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Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act

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Summary

The Congressional Review Act of 1996 established expedited (or "fast track") procedures by which Congress may disapprove a broad range of regulatory rules issued by federal agencies by enacting a joint resolution of disapproval. For initial floor consideration, the Act provides an expedited procedure only in the Senate. (The House would likely consider the measure pursuant to a special rule.) The Senate may use the procedure for 60 days of session after the agency transmits the rule to Congress. In both houses, however, to qualify for expedited consideration, a disapproval resolution must be submitted within 60 days after Congress receives the rule, exclusive of recess periods. Pending action on a disapproval resolution, the rule may go into effect, unless it is a "major rule" on which the President or issuing agency does not waive a delay period of 60 calendar days.

If a disapproval resolution is enacted, the rule may not take effect and the agency may issue no substantially similar rule without subsequent statutory authorization. If a rule is disapproved after going into effect, it is "treated as though [it] had never taken effect." If either house rejects a disapproval resolution, the rule may take effect at once. If the President vetoes the resolution, the rule may not take effect for 30 days of session thereafter, unless the House or Senate votes to sustain the veto. If a session of Congress adjourns *sine die* less than 60 days of session after receiving a rule, the full 60-day periods for action begin anew on the 15th day of session after the next session convenes.

Except for submission of disapproval resolutions and final congressional action thereon, the expedited procedures under the Act apply only to Senate consideration. The House would consider a disapproval resolution under its general procedures, very likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, once the resolution has been before committee for 20 calendar days, the panel is discharged if 30 Senators submit a petition for the purpose. Once the committee has reported or been discharged, a motion to proceed to consider the resolution would in practice be nondebatable, and the Act prohibits various other possible dilatory actions in relation to the motion and the resolution. Floor debate on the resolution is limited to 10 hours, and no amendment is in order.

The Act does not preclude amendment of a disapproval resolution in the House, and means may exist of overcoming the prohibition on amendment in the Senate. For these reasons, and because the initial texts could differ, the resolutions initially adopted by the two houses might not be identical. The Act enables Congress to avoid the need to resolve differences between the two versions by providing that, when either house adopts a disapproval resolution, the other shall first consider its own disapproval resolution and then vote on the resolution received from the first. As long as the substantive effect of both is similar, the difference in text should not affect the ultimate effect of the legislation. If the substantive effects differ, presumably the two measures could not be linked in this way by using the expedited procedures of the Act.

Contents

Expedited Procedures of the Congressional Review Act 1
Congressional Disapproval of Regulations 1
Expedited or "Fast Track" Procedures 1
Statutory Time Frames 2
Initiation Period and Action Period 3
Initiation Period 3
Action Period 3
Effect of *Sine Die* Adjournment 4
Waiting Period 4
Effects of Counting Time Periods in Different Ways 5
Disapproval of Rules After they Take Effect 6
Effect on Waiting Period of Action on Disapproval Resolution 6
Elements of the Expedited Procedures 8
Submission of Rules 8
Initiation of Disapproval Resolutions 8
Form of Disapproval Resolutions 8
Committee Action in the Senate 10
Taking Up a Disapproval Resolution in the Senate 11
Floor Consideration in the Senate 12
Final Congressional Action 13
Vetoes and Override Attempts 13
Limitations of the Expedited Procedures 14
No Expedited Procedures for Initial House Consideration 14
Likely Need for Super-Majority 14
Possibility of Differing Action in Each House 15
Non-Identical Disapproval Resolutions 15
Amendment Making Resolution Ineligible for Expedited Procedure 15
Lack of Companion Resolutions in Both Houses 16

Tables

Table 1. Defining Elements of Principal Time Periods in the Congressional Review Act 2

Contacts

Author Contact Information 17

Expedited Procedures of the Congressional Review Act

Congressional Disapproval of Regulations

The Congressional Review Act, enacted in 1996,[1] establishes special congressional procedures for disapproving a broad range of regulatory rules issued by federal agencies. Before any rule covered by the Act can take effect, the federal agency that promulgates the rule must submit it to Congress. If Congress passes a joint resolution disapproving the rule, and the resolution becomes law, the rule cannot take effect or continue in effect. Also, the agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.[2]

The Congressional Review Act establishes special "expedited procedures" (also known, more informally, as "fast track" procedures) for congressional action on these joint resolutions of disapproval.[3] The expedited procedures established by the Act include several special features, not found in many other statutes providing for expedited procedures, that raise issues about how Congress may apply the procedures in practice. To begin with, most (though not all) of the expedited procedures established by the Act regulate action only in the Senate. The Act also provides for an unusually complex set of action periods and deadlines. Finally, other provisions of the Act impose restrictions that shape and limit the opportunities for action afforded by the expedited procedures.[4]

Expedited or "Fast Track" Procedures

An expedited procedure, or "fast track" procedure, is a set of statutory provisions that govern congressional consideration of a specified kind of measure. Most expedited procedures regulate consideration of joint resolutions either to (1) disapprove some action that the statute authorizes the President, or an agency of the executive branch, to take only if Congress does not disapprove, or (2) approve some action that a statute authorizes to be taken only if Congress approves a specific request to do so. The purpose of the expedited procedure is to enable timely action on the

[1] Subtitle E ("Congressional Review") of the Small Business Regulatory Enforcement Fairness Act of 1996, Title II of the Contract with America Advancement Act of 1996, P.L. 104-121, 101 Stat. 847 at 868-874, codified at Title 5 U.S.C. Sections 801-808. The congressional disapproval procedure is contained in Section 802.

[2] U.S.C. Section 801(b).

[3] To date, the only rule disapproved under these procedures has been the one setting ergonomics standards for labor, proposed late in the Clinton Administration and disapproved by P.L. 107-5, enacted on March 20, 2001. See Rebecca Adams, "GOP-Business Alliance Yields Swift Reversal of Ergonomics Rule," *Congressional Quarterly Weekly Report*, Vol. 59, March 10, 2001, pp. 535–536, 538-539; Adriel Bettelheim and Rebecca Adams, "With Ergonomics Standards Overturned, Will GOP Target Other Clinton Rules?" *Ibid.*, p. 537; Juliet Eilperin, "GOP Targets 45 Rules to Overturn; Clinton Policies Include Abortion, Energy Issues," *Washington Post*, April 8, 2001, pp. A1, A6. See also Cindy Skrzycki, "Ergonomics Rule in GOP's Sights: Aiming Rusty Legislative Artillery," *Washington Post*, March 6, 2001, pp. E1, E10; Victoria Allred, "Time Left to Reverse Final Clinton Rules," *Congressional Quarterly Weekly Report*, Vol. 59, February 10, 2001, p. 312; "Wrangling Intensifies on US Rules; Little-Known Law Becomes Weapon in Partisan Fights," *Boston Globe*, March 20, 2001, pp. A1, A5.

[4] Additional discussion of the expedited procedures of the Congressional Review Act, their practical implications and potential problems, and initial attempts to use them, appears in CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg.

resolution of disapproval or approval by ensuring that Congress will be able to take it up, and complete action on it, within a limited period of time.[5]

Expedited procedures that are provided for in a statute function as rules of each house of Congress. These rules, however, are applicable only to the measures specified by the statute. The Constitution confers the power to make procedural rules on each house of Congress separately, but as with any other statute, enactment of a statute that establishes an expedited procedure requires action by both houses and the President. For this reason, expedited procedure statutes usually include language declaring that those procedures are enacted under the constitutional rulemaking authority of each house, and reserving to each house the authority to change those applicable to itself.[6] The Congressional Review Act follows this practice.

Statutory Time Frames

The Congressional Review Act establishes three principal time periods for congressional action on a joint resolution disapproving a rule, or regulation, proposed by the executive branch. Two of these, here called the *initiation period* and the *action period*, regulate congressional action on joint resolutions of disapproval under the Act. The third, which this report refers to as the *waiting period*, affects the possible effective date of certain rules that the Act defines as "major."

Each of the three time periods nominally runs for 60 days, and all run roughly concurrently. However, the starting point of the initiation period may differ slightly from the others, and the days of the three periods are counted in different ways. These differences (elaborated in the following pages, but summarized below in **Table 1**) play a key role in determining how the Act may operate.

Table 1. Defining Elements of Principal Time Periods in the Congressional Review Act

	Initiation period	Action period	Waiting period
Action prescribed during period	Resolution of disapproval must be submitted in order to be eligible for expedited consideration	Senate may consider resolution of disapproval under expedited procedure	"Major rule" cannot take effect
Period starts when–	Rule is received by Congress	Rule is received by Congress and published in *Federal Register*	Rule is received by Congress and published in *Federal Register*
Days counted toward 60-day limit	All calendar days except those on which either house is in an adjournment of more than 3 days	Only days on which the Senate is in session	All calendar days

The Act also includes procedures governing final action to reconcile House and Senate action on a disapproval resolution submitted and considered in accordance with the Act. These procedures

[5] On the rationale and provisions of expedited procedures generally, see CRS Report 98-888, *"Fast-Track" or Expedited Procedures: Their Purposes, Elements, and Implications*, by Christopher M. Davis, and CRS Report RL30599, *Expedited Procedures in the House: Variations Enacted Into Law*, by Christopher M. Davis.

[6] Each house normally would make any such changes by adopting a simple resolution, which requires action in that house alone.

need not occur within the constraints of the time periods specified, and are not associated with any provisions restricting the time at which they must occur.

Pursuant to other provisions of the Congressional Review Act, however, various actions by Congress or the President can elaborate or alter the effect and application of these three basic time periods. Specifically:

- the sine die adjournment of a session can result in renewal of the initiation period and action period;
- congressional action to defeat a disapproval resolution can result in termination of the waiting period; and
- presidential veto of a disapproval resolution can bring about an additional waiting period, whose extent may depend on subsequent congressional action in relation to the veto.

The following sections address the operation of these subsidiary time restrictions as well as the three basic ones.

Initiation Period and Action Period

Even in the absence of the Congressional Review Act, the general legislative powers of Congress would presumably always allow passage of a bill or joint resolution overriding or abolishing a rule or regulation promulgated pursuant to law by an executive branch agency. The effect of the Congressional Review Act is simply to establish expedited procedures for congressional consideration of a joint resolution accomplishing this end. The Act makes these expedited procedures available to Congress if two conditions are met. First, a disapproval resolution may be considered under the expedited procedure only if it is submitted during a specified initiation period. Second, the Senate may consider the resolution under the expedited procedure only during a specified action period. (As discussed later, the resolution must also conform to certain content requirements.)

Initiation Period

To be eligible for consideration under the terms of the Act, a disapproval resolution must be submitted in either house within 60 days after Congress receives the rule. In contrast to both the waiting period and the action period, recess days are excluded in calculating this initiation period. Any day that either house is in adjournment during a recess of more than 3 days does not count toward this time limit.[7] Normally, in other words, weekend days will count toward the initiation period, but district work periods will not.

Action Period

The action period applies only to initial consideration in the Senate, because the Act establishes no expedited procedures for initial House consideration. The Senate may use the expedited procedures to complete initial consideration of a disapproval resolution only during the 60 days of session following congressional receipt of the rule (and, if required, its publication in the *Federal Register*). Any day on which the Senate does not meet does not count toward the time limit for this action period.[8]

[7] U.S.C. Section 802(a).

[8] U.S.C. Section 802(e).

Effect of *Sine Die* Adjournment

The Congressional Review Act makes special provision for the action period and initiation period if, within 60 days of session after a rule is submitted, Congress adjourns its session *sine die.* Under these conditions, both periods start over again in the new session of Congress, beginning in each house on the 15th day of session after Congress reconvenes.[9]

This provision helps ensure that Congress will effectively have the full periods established by law to act on a disapproval resolution under the expedited procedure. Absent this special provision, the initiation period and action period might end up being split between two sessions of Congress, so that in each session Congress would have less than 60 days to act. If a President submitted a proposed rule shortly before a *sine die* adjournment, Congress might not find it feasible to complete action on a disapproval resolution either in the time remaining before the end of the session, or in the portion of the 60 days remaining at the start of the new session. Completing action could be especially difficult when the new session was the first session of a new Congress, for in that case the disapproval resolution would have to be submitted anew, and proceed through all the stages of the legislative process from its start, in perhaps many fewer than 60 days. Renewal of the full action period and initiation period in the new session is intended to prevent this situation.

Waiting Period

Under the Administrative Procedure Act, a proposed rule may go into effect 30 days after its promulgation in the *Federal Register*, unless the rule itself provides for a later date.[10] The Congressional Review Act alters this stipulation only for what it defines as "major rules."[11] In general, a rule is "major" if the Office of Information and Regulatory Policy, in the Office of Management and Budget (OMB), determines that it will have economic effects of a certain level of significance.[12] The Act provides no means for Congress to alter or override an executive determination that a rule is or is not "major."

The Congressional Review Act provides that a "major rule" may not take effect until 60 calendar days after the rule has been both published in the *Federal Register* and submitted to Congress (unless the rule is one for which such publication is not required, in which case the 60 days begins when the rule is simply submitted to Congress).[13] The President may waive this additional waiting period for a "major rule" if he determines that, for any of several stated reasons, more expeditious implementation is necessary, and so notifies Congress.[14] If he does so, the "major rule" may go into effect subject only to the stipulations of the Administrative Procedure Act.

In sum, the 60-day waiting period established by the Congressional Review Act applies only to "major rules" for which the President has not waived its application. Rules that are not "major,"

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[9] U.S.C. Section 801(d). To be precise, for the House of Representatives the renewed initiation period occurs if the *sine die* adjournment occurs less than 60 legislative days (rather than days of session) after the rule is submitted, and begins on the 15th legislative day of the new session. A legislative day ends each time the body adjourns. In practice, legislative days and days of session in the House normally coincide.

[10] The rule may also go into effect immediately if the agency finds "good cause." 5 U.S.C. Section 801(a)(3), 801(a)(4), and 808(2). See Rosenberg, *Congressional Review of Agency Rulemaking*, pp. 3-4.

[11] 5 U.S.C. Section 804(2).

[12] 5 U.S.C. Section 801(a)(3) and 801(a)(4). See Rosenberg, *Congressional Review of Agency Rulemaking*, pg. 2.

[13] 5 U.S.C. Section 801(a)(3).

[14] 5 U.S.C. Section 801(c). The stated reasons include threats to health and safety, criminal law enforcement, national security, and implementation of trade agreements.

as well as "major rules" for which the President waives the additional waiting period, may take effect, as provided by the Administrative Procedure Act, after 30 days, unless the rule itself provides for a later date.

Effects of Counting Time Periods in Different Ways

The waiting period for "major rules" is defined in calendar days. The action period and initiation period are defined in ways dependent on the congressional schedule. As a result, the waiting period will normally expire first, because its "clock" runs continuously without interruption. The action period for the Senate normally will expire later, because its "clock" pauses on each day the Senate does not meet. The initiation period normally will expire between the other two, because when Congress does not meet, its "clock" sometimes runs (during breaks of three days or less) and sometimes pauses (during more extended recesses).

For example, suppose that after a "major rule" is submitted and published, each house meets for 5 days a week, except for one recess of two weeks. The waiting period expires after 60 calendar days. The recess extends the initiation period to 76 calendar days. The action period elapses only at the rate of 5 days per week when the Senate is in session, and not at all during the recess. It expires after 14 weeks, or 96 calendar days.[15]

These differences have significant implications on how the disapproval procedure under the Act may operate. Specifically:

- The initiation period and action period pause when Congress is not in session. As a result, they cannot expire while Congress is out of session, and so cannot, by the timing of their expiration, prevent congressional action under the expedited procedures of the Act.
- The action period normally will continue after the initiation period ends. If any disapproval resolution is submitted during the initiation period, some time will normally remain in the action period, during which the Senate can consider the resolution under the expedited procedures of the Act.
- The initiation period normally will expire before the action period does. If any resolution is submitted after the initiation period expires, Congress will be unable to consider it under the expedited procedures of the Act, even if the action period has not expired.
- The presence of the waiting period means that Congress will normally have 60 days to use the expedited procedures of the Act to disapprove a "major rule" before it becomes effective.
- Because the action period normally will continue after the waiting period ends (and, by the same token, after the effective date of rules other than "major rules"), Congress will normally retain the ability to use the expedited procedures of the Act to disapprove a rule for some period after the rule has already gone into effect.

The following two sections pursue the implications of this last circumstance.

[15] It is theoretically possible, however, that 60 days excluding recesses will outlast 60 days of session. A day on which the Senate is in session and the House in recess counts as a day of the action period for the Senate, but not as a day of the initiation period. If enough such days occur, the action period, of 60 days of session, could expire before the initiation period, of 60 days excluding recesses. At that point, a disapproval resolution could still be submitted, yet the expedited procedures could not be used for considering it.

Disapproval of Rules After they Take Effect

The opportunity for Congress to disapprove a rule that has already taken effect can arise in several different ways. First, the rule may be a "major rule," which normally may take effect when the waiting period expires. In this case the action period for the Senate normally will continue after the waiting period ends.[16] The Senate remains able to act on a disapproval resolution under the expedited procedure during the remainder of the action period.

Second, a rule that is not a "major rule" is not subject to the waiting period, and so may take effect even earlier in the action period. During the remainder of the action period, the Senate has a correspondingly longer window of opportunity to adopt a resolution, under the expedited procedure, disapproving the rule that has already taken effect.

Third, Congress may adjourn *sine die* before the original action period expires. Both the action period and the initiation period begin anew with the 15th day of session in the following session of Congress.[17] The adjournment, however, does not extend either the waiting period for a "major rule" or any other restriction on the effective date of a rule. The date when the rule takes effect is unaffected by the *sine die* adjournment. In the new session, as a result, the procedures of the Congressional Review Act remain available for Congress to disapprove the rule, even though the rule may already have taken effect.

Finally, the Congressional Review Act explicitly contemplates that even after the action period has terminated, Congress may still enact a joint resolution disapproving a rule pursuant to the Act. For this purpose the disapproval resolution would have to have been submitted during the initiation period, and would have to meet the content requirements of the Act.

The Act also explicitly provides that if Congress enacts a resolution disapproving a rule that has already taken effect, under any of the circumstances just described, the rule "shall be treated as though [it] had never taken effect."[18] The intent seems to be that, in these cases, any consequences the rule had already had would be undone retroactively. This stipulation applies only to a disapproval resolution that was submitted, and received final action, in accordance with the provisions of the Congressional Review Act. If Congress enacted a measure overriding or abolishing a regulation through proceedings that did not meet the procedural requirements of the Act, or in a form that did not meet the content requirements of the Act for a disapproval resolution, it would not have this retroactive effect.

Effect on Waiting Period of Action on Disapproval Resolution

The Congressional Review Act establishes additional relations between the waiting period and certain actions on a disapproval resolution. If either house rejects a disapproval resolution or sustains a veto of one, the waiting period terminates immediately.[19] On the other hand, if the President vetoes a resolution to disapprove a "major rule" to which the waiting period applies, an additional waiting period occurs, during which Congress may override the veto. This additional waiting period is defined as 30 days of session (rather than calendar days, as for the initial waiting

[16] The reverse could also be true, however, if *Federal Register* publication does not occur until well after the rule is submitted to Congress.

[17] 5 U.S.C. Section 801(d) and 802(e). For the House, the new initiation period begins on the 15th legislative day of the new session.

[18] 5 U.S.C. Section 801(f).

[19] 5 U.S.C. Section 801(a)(3) through 801(a)(5).

period). The Act does not specify how the end of the period is determined if the 30th day of session in each house occurs on a different day.[20]

Taking these additional provisions into account, the possible configurations of legislative action and its consequences for "major rules" to which the waiting period applies comprise the following:

- **No Congressional Action.** If neither house of Congress acts on a disapproval resolution during the original waiting period, the rule takes effect when that period expires (or later, if so provided in accordance with the Administrative Procedure Act or the terms of the rule itself).
- **Rejection by Either House.** If either house votes to reject the disapproval resolution, the action presumably ensures that no disapproval resolution will pass both chambers. At that point the waiting period is vitiated, and the rule may take effect immediately (or later, if so required by the Administrative Procedure Act or the rule itself).[21]
- **Passage by Both Houses; No Veto.** If both houses pass the disapproval resolution and the President does not veto it, the resolution becomes law, and the rule becomes "of no force and effect" (whether or not the waiting period has expired).[22]
- **Passage; Veto; No Attempt to Override.** If both houses pass the disapproval resolution and the President vetoes it, the receipt by Congress of the veto message triggers the new waiting period of 30 days of session. If a vote on overriding the veto occurs in neither house, or in only one house, during this new waiting period, the rule takes effect when the 30 days of session expire (or later, if so required by other authorities).[23]
- **Passage; Veto Sustained by Either House.** If either house votes to sustain the veto, Congress can no longer override. At that point the additional 30-day waiting period is vitiated, and the rule may take effect immediately (or later, if so required by other authorities).[24]
- **Passage; Veto Overridden.** If both houses override the veto, the disapproval resolution becomes law, so that the rule becomes "of no force and effect."

As already explained, it is possible that Congress could pass a resolution to disapprove a rule during the action period, but after the rule has already taken effect. If the President then vetoed the disapproval resolution, the rule would presumably be considered to remain in effect pending congressional action on the veto. Under these circumstances, in other words, the additional waiting period would presumably not occur. This interpretation seems consistent with the general intent of the Congressional Review Act that a rule may be vitiated through congressional disapproval even after it has already taken effect.

[20] 5 U.S.C. Section 801(a)(3)(B).

[21] 5 U.S.C. Section 801(a)(5).

[22] 5 U.S.C. Section 801(e) and 802(a).

[23] 5 U.S.C. Section 801(a)(3)(B)(ii).

[24] 5 U.S.C. Section 801(a)(3)(B)(i).

Elements of the Expedited Procedures

Submission of Rules

Under the Congressional Review Act, any agency submitting a covered rule to Congress must do so in a report that also identifies the effective date and whether the rule is "major." At the same time, the agency must provide to each house and to the General Accounting Office (GAO) any available cost-benefit analysis, as well as information about pertinent agency actions pursuant to requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. Each house provides the report to the chair and ranking minority member of the committees with jurisdiction.[25] All this information is intended to afford Congress a basis for determining whether to proceed with disapproval action while it is still early in the action period for the expedited procedure.

For major rules, within 15 calendar days of the rule's submission or publication in the *Federal Register* (whichever is later), GAO is to make a report to the committees of jurisdiction, assessing compliance of the agency issuing the rule with the above reporting requirements. In practice, this GAO report has not involved substantial additional analysis of agency actions, but has taken the form of a simple checklist.[26]

Initiation of Disapproval Resolutions

The actual disapproval process under the Congressional Review Act begins when a Member of either house submits a joint resolution of disapproval. Unlike some expedited procedure statutes, the Act does not provide that the joint resolution be introduced either automatically, or by specified Members, or at any specified time (except that it must be during the 60-day initiation period if the resolution is to qualify for consideration under the terms of the Act). If no Members wish to see a given regulation disapproved, no disapproval resolution need be submitted. In practice, because the prescribed information is provided to committees of jurisdiction or their leaders, it is leaders or other members of the committee who may be most likely to submit a disapproval resolution.

In each house, any disapproval resolution submitted is to be referred to the committee (or committees) with jurisdiction.[27] This step is consistent with the regular procedure in each chamber, and will presumably take place in accordance with normal practice. House resolutions may be referred to a primary committee and also to additional committees with jurisdictional interests in the matter the rule addresses. Senate referrals will normally be to the committee whose jurisdiction predominates in the subject matter.

Form of Disapproval Resolutions

To be eligible for consideration under the expedited procedures of the Congressional Review Act, a disapproval resolution must follow a narrowly prescribed form. The text may only identify the subject of the rule and the agency submitting it, and state that Congress disapproves the rule and

[25] 5 U.S.C. Section 801(a)(1)(B). Rosenberg, *Congressional Review of Agency Rulemaking*, pp. 1-2.

[26] 5 U.S.C. Section 801(a)(1)(C). Rosenberg, *Congressional Review of Agency Rulemaking*, p. 2-3.

[27] 5 U.S.C. Section 802(b).

that it shall have no force or effect.[28] These provisions appear to make the procedures of the Act available only for joint resolutions to disapprove a submitted rule as a whole, so that the expedited procedures of the Act could not be used to vitiate only certain provisions or portions of a rule on a specified subject.[29]

Under these standards, a resolution whose text includes any findings or other additional provisions, for example, would be ineligible for consideration under the expedited procedure. Nevertheless, the Congressional Review Act does not specify the contents of the disapproval resolutions it governs as precisely as do some other expedited procedure statutes. For example, although the Act stipulates the form of language for a disapproval resolution, it does not specify the precise terms in which a rule must be described. As a result, resolutions might be submitted in each chamber proposing to disapprove the same rule in different terms, raising the possibility that disapproval resolutions initially approved in the two chambers might not be identical. In the 107th Congress, for example, S.J.Res. 6 proposed to disapprove "the rule submitted by the Department of Labor relating to ergonomics (published at 65 *Federal Register* 68261 (2000))," while the House companion measure, H.J.Res. 35, proposed to disapprove "the rule submitted by the Occupational Safety and Health Administration on November 14, 2000 (65 *Federal Register* 68,261 *et seq.*) relating to ergonomics."

Again, the Act does not stipulate that the resolution must contain no preamble. Preambles are uncommon in modern congressional practice, and when a resolution includes them, they are often routinely stricken out at the conclusion of floor proceedings. Yet if either house did adopt a disapproval resolution with a preamble, the resolution might again fail to be identical with a companion measure from the other house. Similar problems might arise in any case in which the two houses adopted resolutions disapproving the same rule, but with different texts. As described later, for example, the Congressional Review Act prohibits amendment of a disapproval resolution only in the Senate. In any case of this kind, no measure could go forward to the President until both houses had agreed on a single version. A House-Senate conference or other process for reaching this agreement might be unable to conclude within the time constraints of the expedited procedure (or at all).

Many expedited procedures attempt to prevent this situation from arising, either by prescribing the precise form of the measures covered, by forbidding amendment to those measures, or both. The Act deals with this potential problem instead by the way it regulates the process, sometimes called the "hookup," by which a single vehicle is selected for further action after each house has initially adopted its own measure. In addition, however, these problems are at bottom procedural and technical, rather than substantive, and could usually be easily overcome if majorities in both chambers wished to disapprove a rule. For example, Members might often prevent problems of this kind from arising by informally coordinating their efforts, so as to ensure that disapproval resolutions submitted in each house would share the same text.

If a disapproval resolution did not meet the content requirements of the Act, or if it were not submitted during the initiation period, Congress could still consider it under its ordinary procedures. If such a resolution were enacted, it would presumably suffice to put the regulation disapproved out of effect. This action, however, apparently would not preclude the issuing agency from proposing a "a new rule that is substantially the same" as the disapproved one. The Act

[28] 5 U.S.C. Section 802(a).

[29] See Rosenberg, *Congressional Review of Agency Rulemaking*, pp. 10-12. Although some suggest that the language of the Act might permit a resolution to disapprove only specified provisions of a rule, this position has not found broad acceptance. Ibid.

applies this prohibition only if the disapproval resolution both conforms to the content requirements specified by the Act and was submitted during the initiation period. For this prohibition to apply, on the other hand, the terms of the Act do not appear to require that the Senate has considered the disapproval resolution either under the expedited procedures, or during the action period.[30]

Committee Action in the Senate

For the stages of committee and initial floor consideration, the expedited procedures in the Congressional Review Act apply to the Senate alone. First, the Act attempts to ensure that the Senate will be able to act on the disapproval resolution whether or not the committee of referral reports it. Regardless of when the resolution is introduced, a procedure to discharge the committee from its consideration becomes available beginning 20 calendar days after the rule has been both submitted to Congress and published in the *Federal Register*. If 30 Senators submit a petition for the purpose, the measure is automatically discharged and placed on the calendar, from which it may be called up for floor consideration.[31]

This provision appears to have no close analog among other Senate procedures. Expedited procedure statutes more typically provide that after a specified time period, either the committee is automatically discharged, or a motion to discharge it is privileged (meaning that the motion could be offered on the floor by any Senator, and would not be debatable). By requiring the joint action of 30 Senators, the Congressional Review Act makes discharge somewhat more difficult, ensuring that it can occur only for a disapproval resolution that has significant Senate support.

At least in some cases, these features of the expedited procedure may leave the committee little time to act on the disapproval resolution. For example, perhaps no Senator may wish to introduce the resolution until after the Senate receives the GAO report on the rule. But this report may not arrive until 15 calendar days after the rule is submitted, while the discharge procedure will become available after 20 calendar days. The committee might then have 5 calendar days or fewer to take up the resolution before it could be subjected to discharge. If no disapproval resolution is submitted until the discharge procedure has already become available, the motion might be offered even more closely after submission of the resolution.

If the committee of jurisdiction favors the disapproval resolution, it may mark up and report the measure before the discharge procedure becomes available. It may also do so thereafter, as long as the discharge procedure has not yet been used. Once the committee reports, it can no longer be discharged, but the resolution goes to the calendar, and a motion to proceed to its consideration can be offered.

The Congressional Review Act does not expressly forbid consideration of amendments in committee, but it does prohibit amendments on the Senate floor. A committee can only recommend amendments, which become part of the measure only if adopted on the floor. Because the statute precludes the adoption of amendments on the floor, any recommended by the committee will be moot. For this reason, the committee will in practice find little purpose in

[30] 5 U.S.C. Section 801(b).

[31] 5 U.S.C. Section 802(c). In a new session of Congress, the discharge procedure becomes available 20 calendar days after the start of the renewed action period on the 15th day of session. 5 U.S.C. Section 801(d)(2)(A)(1). In the 107th Congress, when the renewed action period began in the Senate on February 5, 2001, S.J.Res. 5, to disapprove the ergonomics rule transmitted by the Department of Labor, was submitted on March 1, and the committee was discharged on March 5.

acting on amendments to a disapproval resolution, and its markup will presumably consist only of consideration.

The committee might circumvent this restriction by reporting an amended version of the disapproval resolution as an original measure, in lieu of the resolution referred. If the text of this new measure met the statutory requirements for a disapproval resolution, and the committee acted before expiration of the initiation period, the measure would presumably be eligible for expedited consideration under the Congressional Review Act. At the same time, however, the resolution initially submitted, not having been reported, would presumably also remain subject to the expedited discharge procedure of the Act.

Taking Up a Disapproval Resolution in the Senate

Under the procedure provided by the Congressional Review Act, once a disapproval resolution is on the calendar in the Senate, a motion to proceed to consider it is in order.[32] The general procedure of the Senate already permits a motion to consider any measure on the calendar, but only after it has met certain layover requirements. Inclusion of this special provision in the expedited procedure has the effect of waiving these layover requirements.

The motion to consider is normally reserved to the Majority Leader, to whom the Senate, in practice, accords responsibility for arranging the floor agenda. Nevertheless, by including the motion explicitly in the expedited procedure, the Act emphasizes that the Senate, in principle, has means of calling up the disapproval resolution, no matter what position the committee or leadership take on it. As with any other measure, of course, a disapproval resolution could also be brought up for consideration by unanimous consent, which would usually be obtained by the Majority Leader.

Several provisions of the expedited procedure protect against various potential obstacles to the Senate's ability to take up a disapproval resolution. Some of these help ensure that the Senate will be able to vote on a motion to proceed, once the motion is pending, by prohibiting:

- a motion to postpone its consideration;
- a motion to amend it (though Senate rules generally prohibit amendment of motions to proceed anyway); or
- a motion to proceed to consider some other business (which would displace the first motion to proceed).

Any points of order that might be raised against the measure or its consideration are waived as well.[33] Finally, if the motion to proceed is adopted, a motion to reconsider that action is prohibited.

The Congressional Review Act omits one other provision that appears in many expedited procedures for taking up resolutions of disapproval. The Act does not explicitly make the disapproval resolution privileged. It is established Senate practice that a motion to proceed to consider a matter is debatable (and, therefore, subject to filibuster) unless the matter in question is privileged. Senate precedents, however, indicate that if a statute establishes a time limit for the consideration of a specified measure, the provision has the effect of rendering the measure

[32] 5 U.S.C. Section 802(d)(1).

[33] The Act does not make explicit whether the waiver of points of order would apply against a point of order that a resolution fails to meet the requirements for consideration under the expedited procedure.

privileged, so that a motion to proceed to its consideration is not debatable. Consistent with this principle, the Senate has treated a motion to consider a disapproval resolution under the Congressional Review Act as not debatable, even though the Act does not explicitly bar debate.[34]

Floor Consideration in the Senate

After the Senate takes up the disapproval resolution itself, a further series of provisions protects the ability of the body to continue and complete that consideration. First, once the motion to proceed is adopted, the resolution becomes "the unfinished business of the Senate until disposed of," and motions to proceed to consider other business, or to postpone consideration of the resolution, are prohibited.[35] Under these conditions other business may interrupt consideration of the disapproval resolution only if the Senate gives unanimous consent. If the Senate does turn to other business by unanimous consent, the disapproval resolution automatically recurs as pending after the interruption, unless the unanimous consent agreement provides that the other business displace the disapproval resolution as the unfinished business.

Second, it is not in order in the Senate, under the Act, to move to amend or recommit the disapproval resolution. The Senate sometimes uses the motion to recommit in such a way as to effect an amendment. These provisions therefore help to ensure that the Senate disapproval resolution will remain identical, at least in substantive effect, to any House joint resolution disapproving the same rule. This identity could be destroyed by House action on its own measure, however, inasmuch as the Act includes no prohibition against House amendment of the measure during committee or floor consideration. Also, some expedited procedures explicitly prohibit the Senate from suspending a prohibition on amendment by unanimous consent, but no such additional safeguard appears in the Congressional Review Act.

Third, Senate debate on the resolution is limited to 10 hours, equally divided between supporters and opponents, so that no filibuster is possible on the resolution itself. In addition, the Act provides that a motion may be offered to limit the time for debate further, and this motion itself is not debatable. Any appeal from a ruling of the chair during consideration of a disapproval resolution (or motion to proceed to its consideration) also is to be decided without debate.[36] This prohibition further inhibits any potential use of appeals for dilatory purposes, though this use is already constrained by the overall cap on debate time. On the other hand, to forbid appeals altogether would have tended to prevent the Senate from exercising its constitutional authority to determine its own rules.

Finally, the Act provides that at the conclusion of debate, the Senate automatically proceeds to vote on the resolution. No intervening action is permitted, except that one quorum call may take place if any Senator so requests.[37] This quorum call is not required; if not requested, the Senate is to proceed immediately to vote. Absent this provision, however, it might become impossible to stop the Senate from disposing of a disapproval resolution quickly, by voice vote, when few Senators were on the floor. It might also become impossible to secure a roll call vote under these conditions, because not enough Senators might be on the floor to second a demand for one. On the other hand, if the Act did not prohibit other intervening actions at this point, those actions

[34] "Motion to Proceed–S.J.Res. 6," proceedings in the Senate, *Congressional Record*, daily edition, Vol. 147, March 6, 2001, p. S1831.

[35] 5 U.S.C. Section 802(d)(2).

[36] 5 U.S.C. Section 802(d)(4).

[37] 5 U.S.C. Section 802(d)(3).

might be used for dilatory purposes. For example, opponents might delay a vote by offering, and obtaining roll call votes on, motions to table the resolution and to adjourn.

Final Congressional Action

No measure can be presented to the President for approval until both houses have agreed to it in identical form. If each house initially passes its own disapproval resolution, even if the texts are identical, neither can yet go to the President, for neither has been agreed to by both chambers. To prevent this situation, the Congressional Review Act provides that when either house adopts a disapproval resolution and sends it to the other, the receiving house must hold it at the desk, rather than refer it to committee. This action retains the received resolution in a status in which it is available for floor action. The Act then provides that, after the receiving house later considers a disapproval resolution of its own, it shall vote not on its own measure, but instead on the resolution already received from the other house. In this way both houses take final action on the same measure; if both adopt it, the requirements for presentation to the President are satisfied.[38] Unlike the components of the expedited procedure that apply to Senate consideration alone, these provisions govern action whether or not the action period has expired.

In one respect, these proceedings reflect normal practice in both houses for carrying out a "hookup" between corresponding House and Senate measures. Normally, each house initially considers its own measure, but the house that acts second then takes up and passes the corresponding measure already received from the other. If the two measures are not identical, the house acting second normally amends the measure received from the other with the text of its own measure. This action enables the two houses to proceed, by conference or otherwise, to resolve the differences between these two versions of the same measure. The expedited procedure of the Congressional Review Act avoids this necessity by requiring one chamber to vote directly on the measure received from the other, without amending it.

It appears that these provisions of the Act would apply even if the texts of the two measures are not identical, as long as the chair could determine that both would disapprove the same rule, and that they therefore corresponded to each other for purposes of the statutory procedure. In this way, even if the two houses initially consider disapproval resolutions with differing texts, both will ultimately vote on the same text; namely, that approved by whichever house acted first. This mechanism helps to prevent any delay that might arise if the House and Senate could not agree on a final text through conference or amendments between the houses.

Vetoes and Override Attempts

If both chambers adopt a disapproval resolution, the President might normally be expected to veto it, because if his views were not favorable to the regulation in question, the agency would probably not have submitted it to Congress in the first place. This consideration, however, may not apply in situations in which the President under whose administration the rule was submitted has been succeeded by another, who takes a contrary view of the regulatory issue in question. Congressional action on the ergonomics regulation in the 107th Congress exemplified such a situation.

Except for the additional 30-day waiting period already described, however, the Congressional Review Act provides no expedited procedure for overriding a veto. Consideration of veto messages is generally considered privileged in both chambers pursuant to the requirements of the Constitution. The procedures of neither house, however, require a vote on whether to override. In

[38] 5 U.S.C. Section 802(f).

the Senate, an attempt to reach such a vote might be delayed or blocked by filibuster. In other respects, the normal procedures of each house probably would suffice to allow a majority that wished an override vote to secure one.

Limitations of the Expedited Procedures

Although the expedited procedures of the Congressional Review Act eliminate many of the constraints on action inherent in the normal legislative process, the Act lacks certain provisions found in many expedited procedure statutes. As the preceding discussion shows, these omissions in certain respects limit the ability the Act confers on Congress to enact the disapproval resolutions for which it provides.

These limitations may in practice present little obstacle to successful action. Nevertheless, determining how the Act may most effectively be used may require taking them into account. Among the special features described in the preceding sections, three appear potentially the most noteworthy in this connection.

No Expedited Procedures for Initial House Consideration

The expedited procedure in the Act covers committee and floor consideration of disapproval resolutions only in the Senate. Committee and floor consideration in the House of Representatives is to occur under its regular legislative procedures; the Act provides no special mechanisms to help ensure that the House can complete action. In mitigation of this potential obstacle, the House possesses well-established general means to expedite the consideration of measures, which can readily be used for disapprovals under the Congressional Review Act if the leadership and the pertinent committee are supportive.

Specifically, the House might likely consider a disapproval resolution pursuant to the terms of a special rule. A special rule is a House resolution, which the Committee on Rules has jurisdiction to report, making a specified measure in order and proposing terms for its consideration. In particular, a special rule for considering a disapproval resolution might be expected to prohibit amendment on the floor. (A special rule providing such a prohibition is often called a "closed rule.")

Likely Need for Super-Majority

A joint resolution of disapproval, like any other proposed law, may be enacted only through being presented to the President for approval. If Congress passes a joint resolution disapproving a particular rule, a President who favors the rule can veto the measure. In that case the rule will take effect, unless a two-thirds vote in each house overrides the veto.[39]

Experience shows that particular circumstances may arise under which this requirement may present little obstacle to congressional action. If, in the interim between promulgation of the rule and congressional action, a new administration unsympathetic to the rule assumes office, any disapproval resolution may not likely be vetoed in the first place. Congressional disapproval in 2001 of the ergonomics regulation proposed by the Clinton Administration in the previous year illustrates this situation. At that time, substantial congressional interest was expressed in using the Congressional Review Act to disapprove numerous other rules promulgated in the last months of the Clinton Administration as well. Although this interest did not result in other legislative action,

[39] Rosenberg, *Congressional Review of Agency Rulemaking*, pp. 9-10.

some of the regulations in question were withdrawn or suspended by the new Bush Administration.

Possibility of Differing Action in Each House

The provisions of the Congressional Review Act for final congressional action on disapproval resolutions presume that both houses will initially pass measures with substantively similar texts. Yet the overall expedited procedures of the Act do not conclusively ensure:

- that substantively similar disapproval resolutions will be submitted in each chamber;
- that neither house will amend a disapproval resolution in a way that makes it substantively dissimilar from the other, or otherwise ineligible for consideration under the expedited procedures for final action; or
- that each house will take initial action on a disapproval resolution of its own.

Each of these possibilities might present a different kind of difficulty for achieving final enactment. In practice, however, each kind of difficulty could likely be readily overcome when majorities in both houses are supportive of the disapproval effort. Under most circumstances, coordination of disapproval efforts between the two houses could suffice to avoid potential problems.

Non-Identical Disapproval Resolutions

The two houses might initially pass disapproval resolutions with different texts either because:

- the respective resolutions are initially introduced with different texts, or
- either chamber amends its resolution in the course of committee or floor consideration.

The House could amend a disapproval resolution because the procedure in the Act does not prohibit amendment in that chamber. The Senate would be constrained in such action by the prohibition on amendment contained in the expedited procedure, but might be able either to:

- suspend that prohibition by unanimous consent, or
- circumvent the prohibition by acting on a resolution reported from committee as an original measure in lieu of one initially submitted.

None of these actions would necessarily prevent expeditious agreement of the two houses on one of the two measures. As long as both measures, as passed, still met the requirements of the Act, final action could undoubtedly occur through the procedures for hooking up the two measures provided by the Act.

Amendment Making Resolution Ineligible for Expedited Procedure

If either House succeeded in amending a disapproval resolution, the amended resolution might cease to meet the statutory requirements for a measure to be considered under the expedited procedure. For example, one house might amend the resolution to disapprove only part of the rule in question, even though the Congressional Review Act is explicit in making its mechanism for expedited disapproval applicable only to a rule as a whole. A disapproval resolution amended in this way would apparently cease to fulfill the requirements for a disapproval resolution to be eligible for the expedited procedure. When received in the other house, the amended resolution

would then fail to qualify for the automatic hookup for which the Act provides. Instead, the second house could refer it to committee, which might either report it with or without amendment, or take no action and effectively kill the measure.

Alternatively, the second house could use its regular procedures either to consider the amended resolution it received, or to consider a measure of its own that it could then hook up with the one received. The easiest way for supporters of disapproval to deal with this difficulty, however, would be to forestall its arising by preventing or defeating any amendment that would have this effect.

Lack of Companion Resolutions in Both Houses

The Congressional Review Act also affords no procedure pursuant to which either house could take up and adopt a disapproval resolution from the other, except after first considering one of its own. Therefore, if a disapproval resolution is submitted only in one house, none can be enacted under the expedited procedure. The house in which the resolution was submitted could adopt it and send it to the other. The receiving house, however, could not act on the received resolution under the expedited procedure, because that procedure provides for such action only after the receiving house first considers its own measure.

The same difficulty could arise when disapproval resolutions are introduced in both houses, if, in the House of Representatives, none is reported, or one is reported but not considered on the floor. Because the Congressional Review Act provides no expedited committee or floor procedure in the House, supporters of the disapproval resolution could not discharge the House committee, or bring the measure to the House floor, except under the general rules, which normally leave control in the hands of the committee and leadership. Therefore, the procedure in the Act would still offer no means to bring the House to the point at which it could consider a companion resolution received from the Senate.

This situation could be most readily forestalled if supporters of the disapproval effort ensure the submission (as well as consideration and adoption) of corresponding disapproval resolutions in both houses. Also, however, whether or not a companion measure had been submitted in the receiving house, and whether or not the committee of referral in that house had reported the measure or had been discharged from considering it, it would still be possible for the receiving house to act, under its regular procedures, on the measure received from the other and held at the desk. In the 107th Congress, the House of Representatives took action in this way on S.J.Res. 6, disapproving the ergonomics rule, while its companion measure, H.J.Res. 35, remained in committee.

In the House, nevertheless, this end too could normally be achieved only with cooperation from the leadership. In the Senate, considering the House measure without the constraints of the expedited procedure would mean that it could be filibustered.

Finally, the enactment of a disapproval resolution would have the same effect whether it had been considered under the expedited procedure provided by the Act or otherwise. As long as the resolution had been submitted during the initiation period, and satisfied the description provided in the Act, its enactment would render the disapproved rule without force and effect, and would also prohibit the agency from issuing a “substantially similar” rule without subsequent legislative authority.

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