



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D. C. 20503

March 30, 1999

THE DIRECTOR

M-99-13

MEMORANDUM FOR THE HEADS OF DEPARTMENTS, AGENCIES,  
AND INDEPENDENT ESTABLISHMENTS

FROM:

Jacob J. Lew  
Director

A handwritten signature in black ink, appearing to read "Jacob J. Lew", written over the printed name and title.

SUBJECT:

Guidance for Implementing the Congressional Review Act

The Congressional Review Act (CRA, 5 U.S.C. Chapter 8) directs agencies to send a copy of each new final rule (and certain analyses they may undertake related to the rule) to both Houses of Congress (for transmittal to the appropriate authorizing Committees) and to the General Accounting Office. In the FY 99 omnibus appropriations bill, Congress directed OMB to issue guidance on certain "requirements" of the CRA, specifically "5 U.S.C. Sec. 801(a)(1) and (3); sections 804(3), and 808(2), including a standard new rule reporting form for use under section 801(a)(1)(A)-(B)." Attached, in Question and Answer format, is this guidance concerning the CRA. Also attached is the "new rule reporting form."

On January 12, 1999, OMB issued Memorandum 99-07 (January 12, 1999), "Submission of Federal Rules under the Congressional Review Act." This Memorandum supersedes Memorandum 99-07 and Memorandum 99-07 is canceled. The attached new rule reporting form is a slightly modified version of the form previously sent to you.

Attachments

## **AGENCY GUIDANCE CONGRESSIONAL REVIEW OF AGENCY RULES**

In general terms, the Congressional Review Act (CRA) requires agencies to send a copy of each new final rule (and certain analyses that they may undertake related to the rule) to both Houses of Congress (for transmittal to the appropriate authorizing Committees) and to the General Accounting Office (GAO) before the rule can take effect.

When an agency sends a rule to Congress and GAO, the agency is to indicate whether the rule is “major” or not. The CRA directs OMB’s Office of Information and Regulatory Affairs to find whether a rule meets the statutory definition of “major” -- that is, whether the rule is likely to result in an annual effect on the economy of over \$100,000,000; a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises.

The designation of a rule as “major” has several consequences. Unless exempted, a major rule may not take effect until 60 calendar days after it has been submitted to Congress. In addition, GAO is to provide a report to the agency’s authorizing Committee on each major rule. Whether or not a rule is designated as “major,” Congress has 60 legislative days during which it may use expedited procedures to disapprove a rule.

The CRA had the strong support of President Clinton. It was signed on March 29, 1996. By passing this law, Congress acknowledged and assumed more responsibility for its continuing role in the regulatory system. With this law, Congress will be able to speak to any regulatory actions that it thinks are not true to its intent.

As of March 24, 1999, GAO informs us that it had received 187 major rules and 12,646 non-major final rules. Neither House of Congress has passed any motion to disapprove a rule; nor has any such motion been enacted.

### **I. AGENCY SUBMISSIONS TO CONGRESS AND GAO (Section 801(a)(1)).**

#### **A. What does Section 801(a)(1) of the CRA require agencies to submit to Congress and GAO?**

In order for a rule to take effect, you must submit a report to each House of Congress and GAO containing the following:

- a copy of the rule;
- a concise general statement relating to the rule, including whether the rule is a “major

rule;" and

- the proposed effective date of the rule.

When you submit the report, you must also submit to GAO and make available to each House of Congress, the following information:

- a complete copy of any cost-benefit analysis of the rule;
- the agency's actions relevant to sections 603, 604, 605, 607 and 609 of the Regulatory Flexibility Act (RFA) (found generally at 5 U.S.C. chapter 6);
- the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act (UMRA) (found at 2 U.S.C. sections 1532 to 1535); and
- any other relevant information or requirements under any other Act and any relevant Executive Orders (see, for example, those listed on the second page of the CRA submission form, discussed in Question I.B, below).

#### **B. What is the purpose of the CRA submission form?**

On January 12, 1999, OMB sent the agencies a standard form for submitting rules to Congress and GAO, "Submission of Federal Rules under the Congressional Review Act." This standard form was attached to OMB Memorandum 99-07. This guidance supersedes Memorandum 99-07, and Memorandum 99-07 is canceled.

We have attached to this guidance a slightly modified version of the form previously sent to you. It is available on the OMB and GAO Internet web home-pages ([www.whitehouse.gov/WH/EOP/OMB](http://www.whitehouse.gov/WH/EOP/OMB), and [www.gao.gov](http://www.gao.gov)).

The attached form is to be used in lieu of agency transmittal letters for submissions made under the CRA. The questions on the form cover information required by Section 801(a)(1) of the CRA. We are informed that the Senate and House Parliamentarians will accept this form as the cover for transmitting final agency rules, to be used instead of transmittal letters. The Parliamentarians request an original signature on the form sent to the Senate and to the House, signed by an authorized agency official (which need not be a political-level appointee).

#### **C. Where should agencies send their CRA reports?**

You should send CRA reports to--

- the Office of the President of the Senate, S-212, the Capitol, Washington, D.C. 20510;
- the Office of the Speaker of the House, H-209, the Capitol, Washington, D.C. 20515; and
- the Office of the General Counsel, General Accounting Office, Room 7175, 441 G Street, N.W., Washington, D.C. 20548.

#### **D. Which agencies have to submit their final rules to Congress and GAO?**

The CRA applies to every Executive branch “agency” as defined in 5 U.S.C. 551(1). This definition, from the Administrative Procedure Act (APA), includes the independent regulatory commissions and boards.

We would note that this definition of “agency” is informed by the general definitions in 5 U.S.C. 101-105. 5 U.S.C. 105 explicitly excludes the United States Postal Service and the Postal Rate Commission from the definition of “Executive Agency.”

#### **E. Does the CRA require agencies to submit proposed rules to Congress and GAO?**

No. Under the CRA, Congress does not review proposed rules. Therefore, notices of proposed rulemaking (including advance notices of proposed rulemaking, notices of inquiry, and other forms of rulemaking that are not final) do not need to be submitted to Congress and GAO. Instead, you only need to submit final rules (including such documents as interim final rules, and direct final rules).

For a discussion of the “rules” covered by the CRA, see Topic II, below.

## **II. THE CRA DEFINITION OF “RULE” (Section 804(3)).**

The following is intended to provide general guidance on what is a “rule” subject to the CRA.

### **A. How does the CRA define a “rule”?**

Section 804(3) of the CRA defines a “rule” as having--

“the meaning given such term in [5 U.S.C.] section 551, except that such term 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 therefor, 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.”

Accordingly, the CRA's definition of "rule" is based upon the APA definition of "rule," but excludes certain APA rules.

### **B. What is a "rule" under the Administrative Procedure Act?**

The APA defines a "rule" (in 5 U.S.C. 551(4)) as--

"the whole or 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."

As noted above, the CRA at Section 804(3)(A)-(C) excludes certain APA rules from the CRA's definition of "rule."

The APA's definition of "rule" dates back to the statute's original enactment in 1946. During the subsequent fifty years, Federal agencies and courts have had to address on numerous occasions, and in a wide variety of contexts, the issue of whether a particular agency action constitutes a "rule" under the APA. This determination depends on a fact-specific assessment of the particular action in question, evaluated under the APA's general test for what is a "rule."

In determining whether an agency action constitutes a "rule" under the APA, agencies have sought the advice of their legal staffs, as well as that of the Justice Department. Moreover, agencies have been able to derive guidance from the ever-increasing number of court decisions that address whether a particular agency action constitutes an APA "rule."

Since the CRA's definition of "rule" is based directly upon the APA's definition of "rule," agencies may apply the same principles in identifying "rules" under the CRA as they have applied over the years in identifying "rules" under Section 551 of the APA. In addition, agencies may rely on the same processes for making these determinations. In particular, agencies should consult with their legal

staffs in making the determination of whether a particular agency action constitutes a "rule" under the CRA.

**C. Are agency "orders" subject to the CRA?**

No. The APA defines an "order" as a final action in a matter other than a rulemaking.

**D. Are any other rules exempt from the CRA?**

The CRA exempts rules concerning monetary policy developed by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

**III. THE EFFECTIVE DATE OF "MAJOR RULES" (Sections 801(a)(3) and 808(2)).**

**A. What is a "major rule?"**

Section 804(2) defines a "major rule" as a rule that the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) finds has resulted in or is likely to result in:

- an annual effect on the economy of \$100 million or more;
- a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- 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 CRA's definition of "major rule" is identical to the definition of "major rule" that was in Executive Order 12291, which was rescinded in 1993 when Executive Order 12866 was issued.

The CRA's definition of "major rule" is similar, but not identical, to the standard set forth in Section 3(f)(1) of E.O. 12866 for identifying "economically significant rules." The main difference is that some additional rules may be captured by the CRA definition that are not considered "economically significant" under E.O. 12866, notably those rules that would have a significant adverse effect on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The CRA exempts from the definition of "major rule" any rule promulgated under the Telecommunications Act of 1996 and any amendments made to that Act. The remaining CRA

requirements apply to these rules.

**B. What is the process for identifying "major rules" under the CRA?**

If the rule is subject to E.O. 12866 review, you should indicate whether you consider the rule as "major" when you submit both the proposed rule and final rule for OMB review. If the rule is not subject to E.O. 12866 review, you should contact your Desk Officer in OMB's Office of Information and Regulatory Affairs (OIRA) in accordance with your established practice.

**C. When do "major rules" take effect?**

"Major rules" generally may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the *Federal Register*, if it is so published, whichever is later.

**D. When can an agency have a "major rule" take effect sooner than 60 days?**

Section 808 provides that, for two categories of rules, the rule "shall take effect at such time as the Federal agency promulgating the rule determines." These exemptions apply to both major and non-major rules. Although such rules may go into effect "at such time as the Federal agency promulgating the rule determines," the agency is not exempt from the reporting requirements in Section 801(a)(1); the agency must submit the report and related information to Congress and GAO, as discussed in Topic I, above.

The first category, in Section 808(1), involves "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."

The second category, in Section 808(2), involves "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."

An agency may invoke Section 808(2) in the case of rules for which the agency has found "good cause" under the APA (5 U.S.C. 553(b)(B)) to issue the rule without providing the public with an advance opportunity to comment. Application in other circumstances will be considered on a case-by-case basis.

**E. When can the President have a "major rule" take effect sooner than 60 days?**

A "major rule" may take effect before it otherwise would if the President makes a determination by Executive Order that the rule should take effect because such rule is--

- necessary because of an imminent threat to health or safety or other emergency;
- necessary for the enforcement of criminal laws;
- necessary for national security; or
- issued pursuant to any statute implementing an international trade agreement.

Under this authority the President must submit written notice of the determination to Congress.

**F. How can Congressional action change the effective date of a “major rule?”**

Section 801(a)(3)(B) and Section 801(a)(5) address the effect of congressional action on a joint resolution of disapproval on the effective date of "major rules." The situation addressed in Section 801(a)(3)(B) has not yet arisen, since no joint resolution of disapproval has been passed. However, a joint resolution of disapproval was rejected by one House of Congress (the Senate) in 1996. See 142 Cong. Rec. S10723 (daily ed., September 17, 1996). In such a case, Section 801(a)(5) provides that the effective date "shall not be delayed by reason of" the CRA beyond the date on which the joint resolution was rejected.

**G. What happens if Congress enacts a joint resolution of disapproval?**

If Congress passes a joint resolution of disapproval, it is transmitted to the President for signature. If the President signs the joint resolution of disapproval, the rule cannot take effect. If the rule had taken effect prior to the resolution, it cannot continue in effect and it must be treated as though it had never taken effect.



# 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 solicit 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?   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 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)?                                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 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)? | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| F. Did you discuss any of the following in the preamble to the rule?   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| • E.O. 12612, Federalism   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| • E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| • E.O. 12866, Regulatory Planning and Review   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| • E.O. 12875, Enhancing the Intergovernmental Partnership  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| • E.O. 12988, Civil Justice Reform   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| • E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| • Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)  |                       |                       |                       |
| _____  |                       |                       |                       |
| _____  |                       |                       |                       |
| _____  |                       |                       |                       |