definition of a rule to mean "binding." First, these cases do not fully explain what it means for an agency statement to be binding or address the case law suggesting that the term "future effect" merely pertains to the prospective nature of the statement.[62] Second, and perhaps more critical, this case law reading "future effect" to mean that APA "rules" must bind the agency does not explain how to distinguish this requirement from the separate inquiry into whether an agency action is subject to notice-and-comment rulemaking procedures. As discussed in more detail below,[63] some (but not all) APA "rules" must go through procedures commonly known as notice-and-comment rulemaking.[64] To distinguish so-called "legislative" rules that are subject to notice-and-comment procedures from "interpretive" rules, which are not, courts generally ask whether the rule has "the force of law"[65]—or stated another way, whether the rule is "legally binding."[66] Arguably, then, this "legal effect" test for notice-and-comment rulemaking may be equivalent to asking whether a rule binds an agency.[67] However, the

[57] Indep. Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1256 (D.C. Cir. 1996). Accord Amoco Prod. Co. v. Watson, 410 F.3d 722, 732 (D.C. Cir. 2005); Senior Execs. Ass'n v. United States, No. 8:12-cv-02297-AW, 2013 U.S. Dist. LEXIS 43620, at *52 (S.D. Md. Mar. 27, 2013). Some of these cases are framed in terms of the authority of the specific official making the statement, rather than the content or nature of the statement itself, and accordingly might be distinguishable on that basis. See *Amoco Prod. Co.*, 410 F.3d at 732 (D.C. Cir. 2005). Cf. Energy Consumers & Producers Ass'n v. Dep't of Energy, 632 F.2d 129, 139-40 (Temp. Emer. Ct. App. 1980) (holding that "interpretative rules do not have future effect" within the meaning of the APA definition of "rule" because they are not "applied prospectively only").

[58] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 217 (1988) (Scalia, J., concurring).

[59] *Id.* at 216-17.

[60] Tozzi v. HHS, 271 F.3d 301, 313 (D.C. Cir. 2001) (Silberman, J., concurring).

[61] *Id.* However, this requirement of speaking authoritatively seemed to be linked to the language in the APA's third requirement regarding the prescription of law or policy. *Id.* ("Not every utterance, not every speech (with only future effect) legitimately can be described as a rule. Perhaps the key to the definition is the word 'prescribed'.... ").

[62] For example, the D.C. Circuit has, in other cases, made no mention of the idea that to have future effect, an agency statement must be binding. E.g., *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 (concluding that an agency action "is arguably of 'future effect' insofar as it may inform the future conduct of IEDA's members").

[63] See *infra* footnotes 79 to 84 and accompanying text.

[64] See 5 U.S.C. §553.

[65] E.g., Batterton v. Marshall, 648 F.2d 694, 701 (D.C. Cir. 1980).

[66] E.g., Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251-52 (D.C. Cir. 2014).

[67] One possible distinction between the two standards—but one not voiced by the courts—is that rules with future effect might bind the agency only, while rules with legal effect might have binding effect outside the agency. Cf. Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs, 464 F.3d 1306, 1317 (Fed. Cir. 2006) ("The change in existing law affected by a substantive rule is binding not only within the agency, but is also binding on tribunals outside the agency."). However, this distinction still would not fully explain what it means for an agency statement to "bind" only the agency itself.

"future effect" inquiry tests whether an agency action is a "rule" under 5 U.S.C. §551(4), and the "legal effect" inquiry tests whether such a rule is subject to the notice-and-comment procedures outlined in 5 U.S.C. §553. Because the tests are tied to two distinct statutory provisions, they arguably should not both turn on whether a rule is legally binding.[68] This is especially true where courts have generally held that interpretive rules may not be subject to notice-and-comment but are nonetheless "rules" within the meaning of the APA.[69] The fact that Congress expressly exempted "interpretative rules" from the rulemaking procedures applicable to "rules"[70] may itself suggest that such agency actions are rules—otherwise, the exemption would be unnecessary.[71]

The third requirement for an agency action to be considered an APA rule is that it must be "designed to implement, interpret, or prescribe law or policy."[72] The D.C. Circuit has held that agency documents that merely state an "established interpretation" and "tread no new ground" do not "implement, interpret, or prescribe law or policy" and therefore are not rules.[73] Similarly, an agency statement is not a rule if it "does not change any law or official policy presently in effect."[74] Thus, courts have concluded that "educational"[75] documents that merely "reprint[]"[76] or "restate"[77] existing law are not rules under the APA. The D.C. Circuit has also held that an agency's budget request is not a rule.[78]

Notice-and-Comment Rulemaking and Guidance Documents

The APA outlines specific rulemaking procedures that agencies must follow when they formulate, amend, or repeal a rule.[79] The APA generally requires publication in the *Federal Register* and

[68] See, e.g., United States v. Alaska, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'" (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995))).

[69] E.g., Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 698 (D.C. Cir. 1971) (holding that "an agency's interpretation of its law" is an APA "rule," and proceeding to consider whether the agency action was final for purposes of the APA's judicial review requirement).

[70] 5 U.S.C. §553(b)(A).

[71] See, e.g., Duncan v. Walker, 533 U.S. 167, 174 (2001) (noting that courts should avoid treating statutory terms as surplusage and, if possible, should give effect to every statutory word).

[72] See 5 U.S.C. §551(4).

[73] See *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 (considering an EPA letter, responding to an inquiry from a trade association, that stated the EPA's view of the proper interpretation of the governing statute and regulation).

[74] *Indus. Safety Equip. Ass'n*, 837 F.2d at 1120. See also *id.* (noting that although an agency guide gave safety advice and recommendations that went beyond minimum legal requirements, these sections were only advisory and the EPA was careful to "underscore[] the distinction between the present legal requirements" and this advice).

[75] Am. Trucking Ass'n v. United States, 755 F.2d 1292, 1296 (7th. Cir. 1985) (holding an agency report was not a rule where it was merely "an educational undertaking" that did not fix, and was not "intended to fix, any legal rights").

[76] Golden & Zimmerman, LLC v. Domenech, 599 F.3d 426, 431 (4th Cir. 2010) ("In reprinting the relevant statutes, regulations, and rulings, the Reference Guide undoubtedly did not 'implement, interpret, or prescribe law.'") (quoting 5 U.S.C. §551(4)).

[77] *Id.* at 431-32 ("The Reference Guide also contains frequently asked questions and answers.... The questions and answers were not themselves designed to be enforceable rules, but rather to be a mechanism for explaining the laws, regulations, and rulings. They do not impose new legal requirements, having been reiterated over 13 times during the course of over 40 years. Rather, they attempt to restate or report what already exists in the relevant body of statutes, regulations, and rulings.").

[78] Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 20 (D.C. Cir. 2006) ("The agency's proposal to Congress, developed to secure the [appropriated] funds, may serve as a useful planning document, but it is not a 'rule'.... The most that can be said is that it outlines the goals and methods of an administrative program.") (quoting 5 U.S.C. §551(4)).

[79] See 5 U.S.C. §553.

institutes procedural requirements that are often referred to as notice-and-comment rulemaking.[80] Under notice-and-comment rulemaking, agencies must notify the public of a proposed rule and then provide a meaningful opportunity for public comment on that rule.[81] However, not all agency acts that qualify as "rules" under the APA definition are required to comply with the APA's rulemaking procedures.[82] In particular, the APA provides that notice and comment is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[83] Additionally, the APA's rulemaking procedures do not, in relevant part, apply to "matter[s] relating to agency management or personnel."[84] Therefore, agency statements such as guidance documents or procedural rules may not be required to undergo notice-and-comment rulemaking, but may still be APA "rules."

Courts frequently hold that agency's guidance documents are exempt from APA notice-and-comment rulemaking requirements because those documents are properly classified either as interpretative rules or as general policy statements.[85] Interpretive rules merely explain or clarify preexisting legal obligations without themselves "purport[ing] to impose new obligations or prohibitions,"[86] while general policy statements simply describe how an agency "will exercise its broad enforcement discretion"[87] without binding the agency.[88] But as mentioned above, the critical factor distinguishing both interpretive rules and general policy statements from "legislative" rules that must be promulgated through notice-and-comment procedures is "whether the agency action binds private parties or the agency itself with the 'force of law,'"[89] or whether the rule "has legal effect."[90] General policy statements ordinarily are not legally binding,[91] and

[80] *Id.*

[81] See CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey.

[82] See 5 U.S.C. §§553(a), (b)(A).

[83] 5 U.S.C. §553(b)(A). See also, e.g., Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045-48 (D.C. Cir. 1987) (outlining three types of agency rules that are exempt from 5 U.S.C. §553's notice-and-comment requirements). There is also a "good cause" exception to the notice-and-comment requirements. *Id.* §553(b)(B). For a more detailed overview of the good cause exception to notice-and-comment procedures, see CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, by Jared P. Cole.

[84] 5 U.S.C. §553(a)(2). The APA also exempts rules if they involve "a military or foreign affairs function of the United States." 5 U.S.C. §553(a)(1).

[85] See, e.g., Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 717 (D.C. Cir. 2015). See generally Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS L. REV. 605, 667-68 (2016). For further discussion of how agency statements like guidance documents are treated under the APA, see CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey.

[86] Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 252 (D.C. Cir. 2014). See also, e.g., Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[87] *Nat'l Mining Ass'n*, 758 F.3d at 252.

[88] *Am. Hosp. Ass'n*, 834 F.2d at 1046.

[89] Gen. Elec. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002) (quoting Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999)).

[90] Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (internal quotation marks omitted).

[91] See, e.g., Pac. Gas & Elec. Co. v. Fed'l Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A general statement of policy ... does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.") (citation omitted).

accordingly are not "substantive" rules required to undergo notice-and-comment rulemaking procedures.[92]

It should be noted that some cases from the D.C. Circuit have suggested that general policy statements are not "rules" at all under the APA definition.[93] For example, in one case, the D.C. Circuit said that the "primary distinction between a substantive rule—really any rule—and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position."[94] As discussed above, courts have also sometimes held that where an agency statement does not "bind" an agency, it has no "future effect" and therefore cannot qualify as an APA "rule."[95] This "binding effect" requirement has clear parallels to these cases holding that general policy statements are not rules because they do not bind the agency. However, these latter decisions do not explicitly ground this characterization of general policy statements in the text of the APA requiring rules to have "future effect."[96] Accordingly, it is not clear how these two inquiries interrelate. Other cases have characterized general policy statements as APA rules, notwithstanding the fact that such a statement may not be legally binding in a future administrative proceeding.[97]

CRA Incorporation of APA Definition of "Rule"

The CRA incorporates the APA definition of "rule" by reference, and, consequently, should likely be read to incorporate judicial constructions of that definition.[98] Thus, for example, although the CRA does not itself reference agency "orders," some courts have nonetheless imported the APA's distinction between rules and orders when interpreting the CRA.[99] Accordingly, if an agency acts through an order or investigatory act, rather than a rule, the requirements of the CRA likely will not apply.[100]

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[92] See, e.g., Texas v. United States, 787 F.3d 733, 762 (5th Cir. 2015).

[93] See Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997); Nader v. Civil Aeronautics Bd., 657 F.2d 453, 455 (D.C. Cir 1981). See also Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 807 (D.C. Cir. 2006) ("[T]he distinction between 'general statements of policy' and 'rules' is critical."). This last case, however, determined whether policy guidelines constituted "*final* agency action" reviewable by a court under 5 U.S.C. §704. *Id.* at 807-08 (emphasis added). Its applicability to a CRA determination may be limited, because the CRA does not include any similar language requiring "final" agency action before congressional review. *See* 5 U.S.C. §§801-808.

[94] *Syncor Int'l Corp.*, 127 F.3d at 94.

[95] See *supra* footnote 57 and accompanying text.

[96] See *Syncor Int'l Corp.*, 127 F.3d at 94.

[97] See, e.g., Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 666 (D.C. Cir. 1978). See also, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 n.13 (D.C. Cir. 2000) (noting the "two lines of authority," one holding "that a policy statement is not a 'rule,'" and the other characterizing policy statements as rules).

[98] See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 86 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well.'" (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)) (second alteration in original)).

[99] See United States v. Reece, 956 F. Supp. 2d 736, 745 (W.D. La. 2013); United States v. Carlson, Crim. No. 12-305 (DSD/LIB), 2013 U.S. Dist. LEXIS 130893, at *46-47 (D. Minn. July 25, 2013). *See also* Memorandum from Jacob J. Lew, Director, Office of Management and Budget, to the Heads of Departments, Agencies, and Independent Establishments, "Guidance for Implementing the Congressional Review Act," March 30, 1999 (M-99-13) (concluding agency "orders" are not subject to the CRA).

[100] See *Reece*, 956 F. Supp. 2d at 745 (holding that the Drug Enforcement Agency was not required to comply with the CRA's notice requirement where it issued an order under 21 U.S.C. §811(h), a statutory procedure that "is, in essence, an exception to the general procedural requirements of the Administrative Procedure Act and the Congressional Review Act").

During the 115th Congress, commentators have discussed using the CRA to revoke agencies' guidance documents,[101] raising the question of which guidance documents qualify as CRA "rules."[102] As a preliminary matter, it is important to note that "guidance document" is not a defined term under either the CRA or the APA.[103] Even if an agency has characterized a statement as a guidance document rather than a rule, it still may qualify as a "rule" under the CRA.[104] Instead, the relevant question is whether any agency statement labeled as guidance—which could include, for example, actions such as memoranda, letters, or agency bulletins—falls within the statutory definition of "rule," and if so, whether it is nonetheless exempt from the CRA under any of the exceptions to that definition.[105]

As discussed above, agency statements labeled as guidance are frequently exempt from the APA's notice-and-comment rulemaking procedures because they fall within the exceptions for interpretive rules or general policy statements.[106] However, while the CRA adopts the APA's definition of rule, the CRA's exceptions to that definition are not identical to the APA's exemptions from its notice-and-comment procedures.[107] Notably, the CRA does not exclude from its definition of rule either general policy statements or interpretative rules.[108] Instead, the category of agency "rules" subject to the requirements of the CRA appears to encompass most "rules" that must go through the APA's notice-and-comment rulemaking procedures, along with some that do not.[109] Consequently, agency guidance documents that are exempt from the APA's notice-and-comment procedural requirements may nonetheless be subject to the CRA, if they do not fall within one of the CRA's exceptions. But the effect of a disapproval resolution in such a case may be limited because such guidance documents generally lack legal effect in the first place.[110]

The post-enactment legislative history[111] of the CRA indicates that the CRA was intended to encompass some agency statements that would not be subject to the APA's notice-and-comment rulemaking requirements. Following the enactment of the CRA in 1996, the law's sponsors

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[101] See, e.g. Cheryl Bolen, *Senators Targeting Guidance Documents for Special CRA Repeal*, BLOOMBERG NEWS (May 23, 2017), at https://www.bna.com/senators-targeting-guidance-n73014451380; Susan E. Dudley, *Don't Write Off the Congressional Review Act Yet*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 6, 2017), at http://yalejreg.com/nc/dont-write-off-the-congressional-review-act-yet-by-susan-e-dudley; Zachary Warmbrodt, *GOP Maneuver Could Roll Back Decades of Regulation*, POLITICO (Apr. 17, 2018), at https://www.politico.com/story/2018/04/17/congressional-review-act-fallout-485426.

[102] See 5 U.S.C. §804(3).

[103] See *id.* §§551(4), 553, 804(3). Cf. Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 159 (2000).

[104] See, e.g., Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 416 (1942) ("The particular label placed upon [an agency action] by the [Federal Communications] Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.").

[105] See 5 U.S.C. §§553, 804(3).

[106] See, e.g., Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 717 (D.C. Cir. 2015).

[107] See 5 U.S.C. §804(3).

[108] See *id.* §§804(3)(A)-(C).

[109] Compare *id.* §§551(4) (defining "rule"), and 553 (setting out procedures required to make certain types of rules), with *id.* §§804(3) (defining "rule"), and 801 (setting out procedures required for rule to take effect).

[110] See footnotes 89 to 90 and accompanying text.

[111] Courts have sometimes questioned the validity of post-enactment legislative history as an interpretive tool. E.g., Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

inserted into the *Congressional Record* a statement[112] in which they asserted that the law would cover a wide swath of agency actions:

> The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. The term "rule" in subsection 804(3) begins with the definition of a "rule" in subsection 551(4) and excludes three subsets of rules that are modeled on APA sections 551 and 553. This definition of a rule does not turn on whether a given agency must normally comply with the notice-and-comment provisions of the APA.... The definition of "rule" in subsection 551(4) covers a wide spectrum of activities.[113]

This statement suggests that Congress intended the CRA to reach a broad range of agency activities, including agency policy statements, interpretive rules, and certain rules of agency organization, despite the fact that those actions are not subject to the APA's requirements for notice and comment.[114]

However, as discussed above, there is some ambiguity regarding whether certain non-binding statements are rules at all. If general policy statements or other non-binding agency actions are not "rules" under the APA definition, then arguably, they are not rules under the CRA.[115] But importantly, GAO has concluded that general policy statements should be considered "rules" under the CRA.[116] As discussed in more detail below, GAO's resolution of this issue may stand as the last word on the matter, given the role that GAO has come to play in advising Congress on which agency actions are subject to the CRA.[117]

CRA Exceptions

Even if an agency action is a "rule" within the APA definition, it will not be subject to the CRA if it falls within one of the three exceptions to the CRA's definition of a "rule."[118] The CRA incorporates the APA definition of rule,[119] but exempts from that definition any rules "of particular applicability," rules "relating to agency management or personnel," and "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."[120] Some of these exemptions track language in the APA, and accordingly, cases interpreting those APA provisions may be useful to interpret the CRA exceptions.[121] Additionally, the CRA does not "apply to rules that concern monetary policy

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[112] In the statement, the sponsors observed that "no formal legislative history was prepared to explain [the CRA]" and that the statement was "intended to cure this deficiency." Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), pp. E574-575.

[113] Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), p. E578.

[114] See also Rep. David McIntosh, *Congressional Record*, daily edition, vol. 142 (March 28, 1996), p. H3005 ("Although agency interpretive rules, general statements of policy, guideline documents, and agency policy and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the [CRA].").

[115] See 5 U.S.C. §804(3).

[116] E.g., Letter from U.S. Government Accountability Office to Senator Pat Toomey on whether the Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation Interagency Guidance on Leveraged Lending is a "rule" under the CRA, October 19, 2017 (GAO B-329272), p. 12.

[117] *See infra*, "Consequences of GAO Opinions."

[118] See 5 U.S.C. §§804(3)(A)-(C).

[119] *Id.* §551(4).

[120] *Id.* §804(3).

[121] See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 86 (2006) ("[W]hen 'judicial

proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee."[122]

The CRA also contains a partial exception for rules where an agency has, "for good cause," dispensed with notice-and-comment rulemaking procedures, as well as for rules related to "a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping."[123] However, this section does not exempt rules from the CRA procedures entirely; it merely allows the agency to determine when the rule shall take effect, notwithstanding the CRA's requirements.[124]

Rules of Particular Applicability

While the APA's definition of "rule" includes agency statements "of general *or particular* applicability,"[125] the CRA expressly exempts "any rule of particular applicability."[126] Courts have said that this language refers to "legislative-type promulgations" that are "directed to" specifically named parties.[127] In opinions from GAO analyzing whether various agency actions fall within the particular-applicability exception, GAO has stated that to be generally applicable, the CRA does not require a rule to "generally apply to the population as a whole."[128] Instead, "all that is required is a finding" that a rule "has general applicability within its intended range, regardless of the magnitude of that range."[129] For example, in one case, GAO concluded that an agency decision adopting and implementing a plan to counter decreased river flows in a certain river basin was not a matter of particular applicability.[130] Although the decision applied to a specific geographic area, it would, in the view of GAO, nonetheless "have significant economic and environmental impact throughout several major watersheds in the nation's largest state."[131]

The CRA gives examples of some types of rules of particular applicability by specifying that this exemption includes any "rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing."[132]

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interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well.'" (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)) (second alteration in original)).

[122] 5 U.S.C. §807.

[123] See 5 U.S.C. §808(2). The CRA's "good cause" exclusion mirrors the text of 5 U.S.C. §553(b)(B). See *supra* footnote 83.

[124] See 5 U.S.C. §§801, 808.

[125] 5 U.S.C. §551(4) (emphasis added).

[126] *Id.* §804(3)(A).

[127] *See* U.S. Steel Corp. v. EPA, 605 F.2d 283, 285 n.3 (7th Circ. 1979) (discussing APA's legislative history). *See also* PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718, 732 (3d Cir. 1973) (noting that because APA includes statements of particular applicability, it covers rules that "may be directly applicable to specific individuals or situations").

[128] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative Doug Ose on whether the Department of the Interior Record of Decision "Trinity River Mainstem Fishery Restoration" is a "rule" under the CRA, May 14, 2001 (GAO B-287557), p. 9.

[129] *Id.*

[130] *Id.* at 10.

[131] *Id.* at 9-10.

[132] 5 U.S.C. §804(3)(A). The post-enactment legislative history of the CRA offered a number of examples falling within this category of rules: "Examples include import and export licenses, individual rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits and habitat conservation plans, broadcast licenses, and

Moreover, the post-enactment statement for the record written by the CRA's sponsors maintained that "IRS private letter rulings and Customs Service letter rulings are classic examples of rules of particular applicability."[133] Under the APA, courts have also held, for example, that agency actions designating specific sites as covered by environmental laws are rules of "particular applicability."[134]

Rules Relating to Agency Management or Personnel

The second CRA exemption excludes "any rule relating to agency management or personnel."[135] The APA contains a similar exemption from its general rulemaking requirements.[136] Within the context of the APA, courts have concluded that this exemption covers agency statements such as policies for hiring employees.[137] A rule will not fall within this exemption solely because it is "directed at government personnel."[138] Instead, courts have viewed this APA exception to cover internal matters[139] that do not substantially affect parties outside an agency.[140]

Notwithstanding the general presumption of courts that where Congress adopts language from another statute, it also intends to incorporate any settled judicial interpretations of that same language,[141] it is unclear whether this substantial-effect requirement developed by courts in the context of the APA should be read into the CRA. The CRA's second exemption, for "any rule relating to agency management or personnel," does not expressly mention a rule's effect on third parties.[142] By contrast, the CRA's third exemption does.[143] This distinction in language could be read to mean that Congress intentionally chose to create a substantial-effect requirement for the third exception while omitting this limitation from the second one,[144] so that the CRA's second

product approvals, including approvals that set forth the conditions under which a product may be distributed." Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), pp. E578-579. Cf. ABC v. FCC, 682 F.2d 25, 31 (2d Cir. 1982) ("The legislative history of the APA confirms that decisions in agency ratemaking proceedings such as the establishment of a utility's allowable rate of return are rules of particular applicability.... ").

[133] Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), p. E578.

[134] See, e.g., Nat'l Wildlife Fed'n v. Costle, 629 F.2d 118, 126 n.27 (D.C. Cir. 1980) (holding that statement designating dredged material dumping site constitutes a rule of particular applicability for purposes of the APA). But cf. Letter from U.S. Government Accountability Office to Senator Lisa Murkowski on whether the U.S. Forest Service 2016 Amendment to the Tongass Land and Resource Management Plan is a "rule" under the CRA, October 23, 2017 (GAO B-238859), p. 19 ("The 2016 Tongass Amendment is not an approval, license, or registration to a particular person or entity. Nor does it grant or recognize an exemption or relieve a restriction for a particular person or entity. While the plan does only apply to the Tongass National Forest and not to other national forests, it applies to ... all persons or entities using the forest—not just a particular person or entity.").

[135] 5 U.S.C. §804(3)(B).

[136] *Id.* §553(a)(2).

[137] See Stewart v. Smith, 673 F.2d 485, 496, 499 (D.C. Cir. 1982) (characterizing policy of refusing to hire persons over 34 years old for jobs within correctional facilities as a "matter relating to agency management or personnel"). See also Hamlet v. United States, 63 F.3d 1097, 1103 (Fed. Cir. 1995) (suggesting personnel handbooks might fall within this APA exception).

[138] Joseph v. U.S. Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.23 (D.C. Cir. 1977).

[139] See Tunik v. MSPB, 407 F.3d 1326, 1342 (Fed. Cir. 2005).

[140] *Stewart*, 673 F.2d at 498 (noting prior cases had suggested that this "substantial effect" requirement might exist, but declining to adopt that requirement itself).

[141] E.g., Jama v. ICE, 543 U.S. 335, 349 (2005).

[142] See 5 U.S.C. §804(3)(B).

[143] See *id.*

[144] See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

exception excludes "any rule relating to agency management or personnel" regardless of its impact on third parties.[145] On this view, this difference in phrasing would displace the ordinary presumption that Congress incorporates case law interpreting similar statutory provisions.[146] This interpretation of the second exemption could mean that the CRA's exception for rules relating to agency management or personnel may be interpreted more broadly than the APA exception.

However, it is also possible that Congress chose not to include the substantial-effect requirement in this second exception because "prior judicial interpretation" of the identical phrases in the APA made such language unnecessary.[147] Congress may have added a substantial-effect requirement to the third exception in order to settle some ambiguity in the cases interpreting the parallel provision of the APA, as described below.[148]

Rules of Agency Organization, Procedure, or Practice

Finally, the CRA exempts "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."[149] The APA also excludes "rules of agency organization, procedure, or practice" from notice-and-comment rulemaking procedures.[150] Courts have held that this APA exception includes actions like agency decisions relating to how regulated entities must go about satisfying investigative requirements.[151] Unlike the CRA, the APA does not explicitly limit this exception to those rules that do not "substantially affect the rights or obligations of non-agency parties."[152] Nonetheless, because courts have read

intentionally and purposely in the disparate inclusion or exclusion."). See also Stewart v. Smith, 673 F.2d 485, 499 (D.C. Cir. 1982) (declining to hold that the APA's two exemptions for agency matters are coextensive, because "to read the two exemptions as identical ... would ... ignore considerable differences between the language used").

[145] See 5 U.S.C. §804(3)(B).

The post-enactment legislative history of the CRA is arguably unclear on this point. See Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), pp. E579 ("Subsection 804(3)(B) excludes 'any rule relating to agency management or personnel' from the definition of a rule. Pursuant to subsection 804(3)(C), however, a 'rule of agency organization, procedure, or practice,' is only excluded if it 'does not substantially affect the rights or obligations of non-agency parties.' The committees' intent in these subsections is to exclude matters of purely internal agency management and organization, but to include matters that substantially affect the rights or obligations of outside parties.").

[146] See Jama v. ICE, 543 U.S. 335, 351-52 (2005) (holding principle did not apply where judicial authority was "too flimsy" to justify the presumption); Gen. Motors Corp. v. Devex Corp., 461 U.S. 648, 654 (1983) (holding principle did not apply where language of predecessor statute differed from challenged provision).

[147] See United States v. Ressam, 553 U.S. 272, 282 (2008) (Breyer, J., dissenting) ("[O]ne can explain the absence of the words 'in relation to' in less damaging ways. The legislative drafters of the ... amendment may have assumed that prior judicial interpretation ... made the words 'in relation to' unnecessary.").

[148] See *infra* footnotes 154 to 157 and accompanying text.

[149] 5 U.S.C. §804(3)(C).

[150] *Id.* §553(b)(A).

[151] See Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045-48 (D.C. Cir. 1987) (holding that agency manual setting out "enforcement plan" for agency's employees to review regulated entities contained "classic procedural rules") (emphasis omitted); Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 665-66 (D.C. Cir. 1978) (holding that agency regulation providing that the agency would no longer audit insured institutions in the course of their examinations, and that institutions must satisfy the regulatory audit requirement by other means, was a rule "of agency procedure"); Stauffer v. IRS, C.A. No. 15-10271-MLW, 2017 U.S. Dist. LEXIS 161628, at *13-14 (D. Mass. Sept. 29, 2017) (holding agency decision about what types of evidence to accept as proof of disability was a procedural rule because it did not change the substantive standards by which the agency evaluated such claims).

[152] 5 U.S.C. §804(3)(C).

such a limitation into the APA exemption,[153] the case law defining this requirement may be relevant to determine the scope of this CRA exemption.

However, in the cases interpreting this parallel APA exclusion, the impact of a rule on a third party is not the only factor courts use to distinguish between substantive rules, which are required to go through notice-and-comment procedures, and procedural rules, which are not.[154] Instead, courts have engaged in two kinds of inquiries. The first is the "substantial impact test," which asks whether the agency action substantially impacts the regulated industry.[155] However, the D.C. Circuit has noted that even rules best characterized as procedural measures may have a significant effect on regulated parties, and, accordingly, has held that "a rule with a 'substantial impact' upon the persons subject to it is not *necessarily* a substantive rule."[156] Consequently, the D.C. Circuit has also asked whether the rule "encodes a substantive value judgment."[157]

Nonetheless, because the text of the CRA expressly excludes rules "of agency organization, procedure, or practice" that do not "substantially affect the rights or obligations of non-agency parties,"[158] the CRA appears to mandate the use of something akin to the substantial impact test to determine whether a rule falls within this exception.[159] In fact, one of the sponsors of the CRA emphasized prior to its passage that to determine whether a rule should be excluded under this provision, "the focus ... is not on the type of rule but on its effect on the rights or obligations of nonagency parties."[160] He went on to say that the exclusion covered only rules "with a truly minor, incidental effect on nonagency parties."[161] GAO has sometimes drawn on the APA case law described above in its own opinions analyzing whether various actions fall within the purview of the CRA.[162] However, because the substantial-impact test and the substantive-value-

[153] Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974) ("This category ... should not be deemed to include any action which ... substantially affects the rights of those over whom the agency exercises authority."), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99, 104-05 (1977). See also, e.g., Batterton v. Marshall, 648 F.2d 694, 708 (D.C. Cir. 1980) ("The exemption cannot apply ... where the agency action trenches on substantial private rights and interests.").

[154] See, e.g., Texas v. United States, 787 F.3d 733, 765-66 (5th Cir. 2015).

[155] E.g., Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1153 (5th Cir. 1984).

[156] Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 5 (D.C. Cir. 2011) (emphasis added). See also Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (noting that court's "gradual move away from looking solely into the substantiality of the impact"). Cf. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 168 (2d Cir. 2013) (noting that "all procedural rules affect substantive rights to some extent" and concluding that the distinction between substantive and procedural rules might be "one of degree") (quoting *Elec. Privacy Info. Ctr.*, 653 F.3d at 5) (internal quotation mark omitted)).

[157] Pub. Citizen, Inc. v. Dep't of State, 276 F.3d 634, 640 (D.C. Cir. 2002). Cf. Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 705 (2007) (stating that the substantial impact test was "replaced by a new 'legally binding effect' or 'force of law' test in most courts").

[158] See 5 U.S.C. §804(3)(C).

[159] See Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Senator Ted Stevens, Senator Frank Murkowski, and Representative Don Young on whether the U.S. Forest Service Tongass National Forest Land and Resource Management Plan is a "rule" under the CRA, July 3, 1997 (GAO B-275178), p. 13.

[160] Rep. David McIntosh, *Congressional Record*, daily edition, vol. 142 (March 28, 1996), p. H3005. Courts, however, are sometimes skeptical of statements made by individual legislators. E.g. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 599 (2004).

[161] *Id.* See also *id.* ("[T]his exception should be read narrowly and resolved in favor of nonagency parties who can demonstrate that the rule will have a nontrivial effect on their rights or obligations.").

[162] See, e.g., Letter from U.S. Government Accountability Office to Senator Lisa Murkowski on whether the U.S. Forest Service 2016 Amendment to the Tongass Land and Resource Management Plan is a "rule" under the CRA, October 23, 2017 (GAO B-238859), pp. 22-23. Cf. Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative Ted Strickland on whether the Department of Veterans Affairs

judgment test were developed in the context of the APA to test whether rules "implicate the policy interests animating notice-and-comment rulemaking,"[163] these judicially created tests might not be directly applicable to determine whether an agency statement is subject to the CRA.

CRA Requirement for Submission of Rules

The CRA requires that agencies submit actions that fall within the CRA's definition of a rule to both houses of Congress and to GAO before the actions may take effect. Thus, the submission requirement applies generally to rules that are promulgated through APA notice-and-comment procedures, as well as to other types of agency statements, as discussed above.

Specifically, Section 801(a)(1)(A) of the CRA requires the agency to submit a report containing a copy of the rule to each house of Congress and the Comptroller General; a concise general statement relating to the rule, including whether it is a major rule; and the proposed effective date of the rule.[164] The agency is also required to submit additional information pertaining to any cost-benefit analysis the agency conducted, along with information on the agency's actions resulting from other regulatory impact analysis requirements, including the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.[165] For major rules, after receiving this information, GAO is then required to assess the agency's compliance with these additional informational requirements and include its assessment in the major rule report. The report is required to be submitted to the House and Senate committees of jurisdiction within 15 calendar days of the submission of the rule or its publication in the *Federal Register*, whichever date is later.[166]

The "report" that agencies are required to submit along with the rule, in practice, is a two-page form on which they provide the information required under Section 801(a)(1)(A) and, for major rules, most of the information required to be included in GAO's major rule report. In FY1999 appropriations legislation, Congress required the Office of Management and Budget (OMB) to provide agencies with a standard form to use to meet this reporting requirement.[167] OMB issued the form in March 1999 as part of a larger guidance to agencies on compliance with the CRA.[168] A copy of the form is provided in **Appendix A** of this report.[169]

When final rules are submitted to Congress, notice of each chamber's receipt and referral appears in the respective House and Senate sections of the daily *Congressional Record* devoted to "Executive Communications." Notice of each chamber's receipt is also entered into a database that can be searched using the Legislative Information System of the U.S. Congress (LIS) or on

memorandum regarding the VA's marketing activities to enroll new veterans in the VA health care system is a "rule" under the CRA, February 28, 2003 (GAO B-291906), pp. 9-10 (asking whether agency action affects specific "substantive rights").

[163] See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 6 (D.C. Cir. 2011).

[164] 5 U.S.C. §801(a)(1)(A).

[165] P.L. 96-354; P.L. 104-4.

[166] 5 U.S.C. §801(a)(2)(A).

[167] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; P.L. 105-277, 112 Stat. 2681-495.

[168] Memorandum from Jacob J. Lew, Director, Office of Management and Budget, to the Heads of Departments, Agencies, and Independent Establishments, "Guidance for Implementing the Congressional Review Act," March 30, 1999 (M-99-13), pp. 9-10.

[169] A copy of this form is available on the White House website at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/fed_rule.pdf.

Congress.gov.[170] When the rule is submitted to GAO, a record of its receipt at GAO is noted in a database on GAO's website as well.[171]

Once the rule is received in Congress and published in the *Federal Register*, the time periods during which the CRA's expedited procedures are available begin, and Members can use the procedures to consider a resolution of disapproval. Thus, submission of rules to Congress under the CRA is critical because the receipt of the rule in Congress triggers the CRA's expedited procedures for introduction and consideration of a joint resolution disapproving the rule.[172] In other words, if an agency fails to submit a rule to Congress, the House and Senate are unable to avail themselves of the special "fast track" procedures to consider a joint resolution striking down the rule.

Agency Compliance with Submission Requirement

Following enactment of the CRA in 1996, some Members of Congress and others raised concerns over agencies not submitting their rules on several occasions. At a hearing on the CRA in 1997, one year after its enactment, witnesses noted that agencies were not in full compliance with the submission requirement.[173] It was also noted at the hearing, however, that it appeared agencies were seeking "in good faith" to comply with the statute.[174] At a hearing in 1998 on implementation of the CRA, GAO's general counsel testified that agencies were often not sending their rules to GAO or Congress.[175]

Also in 1998, to further improve agency compliance with the CRA, Congress required OMB to issue guidance on certain provisions of the CRA, specifically including the submission requirement in 5 U.S.C. §801(a)(1).[176] To meet this requirement, then-OMB Director Jacob J. Lew issued a memorandum for agencies in March 1999.[177] The Lew memorandum provided information such as where agencies should send their rules in the House and Senate, including the addresses of the Office of the President of the Senate and the Speaker of the House, the offices in each chamber that receive the rules; what information the agencies should include with the rule; and an explanation of what types of rules are required to be submitted.

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[170] House communications can be accessed at the House LIS database at http://www.lis.gov/execcomh/search.html. Senate communications can be accessed at the Senate LIS database at http://www.lis.gov/execcoms/search.html. House and Senate communications can both be accessed on the homepage of Congress.gov.

[171] This database is located at https://www.gao.gov/legal/other-legal-work/congressional-review-act#database.

[172] For an overview of these procedures, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[173] U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Congressional Review Act*, 105th Cong., 1st sess., March 6, 1997. One witness, administrative law scholar Peter Strauss, noted that many agency actions that fall outside of the scope of what agencies publish in the *Federal Register* as part of regular notice-and-comment rulemaking proceedings, were not being submitted (p. 134).

[174] Ibid., p. 49.

[175] U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, *OIRA Implementation of the Congressional Review Act*, 105th Cong., 2nd sess., March 10, 1998.

[176] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; P.L. 105-277, 112 Stat. 2681-495.

[177] Memorandum from Jacob J. Lew, Director, Office of Management and Budget, to the Heads of Departments, Agencies, and Independent Establishments, "Guidance for Implementing the Congressional Review Act," March 30, 1999 (M-99-13). As of the date of this CRS report, this memorandum still appears to be the most authoritative guidance to agencies on compliance with the CRA. It is posted on the White House's website at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/1999/m99-13.pdf.

Because agencies were initially inconsistent about fulfilling the submission requirement, GAO began to monitor agencies' compliance with the submission requirement by comparing the final rules that were published in the *Federal Register* with rules that were submitted to GAO.[178] This was not a role that was required under the CRA; rather, GAO conducted these reviews voluntarily. As then-GAO general counsel Robert Murphy testified in 1998, GAO

> conducted a review to determine whether all final rules covered by the Congressional Review Act and published in the *Register* were filed with the Congress and the GAO. We performed this review both to verify the accuracy of our own data base and to ascertain the degree of agency compliance with the statute. We were concerned that regulated entities may have been led to believe that rules published in the *Federal Register* were effective, when, in fact, they were not unless filed in accordance with the statute.[179]

After its review of agency compliance with the submission requirement, in November 1997, GAO submitted to OMB's Office of Information and Regulatory Affairs (OIRA) a list of the rules that had been published in the *Federal Register* but had not been submitted to GAO. According to GAO, OIRA distributed this list to affected agencies; GAO then followed up again with the agencies that had rules that remained un-submitted in February 1998. GAO stated in its March 1998 testimony that "In our view, OIRA should have played a more proactive role in assuring that the agencies were both aware of the statutory filing requirements and were complying with them."[180]

GAO continued to conduct similar reviews regularly, comparing the list of rules that agencies submitted to GAO against rules that were published in the *Federal Register*. Until 2012, GAO periodically sent letters to OIRA regarding rules that it had not received. In March 2012, GAO notified OIRA that, due to constraints on its resources, it would no longer be sending lists of rules not received. Instead, GAO decided to continue to track only major rules not received, not all final rules, as they had previously done.[181]

Submission of Notice-and-Comment Rules vs. Other Types of Documents

In general, although there have been exceptions noted by GAO, agencies appear to be fairly comprehensive in submitting rules to Congress and GAO when those rules have been promulgated through an APA rulemaking process. GAO's federal rules database lists thousands of such rules each year.[182] In the case of rules that are not subject to notice-and-comment

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[178] For a history of the correspondence between GAO and OIRA regarding agency compliance with the CRA, see CRS Report R40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, by Curtis W. Copeland. The author of that report is retired; however, a copy of it may be obtained upon request from the authors of this report.

[179] See U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, *OIRA Implementation of the Congressional Review Act*, 105th Cong., 2nd sess., March 10, 1998, p. 52.

[180] Ibid., p. 53. See also CRS Report R40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, by Curtis W. Copeland. The author of that report has retired; however, a copy of it may be obtained upon request from the authors of this report.

[181] Curtis W. Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," white paper, July 15, 2014. A copy of this white paper had previously been posted on the website of the Administrative Conference of the U.S. but is no longer available there. A copy can be obtained upon request from Maeve P. Carey, one of the authors of this report.

[182] See https://www.gao.gov/legal/other-legal-work/congressional-review-act#database. As of September 20, 2018, agencies had submitted 77,177 rules to GAO under the CRA.

procedures, however, agencies often do not fulfill the submission requirement, and tracking compliance for these types of agency actions is more difficult.[183]

Although GAO has voluntarily tracked agency compliance with the submission requirement, its methodology for doing so did not result in a complete list of agency actions that should have been submitted. GAO's point of reference was to compare regulations that were published in the *Federal Register* against regulations it received pursuant to the CRA. Most rules that are required to be published in the *Federal Register* are indeed subject to the CRA, making this a potentially helpful method of identifying rules that were not submitted. However, many of the other agency actions that are not subject to notice-and-comment requirements are not generally published in the *Federal Register* and are also not submitted to GAO. Therefore, using this method, many rules that should have been submitted likely were undetected by GAO and thus not included in the lists of un-submitted rules it sent to OIRA and to the agencies. It is precisely this issue that led to Members requesting GAO's opinion on individual agency actions that were of specific interest to them and were not submitted to Congress (nor, in most cases, published in the *Federal Register*).[184]

The higher incidence of noncompliance with the CRA's submission requirement for agency actions that were conducted outside the notice-and-comment rulemaking process is likely due in large part to the practical difficulty of submitting the substantial number of agency statements that qualify as rules under the CRA. The CRA's submission requirement could potentially include a wide variety of items such as FAQs posted on agency websites, press releases, bulletins, information memoranda, and statements made by agency officials. In congressional testimony in 1997, one administrative law scholar argued that agencies "annually take tens of thousands of actions" that would fall under the CRA's definition of rule, and that

> Were agencies to comply fully with [the CRA's] requirement that all these matters be filed with Congress as a condition of their effectiveness (as it appears, thus far, they are not doing), Congress and the GAO would be swamped with filings. Burying Congress in paper might even seem a useful means of diverting attention from larger, controversial matters; haystacks can be useful for concealing needles. No one believes many, if any, of these rules will be the subjects of resolutions of disapproval. Yet for them even simple accompanying documents to permit data analysis and tracking, such as GAO has been proposing, would impose significant aggregate costs, well beyond their possible benefit.[185]

In addition, it seems possible that many agencies are unaware of the breadth of the CRA's coverage. Reading through various agencies' responses to the GAO opinions discussed below suggests that many agencies appear to be aware that notice-and-comment rules are generally covered by the CRA, but they may be unaware that many other types of actions are covered. For

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[183] See, for example, U.S. Congress, House Committee on Oversight and Government Reform, *Shining Light on Regulatory Dark Matter*, Majority Staff Report, 115th Cong., March 2018, p. 10, at https://oversight.house.gov/release/committee-report-scrutinizes-federal-regulatory-guidance-practices/, noting a small number of agency guidance documents that agencies submitted to Congress under the CRA during the 10-year period the committee studied in its report.

[184] At least one of the agency actions addressed in a GAO opinion was published in the *Federal Register*; see Farm Credit Administration, "National Charters Booklet: Notice and Request for Comment," 65 *Federal Register* 45066, July 20, 2000.

[185] Prepared statement of Peter L. Strauss, U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Congressional Review Act*, 105th Cong., 1st sess., March 6, 1997, p. 138.

Further, he argued that Congress should consider narrowing the scope of the CRA: "Congress... should assure that its limited resources are addressed to the most important occasions for review, by adopting a mechanism for limiting the application of the Act."

example, in an opinion it issued in 2012 regarding an action taken by the Department of Health and Human Services, GAO stated that "We requested the views of the General Counsel of HHS on whether the July 12 Information Memorandum is a rule for purposes of the CRA by letter dated August 3, 2012. HHS responded on August 31, 2012, stating that the Information Memorandum was issued as a non-binding guidance document, and that HHS contends that guidance documents do not need to be submitted pursuant to the CRA."[186] GAO concluded, however, "We cannot agree with HHS's conclusion that guidance documents are not rules for the purposes of the CRA and HHS cites no support for this position."[187]

GAO's Role in Determining Whether an Agency Action is Covered by the CRA

Because submission of rules is key to Congress's ability to use the CRA, if an agency does not submit a rule to Congress, this could potentially frustrate Congress's ability to review rules under the act. To avoid Congress being denied its opportunity for review of rules in this way, however, the Senate appears to have developed a practice that allows it to employ the CRA's review mechanism even when an agency does not submit a rule for review. That practice has involved seeking an opinion from GAO on whether an agency action should have been submitted under the CRA (i.e., whether the action is covered by the CRA's definition of "rule").

In several instances since the enactment of the CRA in 1996, Members of Congress sought an opinion from GAO as to whether certain agency actions were covered by the CRA, despite the agency not having undertaken notice-and-comment rulemaking or having submitted the action to Congress.[188] GAO has issued 18 opinions of this type as of September 20, 2018. Generally, in these opinions, GAO has defined the term "rule" as used in the CRA expansively.[189] In 11 of the 18 opinions, GAO opined that the agency statement in question was a rule under the CRA that should have been submitted to the House and Senate for review.[190] These opinions are summarized below in this report and are listed in a table in **Appendix B**.

In recent years, the Senate has considered publication in the *Congressional Record* of a GAO opinion classifying an agency action as a rule as the trigger date for the initiation period to submit a disapproval resolution and for the action period during which such a joint resolution qualifies for expedited consideration in the Senate.[191] Thus, the question of whether Congress may use the

[186] Letter from U.S. Government Accountability Office to Senator Orrin Hatch and Representative Dave Camp on whether the Department of Health and Human Services Information Memorandum concerning the Temporary Assistance to Needy Families Program is a "rule" under the CRA, September 4, 2012 (GAO B-323772), p. 5.

[187] Ibid.

[188] Examples of these letters from Members to GAO can be obtained upon request from Maeve P. Carey, one of the authors of this report.

[189] See, e.g., Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative Doug Ose on whether the Department of the Interior Record of Decision "Trinity River Mainstem Fishery Restoration" is a "rule" under the CRA, May 14, 2001 (GAO B-287557), pp. 13-14 ("Congress intended that the CRA should be broadly interpreted both as to the type and scope of rules covered. It was intended to cover not only formal rulemaking, but also to cover rules that are not subject to notice and comment requirements of the APA.... [T]he entire focus of the Act is to require congressional review of agency actions that substantially affect the rights or obligations of outside parties.").

[190] Copies of these opinions are available on GAO's website at https://www.gao.gov/legal/other-legal-work/congressional-review-act#legal_opinions.

[191] See, e.g., *Congressional Record*, daily edition, vol. 163, October 24, 2017, p.S6760; and *Congressional Record*, daily edition, vol. 163, November 27, 2017, p.S7330.

CRA's expedited parliamentary disapproval mechanism generally hinges upon the nature of GAO's opinion in such cases. By allowing the GAO opinion to serve as a substitute for the actual submission of a rule, the Senate can still avail itself of the CRA's expedited procedures to overturn rules.

Origin of GAO's Role

In responding to these requests from Members for opinions on whether certain agency actions are covered, GAO has played an important role in determining the applicability of the CRA. The specific role that GAO has played in this regard is not explicitly outlined in the statute, however. But a review of the history of the early implementation of the CRA, and a consideration of GAO's other activities under the CRA, suggests that the role GAO currently plays with regard to determining whether a specific agency action is a "rule" is linked to other activities GAO has engaged in regarding the CRA.

As has been noted, GAO's primary statutory requirement under the CRA is to provide a report to the committees of jurisdiction on each major rule, and to include in the report information about the agency's compliance with various steps of the rulemaking process for each major rule.[192]

For non-major rules, soon after the CRA was enacted, GAO voluntarily created an online database of rules submitted to it under the CRA, suggesting that it was willing to go beyond what was required of it by the statute to facilitate implementation.[193] As GAO's general counsel explained in congressional testimony in 1998, "Although the law is silent as to GAO's role relating to the nonmajor rules, we believe that basic information about the rules should be collected in a manner that can be of use to Congress and the public. To do this, we have established a database that gathers basic information about the 15-20 rules we receive on the average each day."[194] The database can be used to search for rules by elements such as the title, issuing agency, date of publication, type of rule (major or non-major), and effective date. The website also contains links to each of GAO's major rule reports.

Perhaps most notably, however, GAO's determination of whether agency actions are considered "rules" under the CRA appears to be closely linked to its monitoring of agency compliance with the submission requirement as discussed above. The question of whether an agency action is a rule under the CRA is also a question of whether it should be submitted; arguably, then, GAO is addressing a very similar question in its opinions on whether certain agency actions are covered as it was in its initial reports to OIRA on agency compliance with the submission requirement.

A discussion of GAO's role in a congressional hearing on the Tongass Land Management Plan in 1997 provides some evidence of the voluntary and, initially, ad hoc nature of GAO's role in this regard.[195] One of the issues that was addressed at the hearing was whether the plan should be considered a rule under the CRA; GAO's general counsel was invited to testify at the hearing. Six days before the hearing, GAO issued its second opinion on the applicability of the CRA, in which it stated that the Tongass Land Management Plan should have been submitted as a rule under the

[192] 5 U.S.C. §801(a)(2)(A).

[193] The database is available at https://www.gao.gov/legal/other-legal-work/congressional-review-act#database.

[194] U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, *OIRA Implementation of the Congressional Review Act*, 105th Cong., 2nd sess., March 10, 1998, pp, 58-59.

[195] U.S. Congress, Senate Committee on Energy and Natural Resources and House Committee on Resources, Joint Hearings on Tongass Land Management, 105th Cong., 1st sess., July 9 and 10, 1997, S.Hrg. 105-252 (Washington: GPO, 1997).

CRA. Former Senator Larry Craig, who had requested the opinion, asked GAO's general counsel at the hearing about GAO's role:

> It is our understanding of your testimony and our own reading of the Regulatory Flexibility Act that the General Accounting Office has been given the role of advising Congress and perhaps agencies on whether their policy decisions constitute rules. It is our understanding that the GAO's independent opinion is generally given considerable weight by the agencies. Is this also the GAO's understanding of its role?[196]

In response, GAO's general counsel, Robert Murphy, stated that the CRA

> does not provide any identification of who is to decide what a rule is, unlike the issue of whether a rule is a major rule or not, which, as [OIRA Administrator] Ms. Katzen pointed out, has been assigned to her. So in that sense, I cannot say that GAO has a special role under the statute for making that determination. The decision, the opinion, that we issued last week on the question [of whether the Tongass Land Management Plan was a rule under the CRA] was done in our role as adviser to the Congress in response to the request of three chairmen of congressional committees.[197]

Thus, GAO acknowledged that its opinion was provided not pursuant to any specific provision of the statute, but in a more general, advisory capacity.

Congressional Response to GAO Opinions Since 1996

Although GAO has issued 18 opinions on the applicability of the CRA since 1996, Congress's response to those opinions has varied over time. Initially, the GAO opinions finding that the agency actions in question were rules under the CRA did not lead to the introduction of joint resolutions of disapproval—Members appear not to have introduced any joint resolutions of disapproval following a GAO opinion until 2008. In 2008, GAO issued an opinion stating that a letter from the Centers for Medicare & Medicaid Services to state health officials concerning the State Children's Health Insurance Program was a rule for the purposes of the CRA; in response, Senator John D. Rockefeller introduced S.J.Res. 44 to disapprove the guidance provided in the letter.[198] According to a press release from the Committee on Finance at the time, however, the committee did not take further action on the resolution of disapproval because it had missed the window during which the action would have been required to be taken under the CRA to use its expedited procedures.[199]

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[196] Ibid., p. 20.

[197] Ibid.

[198] Letter from U.S. Government Accountability Office to Senator John D. Rockefeller, IV, and Senator Olympia Snowe on whether the Center for Medicare & Medicaid Services Letter on the State Children's Health Insurance Program is a "rule" under the CRA, April 17, 2008 (GAO B-316048).

[199] United States Senate Committee on Finance, "Senators Vow to Keep Fighting for Children's Health Care," press release, July 22, 2008, at https://www.finance.senate.gov/chairmans-news/senators-vow-to-keep-fighting-for-childrens-health-care.

In 2008, after Senator Rockefeller introduced a resolution disapproving of a letter from the Centers for Medicare & Medicaid Services, there was some dispute regarding when the CRA deadlines began. United States Senate Committee on Finance, "Senators Vow to Keep Fighting for Children's Health Care," press release, July 22, 2008, at https://www.finance.senate.gov/chairmans-news/senators-vow-to-keep-fighting-for-childrens-health-care. The Senators supporting the resolution argued that the CRA deadlines began either when the resolution was introduced or when CMS affirmatively refused to submit the rule to Congress; however, it was ultimately decided that the clock started ticking on the day that GAO published its opinion determining that the agency letter was a rule. Ibid.

The first time either chamber took action on a resolution of disapproval introduced following a GAO opinion was in 2012, when the House passed H.J.Res. 118 (112th Congress), a resolution of disapproval that would have overturned an information memorandum issued by the Department of Health and Human Services relating to the implementation of the Temporary Assistance for Needy Families (TANF) program. The first time the Senate took action on such a resolution of disapproval was on April 18, 2018, when it passed S.J.Res. 57, overturning guidance from the Bureau of Consumer Financial Protection (CFPB) pertaining to indirect auto lending and the Equal Credit Opportunity Act.[200] The House passed S.J.Res. 57 on May 8, 2018, and the President signed it into law on May 21, 2018.

Consequences of GAO Opinions

Standing alone, a GAO opinion deciding whether an agency action is a "rule" covered by the CRA does not have legal effect.[201] As discussed, GAO's role in determining whether actions are subject to the CRA is not provided for in the CRA,[202] and its opinions are, in essence, advisory.[203] The opinions do not have any immediate effect other than advising Congress as to whether GAO considers an agency action to meet the definition of *rule* under the CRA. As a matter of course, however, it appears that the Senate has chosen to treat the GAO opinions as dispositive on the issue. In several cases, individual Senators have stated that once a GAO opinion determining that an agency action is a rule is published in the *Congressional Record*, the time periods under the CRA commence and the agency action in question becomes subject to the CRA disapproval mechanism.[204] The recent enactment of a joint resolution of disapproval that was introduced following a GAO opinion regarding a 2013 CFPB bulletin that had not been submitted by the agency indicates that Congress, in at least some cases, is willing to consider the GAO opinion as a substitute for the agency's submission of a rule to Congress.[205]

A CRA provision barring judicial review makes it unlikely that a GAO opinion or any other congressional determination stating that a rule is subject to the CRA would be subject to challenge in court.[206] This provision states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[207] Accordingly, most courts have refused to

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[200] Consumer Financial Protection Bureau, *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, March 21, 2013, at https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[201] Cf., e.g., United States *ex rel.* Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94, 100 (D.D.C. 1964) ("The Comptroller General ... does not render legal opinions."). Critically, the Comptroller General, a legislative agent, is prohibited by the Constitution from executing the laws; the Supreme Court has accordingly struck down statutory provisions that gave the Comptroller General "ultimate authority," including power over the President, to determine which budget cuts to make. Bowsher v. Synar, 478 U.S. 714, 732-33 (1986).

[202] See 5 U.S.C. §§801-808.

[203] Cf., e.g., United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456, 463 n.6 (5th Cir. 1977).

[204] See, e.g., *Congressional Record*, daily edition, vol. 163, October 24, 2017, p.S6760; and *Congressional Record*, daily edition, vol. 163, November 27, 2017, p.S7330.

[205] See P.L. 115-172.

[206] 5 U.S.C. §805.

[207] *Id.* However, the post-enactment legislative history suggests that this provision is not intended to bar courts' ability to review or enforce the resolutions of disapproval themselves. Rep. Henry Hyde, *Congressional Record*, daily edition, vol. 142, (April 19, 1996), p. E577 ("The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law.... Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule."). See also Ctr. for Biological Diversity v. Zinke, No. 3:17-cv-00091-SLG, 2018 U.S. Dist. LEXIS 78136, at *25 n.89 (D. Alaska May 9, 2018) (holding 5 U.S.C. §805 did not preclude review of claim that agency acted

review any claims arguing that an agency action should have been submitted to Congress as a rule under the CRA.[208] As a result, the question of whether an agency action is subject to the CRA and its fast-track procedures will likely be settled in the political arena rather than in the courts, and, if Congress continues to treat GAO opinions as determinative, those opinions likely will be the final word on the issue.[209]

The provision barring judicial review may mean that one other critical aspect of the CRA may be addressed outside of the courts and through GAO opinions: whether a rule has taken effect. As discussed previously, the CRA states that agencies must submit covered rules to Congress and the Comptroller General "before a rule can take effect,"[210] suggesting that a rule may not become operative until the report required by the CRA is submitted to Congress. Indeed, the post-enactment statement inserted into the *Congressional Record* by the CRA's sponsors stated that, barring two exceptions listed in the CRA, "any covered rule not submitted to Congress and the Comptroller General will … not [take] effect until it is submitted pursuant to subsection 801(a)(1)(A)."[211] However, courts have refused to adjudicate claims arguing that various rules are not in effect because an agency has failed to submit the rules to Congress.[212] Accordingly, it is unlikely that a court would be willing to enforce this provision and declare that a rule lacks effect because it was not submitted to Congress.

If an agency has not submitted a disputed action to Congress, it is possible that this inaction was the result of the agency's view that the rule was not subject to the CRA. A GAO opinion stating that an agency action does constitute a rule, while not itself rendering a rule ineffective, may be the first indication to the agency that the rule did not "take effect" because the agency did not fulfill the CRA submission requirement.[213] But in the context of agency rules that inherently lack legal effect, the determination that they lack "effect" under the CRA may not have much practical impact. In the context of rulemaking, to "take effect" usually means that something has become *legally* effective.[214] As noted, however, the CRA encompasses some non-legislative rules that

unlawfully when, following the enactment of a joint resolution of disapproval, the agency treated its rule as though it had never taken effect).

[208] See, e.g., Montanans for Multiple Use v. Barbouletos, 542 F. Supp. 2d 9, 20 (D.D.C. 2008), *aff'd* 568 F.3d 225 (D.C. Cir. 2009). See also *supra* footnote 35.

[209] Even if the CRA did not contain a provision barring judicial review, or if that provision were found not to apply to a certain dispute, courts may be reluctant to intervene in a dispute regarding the application of the CRA, to the extent that any given dispute would require a court to second-guess congressional procedures. See, e.g., Leach v. Resolution Trust Corp., 860 F. Supp. 868, 875 (D.D.C. 1994) (declining to resolve dispute over the meaning of a statutory term because it would require court to meddle in Congress's internal affairs). See also NLRB v. Canning, 134 S. Ct. 2550, 2574-76 (2014) (noting "the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its business").

[210] 5 U.S.C. §801.

[211] *Congressional Record*, daily edition, vol. 142, April 19, 1996, p.E575.

Section 808 provides two exceptions to this section by specifically stating that "(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or (2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines." 5 U.S.C. §808.

[212] E.g. Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009).

[213] See 5 U.S.C. §801.

[214] See, e.g., NRDC v. EPA, 22 F.3d 1125, 1138 (D.C. Cir. 1994); Consumer Energy Council v. FERC, 673 F.2d 425, 468 n.179 (D.C. Cir. 1982). See also, e.g., CTIA – The Wireless Ass'n v. FCC, 530 F.3d 984, 989 (D.C. Cir. 2008) ("[U]ntil the rule does take effect, petitioners 'are not required to engage in, or to refrain from, any conduct during the time the case is held in abeyance.'" (quoting Devia v. NRC, 492 F.3d 421, 427 (D.C. Cir. 2007)) (internal quotation

inherently lack legal effect.[215] The fact that the CRA requires agencies to submit some agency statements that lack legal effect suggests that the term "effect," as used in the CRA's submission requirement, means something other than legal effect.[216] While reviewing notice-and-comment rulemakings, some courts have held that the CRA suspends a rule's operation notwithstanding the fact that a rule may technically have become effective.[217] With respect to rules such as general policy statements that generally lack legal force, however, even if an agency failed to comply with the CRA's submission requirement and erroneously regarded the rule as being operative, it is less likely that the operation of the statement had a discernible and independent effect on the agency's actions.[218]

Summary of GAO Opinions

This section briefly summarizes each of the 18 GAO opinions to date on whether certain agency actions were rules and, thus, were eligible for disapproval under the CRA. Where GAO appeared to consider one or more of the CRA exceptions to the definition of "rule" as fundamental to its analysis, the summaries identify which exception GAO focused on in its opinion. The opinions are listed in chronological order by the date on which GAO issued the opinion.

For a more concise summary of each of these opinions, see the table in **Appendix B**.

Department of Agriculture Memorandum Concerning the Emergency Salvage Timber Sale Program[219]

The Emergency Sale Timber Program was enacted as part of the Emergency Supplemental Appropriations and Rescissions Act of 1995.[220] The program was intended to "increase the sales of salvage timber in order to remove diseased and damaged trees and improve the health and ecosystems of federally owned forests."[221] On July 2, 1996, the Secretary of Agriculture sent a memorandum entitled "Revised Direction for Emergency Timber Salvage Sales Conducted Under Section 2001(b) of P.L. 104-19" to the Chief of the Forest Service, containing "clarifications in policy" for the program.

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marks omitted)).

[215] See *supra*, "CRA Incorporation of APA Definition of "Rule"

[216] See generally Bailey v. United States, 516 U.S. 137, 145 (1995) (stating that courts should read statutory words in context, "with the assumption that Congress intended each of its terms to have meaning").

[217] See NRDC v. Abraham, 355 F.3d 179, 201-02 (2d Cir. 2004); Liesegang v. Sec'y of Veterans Affairs, 312 F.3d 1368, 1374-75 (Fed. Cir. 2002). See also BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "take effect" as "to become operative or executed," or "to be in force; to go into operation).

[218] See, e.g., Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 253 (D.C. Cir. 2014) (noting that if an agency applies guidance as if it is binding, the guidance is likely a legislative rule); Pac. Gas & Elec. Co., 506 F.2d 33, 38 (D.C. Cir. 1974) ("The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.... When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.").

[219] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Senator Larry Craig on whether the Department of Agriculture memorandum concerning the Emergency Salvage Timber Sale Program is a "rule" under the CRA, September 16, 1996 (GAO B-274505).

[220] P.L. 104-19, §2001.

[221] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Senator Larry Craig on whether the Department of Agriculture memorandum concerning the Emergency Salvage Timber Sale Program is a "rule" under the CRA, September 16, 1996 (GAO B-274505), p. 3.

GAO concluded that the memorandum was a rule under the CRA because some of its contents "clearly are of general applicability and future effect in interpreting section 2001 of P.L. 104-19" and because, contrary to the argument the Department of Agriculture made to GAO when GAO requested its views on the matter, the memorandum "does not fall within the agency procedure or practice exclusion [in 5 U.S.C. §804(3)(C)]."[222]

U.S. Forest Service Tongass National Forest Land and Resource Management Plan[223]

On May 23, 2007, the Department of Agriculture's Forest Service issued the Tongass National Forest Land and Resource Management Plan, which "sets forth the management direction for the Tongass Forest and the desired condition of the Forest to be attained through Forest-wide multiple-use goals and objectives."[224]

GAO concluded that the plan was a rule under the CRA and was not excepted under 5 U.S.C. §804(3) because "decisions made in the Plan substantially affect non-agency parties and are, therefore, not 'agency procedures.'"[225]

American Heritage River Initiative, Created by Executive Order 13061[226]

President William Clinton signed Executive Order 13061 on September 11, 1997, announcing policies related to the American Heritage River Initiative (AHRI).[227] The AHRI was intended to support American communities' efforts to restore and protect their rivers; the President was to designate, by proclamation, 10 rivers that would take part in the program.

GAO concluded that Executive Order 13061 was not a rule under the CRA because the President is not an "agency" for the purposes of the CRA (or, for that matter, under the APA).[228] As such, actions taken by the President are not subject to the CRA.

Environmental Protection Agency "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits"[229]

On February 5, 1998, the Environmental Protection Agency (EPA) issued its "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits." According to EPA,

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[222] Ibid., p. 8.

[223] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Senator Ted Stevens, Senator Frank Murkowski, and Representative Don Young on whether the U.S. Forest Service Tongass National Forest Land and Resource Management Plan is a "rule" under the CRA, July 3, 1997 (GAO B-275178).

[224] Ibid., p. 5.

[225] Ibid., p. 8.

[226] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Senator Conrad Burns on whether the American Heritage River Initiative, created by Executive Order 13061, is a "rule" under the CRA, November 10, 1997 (GAO B-278224).

[227] Executive Order 13061, "Federal Support of Community Efforts Along American Heritage Rivers," 62 *Federal Register* 48445-48448, September 15, 1997.

[228] The CRA cross-references the definition of "agency" from the Administrative Procedure Act, which has been determined not to apply to the President, even though the text of the statute does not exempt the President from the definition of "agency." See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992), holding that the President's actions may not be reviewed under the APA and declining to hold that the President is an "agency" within the APA's definition.

[229] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative

the intent of the guidance was to update EPA's procedural and policy framework regarding complaints alleging discrimination in the environmental permitting context.

GAO concluded that "considered as a whole, the Interim Guidance clearly affects the rights of non-agency parties" and thus was a rule under the CRA and not exempt under 5 U.S.C. §804(3).[230]

Farm Credit Administration National Charter Initiative[231]

On May 3, 2000, the Farm Credit Administration (FCA) issued a booklet entitled "National Charters," and then the FCA published the booklet in the *Federal Register* on July 20, 2000.[232] The booklet "provide[d] guidance on the national charter application process and the national charter territory. Specifically, the Booklet explain[ed] how a direct lender association can apply for a national charter; what the territory of a national charter will be; and what conditions the FCA will impose in connection with granting a national charter."[233]

GAO concluded that "we find that the Booklet, while labeled a statement of policy by the FCA, in actuality, meets the requirements of a legislative rule—which should have been issued using informal rulemaking procedures, including notice and comment."[234] GAO then concluded that the booklet constituted a rule under the CRA and was not exempt under 5 U.S.C. §804(3) because the policies established in the booklet would have an effect on non-agency parties, and because statements made within the booklet clearly indicate that "the FCA recognizes the effect of the Booklet and national charters on other parties."[235]

Department of the Interior Record of Decision "Trinity River Mainstem Fishery Restoration"[236]

The Trinity River Record of Decision (ROD) was issued in December 2000 and documented the Department of the Interior's selection of the actions that it deemed necessary to "restore and maintain the anadromous fish in the Trinity River."[237] The ROD identified the department's selected courses of action for addressing the decreased river flows in the Trinity River Basin.

GAO concluded that the ROD was a "rule" under the CRA because "its essential purpose is to set policy for the future," it was not a rule of agency procedure or practice under 5 U.S.C. §804(3),

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David McIntosh on whether the Environmental Protection Agency "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" is a "rule" under the CRA, January 20, 1999 (GAO B-281575).

[230] Ibid., p. 6.

[231] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative James Leach on whether the Farm Credit Administration's national charter initiative is a "rule" under the CRA, October 17, 2000 (GAO B-286338).

[232] Farm Credit Administration, "National Charters Booklet: Notice and Request for Comment," 65 *Federal Register* 45066, July 20, 2000.

[233] Ibid.

[234] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative James Leach on whether the Farm Credit Administration's national charter initiative is a "rule" under the CRA, October 17, 2000 (GAO B-286338), pp. 7-9.

[235] Ibid., p. 8.

[236] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative Doug Ose on whether the Department of the Interior Record of Decision "Trinity River Mainstem Fishery Restoration" is a "rule" under the CRA, May 14, 2001 (GAO B-287557).

[237] Ibid., p. 1.

and "it will have broad effect on both rivers' ecosystems and potentially significant economic effect within the Sacramento and Trinity River basins."[238]

Department of Veterans Affairs Memorandum Regarding the VA's Marketing Activities to Enroll New Veterans in the VA Health Care System[239]

On July 18, 2002, the Department of Veterans Affairs (VA) issued a memorandum to network directors regarding the VA's marketing activities to enroll new veterans in the VA health care system. Specifically, the memorandum directed the network directors to no longer engage in trying to enroll new veterans through the use of certain types of activities, such as health fairs, veteran open houses, and enrollment displays at VSO meetings.

GAO concluded that the memorandum was not a rule under the CRA because it "is clearly excluded from the coverage of the CRA by one of the enumerated exceptions found in 5 U.S.C. §804(3)"—specifically, GAO considered the memorandum to be a statement of agency procedure or practice that did not affect the rights or obligations of non-agency parties.[240] Rather, the memorandum governed internal agency procedures and did not affect the ability of veterans to enroll in the VA health care system.[241]

Department of Veterans Affairs Memorandum Terminating Vendee Loan Program[242]

On January 23, 2003, the VA issued a memorandum terminating the Vendee Loan Program, a program that allowed the VA to make loans for the sale of foreclosed VA-loan-guaranteed property. In the memorandum, which was addressed to all directors and loan guarantee officers, the VA Secretary announced that it would no longer finance the sale of acquired properties.

GAO concluded that the memorandum was not a rule under the CRA because it was a rule relating to agency management (i.e., excepted under 5 U.S.C. §804(3)(B)) or a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties (i.e., excepted under 5 U.S.C. §804(3)(C)). GAO noted that "this is the type of management decision left to the discretion of the Secretary of VA in order to maintain the effective functioning and long-term stability of the program," and that "since the vendee loans were a purely discretionary method for VA to use to dispose of foreclosed properties, the change in the agency's 'organization' or 'practice' does not affect any party's right or obligation."[243]

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[238] Ibid., pp. 7-9.

[239] Letter from U.S. General Accounting Office (GAO, now Government Accountability Office) to Representative Ted Strickland on whether the Department of Veterans Affairs memorandum regarding the VA's marketing activities to enroll new veterans in the VA health care system is a "rule" under the CRA, February 28, 2003 (GAO B-291906).

[240] Ibid., p. 4.

[241] Ibid., pp. 4-5.

[242] Letter from U.S. Government Accountability Office to Representative Lane Evans on whether the Department of Veterans Affairs memorandum terminating Vendee Loan Program is a "rule" under the CRA, May 19, 2003 (GAO B-292045).

[243] Ibid., p. 6.

Center for Medicare & Medicaid Services Letter on the State Children's Health Insurance Program[244]

On August 17, 2007, the Centers for Medicare & Medicaid Services issued a letter to state health officials concerning the State Children's Health Insurance Program (SCHIP).[245] The letter "purports to clarify the statutory and regulatory requirements concerning prevention of crowd out for states wishing to provide SCHIP coverage to children with effective family incomes in excess of 250 percent of the federal poverty level (FPL) and identifies a number of particular measures that these states should adopt."[246]

GAO concluded that the letter was a rule for the purposes of the CRA because it was a "statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy with regard to the SCHIP program," and because GAO did "not believe that the August 17 letter comes within any of the exceptions to the definition of rule contained in the Review Act."[247]

Department of Health and Human Services Information Memorandum Concerning the Temporary Assistance to Needy Families Program[248]

On July 12, 2012, the Department of Health and Human Services' Administration for Children and Families issued an information memorandum concerning the Temporary Assistance for Needy Families (TANF) program.[249] The memorandum notified states that HHS was willing to exercise waiver authority over some of the program's work requirements.

GAO concluded that the information memorandum was a rule for the purposes of the CRA because it was a "statement of general applicability and future effect, designed to implement, interpret, or prescribe law or policy with regard to TANF," and it did not fall within any of the three exceptions to the definition of a rule.[250] As GAO stated, the memorandum applied to states and therefore was of general applicability, rather than particular applicability; it applied to the states and not agency management or personnel; and it established "the criteria by which states may apply for waivers from certain requirements of the TANF program. These criteria affect the obligations of the states, which are non-agency parties."[251]

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[244] Letter from U.S. Government Accountability Office to Senator John D. Rockefeller IV and Senator Olympia Snowe on whether the Center for Medicare & Medicaid Services Letter on the State Children's Health Insurance Program is a "rule" under the CRA, April 17, 2008 (GAO B-316048).

[245] Letter from U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, to state health officials, July 12, 2012.

[246] Letter from U.S. Government Accountability Office to Senator John D. Rockefeller IV and Senator Olympia Snowe on whether the Center for Medicare & Medicaid Services Letter on the State Children's Health Insurance Program is a "rule" under the CRA, April 17, 2008 (GAO B-316048), p. 2.

[247] Ibid., p. 13.

[248] Letter from U.S. Government Accountability Office to Senator Orrin Hatch and Representative Dave Camp on whether the Department of Health and Human Services Information Memorandum concerning the Temporary Assistance to Needy Families Program is a "rule" under the CRA, September 4, 2012 (GAO B-323772).

[249] U.S. Department of Health and Human Services, Administration for Children and Families, Office of Family Assistance, Guidance Concerning Waiver and Expenditure Authority Under Section 1115, Information Memorandum, TANF-ACF-IM-2012-03, July 12, 2012.

[250] Letter from U.S. Government Accountability Office to Senator Orrin Hatch and Representative Dave Camp on whether the Department of Health and Human Services Information Memorandum concerning the Temporary Assistance to Needy Families Program is a "rule" under the CRA, September 4, 2012 (GAO B-323772), p. 6.

[251] Ibid., p. 4.

Environmental Protection Agency Proposed Rule on Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units[252]

On January 8, 2014, the Environmental Protection Agency issued a proposed rule entitled "Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units."[253] The proposed rule was intended to establish "standards for fossil fuel-fired electric steam generating units (utility boilers and Integrated Gasification Combined Cycle (IGCC) units) and for natural gas-fired stationary combustion turbines."[254]

GAO concluded that the proposed rule in question was not an action that was covered by the CRA, because the CRA was intended to apply only to final rules: "The issuance of a proposed rule is an interim step in the rulemaking process intended to satisfy APA's notice requirement, and, as such, is not a triggering event for CRA purposes."[255] Furthermore, GAO stated "the precedent provided in our prior opinions underscores that proposed rules are not rules for CRA purposes, and GAO has no role with respect to them."[256]

Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation Interagency Guidance on Leveraged Lending[257]

On March 22, 2013, the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation, issued interagency guidance on leveraged lending.[258] The guidance "outline[d] for agency-supervised institutions high-level principles related to safe-and-sound leveraged lending activities, including underwriting considerations, assessing and documenting enterprise value, risk management expectations for credits awaiting distribution, stress-testing expectations, pipeline portfolio management, and risk management expectations for exposures held by the institution."[259]

GAO concluded that the leveraged-lending guidance was a rule under the CRA because it was a general statement of policy that had future effect and because GAO could "readily conclude that the guidance does not fall within any of the three exceptions in the CRA."[260] GAO's opinion,

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[252] Letter from U.S. Government Accountability Office to Senator Mitch McConnell on whether the Environmental Protection Agency's proposed rule on Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units is a "rule" under the CRA, May 29, 2014 (GAO B-325553).

[253] Environmental Protection Agency, "Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units," 79 *Federal Register* 1429, January 8, 2014.

[254] Ibid.

[255] Letter from U.S. Government Accountability Office to Senator Mitch McConnell on whether the Environmental Protection Agency's proposed rule on Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units is a "rule" under the CRA, May 29, 2014 (GAO B-325553), p. 6.

[256] Ibid., p. 1.

[257] Letter from U.S. Government Accountability Office to Senator Pat Toomey on whether the Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation Interagency Guidance on Leveraged Lending is a "rule" under the CRA, October 19, 2017 (GAO B-329272).

[258] The Office of the Comptroller of the Currency, Department of the Treasury; Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation, "Interagency Guidance on Leveraged Lending," 78 *Federal Register* 17766, March 22, 2013.

[259] Ibid.

[260] Letter from U.S. Government Accountability Office to Senator Pat Toomey on whether the Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation Interagency Guidance

which was issued on October 19, 2017, was silent on the matter of the timing of its opinion relative to the guidance, which was issued in 2013.

U.S. Forest Service 2016 Amendment to the Tongass Land and Resource Management Plan[261]

On December 9, 2016, the U.S. Department of Agriculture's Forest Service approved an amendment to the Tongass Land and Resource Management Plan.[262] The plan identified the uses that may occur in each area of the forest. The Forest Service is required under the National Forest Management Act of 1976 to update forest plans at least every 15 years and potentially more frequently.[263]

GAO concluded that the amendment to the plan was a rule under the CRA because the amendment "has a substantial impact on the regulated community such that it is a substantive rather than a procedural rule for purposes of CRA."[264] As such, the plan could not be considered to fall within the exception in 5 U.S.C. §804(3)(C), despite the argument presented by USDA when GAO asked the agency its views on the matter.

Bureau of Land Management Eastern Interior Resource Management Plan[265]

On December 30, 2016, the Department of the Interior's Bureau of Land Management issued its resource management plan for four areas in Alaska: the Draanjik Planning Area, the Fortymile Planning Area, the Steese Planning Area, and the White Mountains Planning Area.[266] Land management plans such as these are intended to provide specific information for the use of public lands and are required under the Federal Land Policy and Management Act of 1976.[267]

GAO concluded that the plan was a rule under the CRA because it was of general applicability, had future effect, and was designed to implement, interpret, or prescribe law or policy, and because it did not fit into any of the three exceptions. Of particular relevance appeared to be the exception in 5 U.S.C. §804(3): "Because the Eastern Interior Plan designates uses by nonagency

on Leveraged Lending is a "rule" under the CRA, October 19, 2017 (GAO B-329272), p. 7.

[261] Letter from U.S. Government Accountability Office to Senator Lisa Murkowski on whether the U.S. Forest Service 2016 Amendment to the Tongass Land and Resource Management Plan is a "rule" under the CRA, October 23, 2017 (GAO B-238859).

[262] U.S. Department of Agriculture Forest Service, *Land and Resource Management Plan*, December 2016, at https://www.fs.usda.gov/detail/tongass/landmanagement/?cid=stelprd3801708.

[263] 16 U.S.C. §1604(f)(5). The Tongass plan was first completed in 1979 and amended in 1986, 1991, 1997, and 2008. Letter from U.S. Government Accountability Office to Senator Lisa Murkowski on whether the U.S. Forest Service 2016 Amendment to the Tongass Land and Resource Management Plan is a "rule" under the CRA, October 23, 2017 (GAO B-238859), p. 5.

[264] Ibid., p. 14.

[265] Letter from U.S. Government Accountability Office to Senator Lisa Murkowski on whether the Bureau of Land Management's Eastern Interior Resource Management Plan is a "rule" under the CRA, November 15, 2017 (GAO B-329065).

[266] U.S. Department of the Interior, Bureau of Land Management, "Notice of Availability of Records of Decision and Approved Resource Management Plans for the Four Subunits of the Eastern Interior Resource Management Plan and Final Environmental Impact Statement," 82 *Federal Register* 1753, January 6, 2017.

[267] P.L. 94-579.

parties that may take place in the four areas it governs, it is not a rule of agency organization, procedure or practice."[268]

Consumer Financial Protection Bureau Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act[269]

On March 21, 2013, the Consumer Financial Protection Bureau issued a bulletin on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act."[270] The bulletin "provide[d] guidance about indirect auto lenders' compliance with the fair lending requirements of the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B."[271]

GAO concluded that the bulletin was a rule under the CRA because it "is a statement of general applicability, since it applies to all indirect auto lenders; it has future effect; and it is designed to prescribe the Bureau's policy in enforcing fair lending laws," and because the bulletin "does not fall within any of the [CRA's] exceptions."[272] GAO's opinion, which was issued on October 19, 2017, was silent on the matter of the timing of its opinion relative to the bulletin, which was issued in 2013.[273]

U.S. Agency for International Development Fact Sheet on Global Health Assistance and Revisions to Standard Provisions for U.S. Nongovernmental Organizations[274]

On January 23, 2017, President Donald J. Trump released a presidential memorandum establishing his Administration's policy on global health assistance funding, often referred to as the "Mexico City Policy."[275] The policy prohibited assistance to foreign nongovernmental organizations and other entities that perform or promote abortion as a method of family planning.

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[268] Letter from U.S. Government Accountability Office to Senator Lisa Murkowski on whether the Bureau of Land Management's Eastern Interior Resource Management Plan is a "rule" under the CRA, November 15, 2017 (GAO B-329065), p. 7.

[269] Letter from U.S. Government Accountability Office to Senator Pat Toomey on whether the Consumer Financial Protection Bureau bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act is a "rule" under the CRA, December 5, 2017 (GAO B-329129).

[270] Consumer Financial Protection Bureau, *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, March 21, 2013, at https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[271] Ibid., p. 1.

[272] Letter from U.S. Government Accountability Office to Senator Pat Toomey on whether the Consumer Financial Protection Bureau bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act is a "rule" under the CRA, December 5, 2017 (GAO B-329129), pp. 6-7. S.J.Res. 57S.J.Res. 57.

[273] As discussed earlier in this report, however, the Senate appears to have determined that the date of publication of the GAO opinion in the *Congressional Record* is what triggers the time periods for expedited review. The date on which the GAO opinion was published in the *Congressional Record* was December 6, 2017 (*Congressional Record*, daily edition, vol. 163, December 6, 2017, p. S7888). On April 18, 2018, the Senate passed disapproval resolution S.J.Res. 57 using the CRA's procedures. The House passed S.J.Res. 57 on May 8, 2018, and the President signed it into law on May 21, 2018.

[274] Letter from U.S. Government Accountability Office to Senator Jeanne Shaheen, Senator Benjamin Cardin, Senator Richard Blumenthal, Senator Patty Murray, Representative Nita M. Lowey, Representative Diana DeGette, Representative Eliot L. Engel, and Representative Barbara Lee on whether the U.S. Agency for International Development fact sheet on global health assistance and revisions to standard provisions for U.S. nongovernmental organizations is a "rule" under the CRA, May 1, 2018 (GAO B-329206).

[275] Executive Office of the President, President Donald J. Trump, "The Mexico City Policy," 82 *Federal Register* 8495, January 23, 2017.

To implement this policy, the Department of State issued a fact sheet entitled "Protecting Life in Global Health Assistance" on May 15, 2017, and the U.S. Agency for International Development (USAID) issued revisions to its "Standard Provisions for U.S. Nongovernmental Organizations" on March 2, 2017.[276]

GAO concluded that the two agency actions in question were not rules for the purposes of the CRA because, although the fact sheets were issued by federal agencies, they were merely implementing a decision of the President, under a statute that specifically granted broad policymaking authority to the President. GAO based this decision on a 1989 D.C. Circuit case, *DKT Memorial Fund v. Agency for International Development*, which held that agency actions implementing the decision of President Ronald Reagan to establish the Mexico City Policy were not reviewable under the APA.[277] The court held that the disputed decision involved "not a rulemaking by an agency, but rather a policy-making at the highest level by the executive branch," concluding that it did not have authority under the APA "to review the wisdom of policy decisions of the President"[278] where the relevant statute granted the President broad discretion in the area of foreign affairs.[279] GAO determined that in accordance with this precedent, the agency actions implementing President Trump's policy decision were not subject to the CRA.[280]

Internal Revenue Service Statement on Health Care Reporting Requirements[281]

In guidance for the 2018 tax filing season, IRS announced on its website that it "would not accept electronically filed individual income tax returns where the taxpayer does not meet ACA reporting requirements, specifically to report full-year health coverage, claim a coverage exemption, or report a shared responsibility payment (known as 'silent returns')."[282]

GAO concluded that the agency statement was not a rule under the CRA because it "is a rule of agency procedure or practice that does not substantially affect taxpayers' rights or obligations," thus falling into the exception in 5 U.S.C. §804(3)(C).[283] In effect, according to GAO, the "statement changes the timing of IRS compliance measures, but it does not change IRS's basis for

[276] U.S. Department of State, *Protecting Life in Global Health Assistance*, Fact Sheet, Washington, DC, May 15, 2017, at https://www.state.gov/r/pa/prs/ps/2017/05/270866.htm; and U.S. Agency for International Development, *Revisions to the "Standard Provisions for U.S. Nongovernmental Organizations,"* March 2, 2017, pp. 74-86.

[277] 887 F.2d 275, 281-82 (D.C. Cir. 1989).

[278] *Id.* at 281.

[279] *Id.* at 281-82.

[280] Letter from U.S. Government Accountability Office to Senator Jeanne Shaheen, Senator Benjamin Cardin, Senator Richard Blumenthal, Senator Patty Murray, Representative Nita M. Lowey, Representative Diana DeGette, Representative Eliot L. Engel, and Representative Barbara Lee on whether the U.S. Agency for International Development fact sheet on global health assistance and revisions to standard provisions for U.S. nongovernmental organizations is a "rule" under the CRA, May 1, 2018 (GAO B-329206), p. 6.

[281] Letter from U.S. Government Accountability Office to Representative Mark Meadows on whether the Internal Revenue Service statement on health care reporting requirements is a "rule" under the CRA, May 17, 2018 (GAO B-329916).

[282] See https://www.irs.gov/affordable-care-act/individuals-and-families/individual-shared-responsibility-provision. GAO's opinion does not appear to state exactly when this change was announced.

[283] Letter from U.S. Government Accountability Office to Representative Mark Meadows on whether the Internal Revenue Service statement on health care reporting requirements is a "rule" under the CRA, May 17, 2018 (GAO B-329916), p. 1.

assessing taxpayers' compliance with existing law—namely, the requirement to file a complete tax return and to meet ACA reporting requirements."[284]

Social Security Administration Hearings, Appeals, and Litigation Law Manual[285]

The Social Security Administration's (SSA) Hearings, Appeals, and Litigation Law Manual (HALLEX) describes how SSA will process and adjudicate claims for disability benefits under the Social Security Act. Two sections of the manual stated a policy under which an SSA adjudicator could not rely on information from the Internet, including from social media networks, in deciding a claim for benefits (with two exceptions).[286]

GAO concluded that these two sections of HALLEX were not rules under the CRA because they were merely "procedures that govern the use of evidence from the Internet during those proceedings" and they "do not impose new burdens on claimants or alter claimants' rights or obligations during the SSA appeal process."[287] Thus, GAO concluded that "the HALLEX sections are procedural rules that meet the [5 U.S.C. §804(3)(C)] exception."[288]

[284] Ibid., p. 8.

[285] Letter from U.S. Government Accountability Office to Representative Jason Smith on whether portions of the Social Security Administration's Hearings, Appeals, and Litigation Law Manual (HALLEX) are "rules" under the CRA, September 10, 2018 (GAO B-329926).

[286] Social Security Administration, *Hearings, Appeals, and Litigation Law Manual (HALLEX)*, at https://www.ssa.gov/OP_Home/hallex/hallex.html. The two sections at issue were HALLEX I-2-5-69 and HALLEX I-3-2-40. According to GAO, HALLEX I-2-5-69 was last updated on August 30, 2013, and HALLEX I-3-2-40 was last updated on February 28, 2015.

[287] Letter from U.S. Government Accountability Office to Representative Jason Smith on whether portions of the Social Security Administration's Hearings, Appeals, and Litigation Law Manual are "rules" under the CRA, September 10, 2018 (GAO B-329926), p. 7.

[288] Ibid.

Appendix A. Submission Form for Rules Under the CRA

24722

Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate ☐ Speaker of the House of Representatives ☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

2. Subdivision or Office

3. Rule Title

4. Regulation Identifier Number (RIN) or Other Unique Identifier (if applicable)

5. Major Rule Non-major Rule

6. Final Rule Other _____

7. With respect to this rule, did your agency solict public comments? Yes ○ No N/A

8. Priority of Regulation (fill in one)

Economically Significant; or
Significant; or
Substantive, Nonsignificant

Routine and Frequent or
Informational/Administrative/Other
(Do not complete the other side of this form if filled in above.)

9. Effective Date (if applicable)

10. Concise Summary of Rule (fill in one or both) attached stated in rule

Submitted by: _____ (signature)

Name: _____

Title: _____

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

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	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?			
B. With respect to this rule, by the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?			
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?			
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?			
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?			
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?			
F. Did you discuss any of the following in the preamble to the rule?			
• E.O. 12612, Federalism			
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights			
• E.O. 12866, Regulatory Planning and Review			
• E.O. 12875, Enhancing the Intergovernmental Partnership			
• E.O. 12988, Civil Justice Reform			
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks			
• Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)			

3/23/99

Source: Form available on the White House website at https://www.whitehouse.gov/omb/information-regulatory-affairs/regulatory-matters/.

Appendix B. Summary of GAO Opinions

Table 1. Government Accountability Office Opinions on Whether Certain Agency "Rules" Are Covered by the Congressional Review Act

As of September 20, 2018

Agency Action	GAO Opinion Citation	Date of Opinion	Requested By	GAO Determination
Department of Agriculture memorandum concerning the Emergency Salvage Timber Sale Program	B-274505	September 16, 1996	Senator Larry Craig	Agency action is a rule under the CRA.
U.S. Forest Service Tongass National Forest Land and Resource Management Plan	B-275178	July 3, 1997	Senator Ted Stevens Senator Frank Murkowski Representative Don Young	Agency action is a rule under the CRA.
American Heritage River Initiative, created by Executive Order 13061	B-278224	November 10, 1997	Senator Conrad Burns	Action is not a rule under the CRA because the President is not an agency under the CRA.
Environmental Protection Agency "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits"	B-281575	January 20, 1999	Representative David McIntosh	Agency action is a rule under the CRA.
Farm Credit Administration national charter initiative	B-286338	October 17, 2000	Representative James Leach	Agency action is a rule under the CRA.
Department of the Interior Record of Decision "Trinity River Mainstem Fishery Restoration"	B-287557	May 14, 2001	Representative Doug Ose	Agency action is a rule under the CRA.
Department of Veterans Affairs (VA) memorandum regarding the VA's marketing activities to enroll new veterans in the VA health care system	B-291906	February 28, 2003	Representative Ted Strickland	Agency action is not a rule under the CRA because it falls under the exception in 5 U.S.C. §804(3)(C).
Department of Veterans Affairs memorandum terminating Vendee Loan Program	B-292045	May 19, 2003	Representative Lane Evans	Agency action is not a rule under the CRA because it falls under the exception in 5 U.S.C. §804(3)(B) or (C).
Centers for Medicare & Medicaid Services Letter on the State Children's Health Insurance Program	B-316048	April 17, 2008	Senator John D. Rockefeller, IV Senator Olympia Snowe	Agency action is a rule under the CRA.

Agency Action	GAO Opinion Citation	Date of Opinion	Requested By	GAO Determination
Department of Health and Human Services Information Memorandum concerning the Temporary Assistance to Needy Families Program	B-323772	September 4, 2012	Senator Orrin Hatch Representative Dave Camp	Agency action is a rule under the CRA.
Environmental Protection Agency proposed rule on Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units	B-325553	May 29, 2014	Senator Mitch McConnell	Agency action is not a rule because "the precedent provided in our prior opinions underscores that proposed rules are not rules for CRA purposes, and GAO has no role with respect to them."
Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation Interagency Guidance on Leveraged Lending	B-329272	October 19, 2017	Senator Pat Toomey	Agency action is a rule under the CRA.
U.S. Forest Service 2016 Amendment to the Tongass Land and Resource Management Plan	B-238859	October 23, 2017	Senator Lisa Murkowski	Agency action is a rule under the CRA.
Bureau of Land Management Eastern Interior Resource Management Plan	B-329065	November 15, 2017	Senator Lisa Murkowski	Agency action is a rule under the CRA.
Consumer Financial Protection Bureau bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act	B-329129	December 5, 2017	Senator Pat Toomey	Agency action is a rule under the CRA.
U.S. Agency for International Development fact sheet on global health assistance and revisions to standard provisions for U.S. nongovernmental organizations	B-329206	May 1, 2018	Senator Jeanne Shaheen Senator Benjamin Cardin Senator Richard Blumenthal Senator Patty Murray Representative Nita M. Lowey Representative Diana DeGette Representative Eliot L. Engel Representative Barbara Lee	Agency actions are not rules under the CRA because "federal courts have held that agencies' implementation of presidential policy-making does not constitute a rule."

Agency Action	GAO Opinion Citation	Date of Opinion	Requested By	GAO Determination
Internal Revenue Service statement on health care reporting requirements	B-329916	May 17, 2018	Representative Mark Meadows	Agency action is not a rule under the CRA because it falls under the exception in 5 U.S.C. §804(3)(C).
Social Security Administration Hearings, Appears, and Litigation Law Manual ("HALLEX")	B-329926	September 10, 2018	Representative Jason Smith	Agency action is not a rule under the CRA because it falls under the exception in 5 U.S.C. §804(3)(C).

Source: Congressional Research Service. Opinions are listed on the Government Accountability Office website at https://www.gao.gov/legal/other-legal-work/congressional-review-act#legal_opinions.

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