

GAO Issues Opinions on Applicability of Congressional Review Act to Two Guidance Documents

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On October 19, 2017, the Government Accountability Office (GAO) [released an opinion](#) on the applicability of the Congressional Review Act (CRA) to a [2013 interagency guidance document](#) on leveraged lending issued by the Office of the Comptroller of the Currency, the Federal Reserve Board of Governors, and the Federal Deposit Insurance Corporation. The opinion was issued in response to a letter written to GAO by Senator Pat Toomey. In the letter, Senator Toomey requested GAO's opinion as to whether the interagency guidance falls within the definition of "rule" under the CRA. GAO's opinion concluded that the guidance does fall within the definition, and it is therefore subject to the requirements of the CRA.

In addition, on October 23, 2017, GAO [issued another opinion](#) on whether another agency guidance document was subject to the CRA. The guidance document in question was a [2016 amendment to the Tongass Land and Resource Management Plan](#), which was issued by the Department of Agriculture. GAO's opinion on the land management plan was written in response to a request from Senator Lisa Murkowski inquiring whether GAO considered the document to be a "rule" under the CRA. In its opinion, GAO concluded that the management plan does fall within the definition.

The [definition of a "rule"](#) under the Congressional Review Act is broader than the category of rules that are subject to the [Administrative Procedure Act's \(APA's\) notice and comment requirements](#). As such, some agency actions (e.g., guidance documents) that are not subject to notice and comment rulemaking may still be considered rules under the CRA. In its opinion on the interagency leveraged lending guidance document, GAO's analysis concluded that it "is a general statement of policy designed to assist financial institutions in providing leveraged lending to creditworthy borrowers in a sound manner. As such, it is a rule subject to the requirements of CRA." In its opinion on the Tongass land management plan, GAO concluded that "the 2016 Tongass Amendment is a rule for CRA purposes as it meets the definition of the term 'rule' under APA, and none of the CRA exceptions apply."

In several instances since the [enactment](#) of the CRA in 1996, Members of Congress have identified agency actions that were not notice-and-comment rules and sought an opinion from GAO as to whether the actions would fall under the CRA's broad definition of "rule," despite the agency not having undertaken a rulemaking process or submitted the action to Congress. Including the recent response to Senator Toomey's and Senator Murkowski's letters, GAO has now issued 13 such opinions, the first 11 of which are listed in the Appendix of [CRS Report R43992](#). In 9 of the 13 cases, GAO

indicated that the agency action in question was a rule under the CRA and should have been submitted to the House and Senate for review. The first of these GAO opinions was issued in September 1996, six months after the CRA's enactment.

Submission of rules to Congress under the CRA is important for two reasons: (1) the [CRA requires](#) covered agency actions to be submitted to Congress and GAO before they may take effect, and (2) the receipt of the rule (or guidance document) in Congress triggers the CRA's expedited procedures for introduction and consideration of a disapproval resolution. As such, by not submitting a rule to Congress, an agency could potentially avoid congressional review under the CRA. It appears, however, that in recent cases, [the Senate has considered](#) the publication in the Congressional Record of the GAO opinions discussed above 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.

With regard to the interagency guidance on leveraged lending, although the GAO opinion stated that the document qualifies as a rule under the CRA, the opinion was silent on the issue of the guidance having been issued in 2013. It is unclear if the Senate would treat a disapproval resolution aimed at this guidance document any differently due to the fact that the agency action in question was issued four years ago, far longer than the CRA has previously reached back.

GAO's opinions do not have any immediate effect on the applicability or effectiveness of the guidance documents. If a joint resolution disapproving one or both of these guidance documents were to be enacted, the guidance would immediately no longer be in effect and the agencies would be prohibited from issuing guidance that is "substantially the same." For more information on the effect of disapproving a CRA disapproval resolution, see [this CRS Insight](#).

For a more detailed overview of the CRA, see [CRS Report R43992, *The Congressional Review Act \(CRA\): Frequently Asked Questions*](#).