

# The REINS Act Is Burdensome, Irrational, and Legally Questionable

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One of the most problematic bills recently passed by the House of Representatives is the Regulations from the Executive in Need of Scrutiny (“REINS”) Act of 2017.<sup>1</sup> Like prior versions of the REINS Act passed by the House in earlier sessions of Congress, this bill would require both houses of Congress to approve each major rule issued by a federal agency before the rule could go into effect. If Congress fails to act, it would not only block the rule, but the agency would also be prohibited from promulgating another related rule for the duration of that congressional session.

This bill also goes much farther than earlier versions of the REINS Act. It would require Congress to review and retroactively approve all existing regulations, or else they will be automatically repealed. The bill also requires an agency to repeal existing rules to offset the costs of each new rule an agency issues.

Rules from federal agencies help save lives and money as authorized by statutes over the last century. The REINS Act would hamper agencies’ ability to carry out their statutory duties and protect the public. The REINS Act would put a huge burden on Congress, while likely worsening outcomes for the American public. The REINS Act also raises a number of red flags about its legality.

## What’s in the Bill

- Congress would be required to review and retroactively approve all existing regulations, or else they will be automatically repealed after 10 years.
- For each new rule an agency issues, it would need to repeal existing rules to offset the new rule’s costs.
- Both chambers of Congress would need to approve each “major” rule—those with an annual cost of \$100 million or other significant adverse effects on the economy—before that rule could go into effect.
- If Congress fails to approve a major rule, the federal agency that issued it would be prohibited from issuing any related rules for the rest of that congressional session.
- Congress could block non-major rules with a joint resolution.

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# The 2017 REINS Act Would Impose a Tremendous Burden on Congress, and the Failure To Carry Out this Inordinate Task Would Threaten Public Health and Safety

Congress initially established and delegated rulemaking authority to federal agencies for a reason. Agencies, with the expertise and time to examine scientific and economic details in depth, are better positioned than Congress to engage in the intricate and technical process of rulemaking.

Preparing and issuing a major rule can take years of hard work by expert agencies. The agency must conduct a careful review of scientific, economic, or technical information, respond to comments from the regulated industry and beneficiaries, and articulate its basis for the rule in the Federal Register. Congress, with its wider docket of issues, its relative lack of expertise on each given regulatory matter, and its smaller staff size, is not well equipped to make these highly complicated evaluations.

Hundreds of major rules and thousands of non-major rules are issued each year.<sup>2</sup> Reviewing these major rules—and optionally, non-major rules—would require an inordinate amount of time from members of Congress. This time would be on top of the time that the agency would be required to spend evaluating the rule through its normal channels, as well as the additional burden of preparing an extensive report for Congress.<sup>3</sup>

The 2017 version of the REINS Act would go much farther than prior versions of the bill, in that it would require Congress to review 10% of all existing rules every year for a decade. This would amount to a minimum of tens of thousands of rules per year.<sup>4</sup> As with the review of new rules, this would require a substantial time commitment from members of Congress to carefully review rules on many technical and complex subjects. The review process would also result in a major burden on agencies, which would have to develop a more detailed cost-benefit analysis for all of these rules, some of them entirely from scratch for the rules that predated modern regulatory review requirements.

If Congress fails to approve a rule during this review, the rule would automatically lapse at the end of 10 years, putting at risk vital health and safety protections, including some that are required by law. This review process would also cause substantial uncertainty in the regulated business communities.

## There Is No Reason to Expect that the REINS Act Will Benefit Society

By adding additional procedural hurdles, without improving the substantive quality of the cost-benefit analysis that agencies are already doing for major rules, there is no indication that the congressional review process for new rules will result in net gains to society.

Likewise, there is no reason to believe that the requirement for Congress to review all existing rules ever issued would result in any benefits. Every president since President Carter has undertaken a retrospective review process to reconsider existing regulations for amendment or repeal.<sup>5</sup> There is no evidence that a sweeping review like that proposed in the 2017 REINS Act would result in any net benefits, given the ongoing agency retrospective review processes that have produced relatively minor results.

The 2017 version of the REINS Act also adds another senseless new section that would require agencies to focus on offsetting the costs of rules, without any consideration of those rules' benefits. The Act would impose a "cut-go requirement," whereby an agency would be required to "identify a rule or rules that may be amended or repealed to completely offset any annual costs of [any] new rule to the United States economy."<sup>6</sup> This requirement would arbitrarily focus on regulatory costs alone, ignoring the very real benefits associated with rules, which are typically diffuse and society-wide. Furthermore, the regulatory uncertainty surrounding whether rules would be enacted or repealed would cause unsettling or disruptive confusion in the regulated business communities.<sup>7</sup>

Furthermore, the REINS Act could foreclose agencies from regulating entire topic areas. If Congress fails to approve a rule under the REINS Act, the bill would prohibit the agency from promulgating any other regulation "relating to the same rule" during the same Congress.<sup>8</sup> "Relating to the rule" is not defined in the bill, but it could potentially be interpreted in a sweeping fashion to preclude important rules that touch on the same topic as an unapproved rule. This could needlessly and senselessly delay vital rules that could save lives and money.

## The REINS Act Raises Serious Legal Questions and Constitutional Red Flags

Both the retroactive repeal procedure and the major rule review process raise constitutional red flags.<sup>9</sup> The Supreme Court found a one-chamber legislative veto of a rule to be unconstitutional in *INS v. Chadha*.<sup>10</sup> The retrospective review process is the same type of one-chamber legislative veto that the Court held unconstitutional in *Chadha*. If one chamber fails to approve an existing rule after 10 years, it would be automatically invalidated.

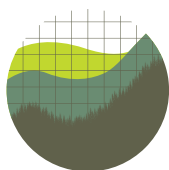
With respect to the new rule review process, the REINS Act delays the effective date of any major rule until after Congress approves it, so Congress's review looks more like legislative action than the one-chamber veto in *Chadha*. However, the rule in question would still be subject to court challenges on administrative law grounds, meaning that the rule remains executive in nature. So Congress's ability to block the rule raises the same constitutional concerns about the balance of power between government branches as the legislative veto in *Chadha*.

Additionally, both of these provisions could result in situations where Congress would be implicitly repealing earlier statutes by omission alone. In particular, in situations where regulations have been issued pursuant to mandatory requirements in earlier statutes, especially those with specific deadlines, Congress would be striking down the requirements in those earlier statutes without ever voting directly on an amendment. Courts strongly disfavor implied repeals of statutes.<sup>11</sup>

*To learn more about the REINS Act, please contact the  
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# Endnotes

- <sup>1</sup> H.R. 26, 115th Cong. (2017) (passed by the House of Representatives on Jan. 5, 2017) [hereinafter “H.R. 26”], available at <https://www.congress.gov/bill/115th-congress/house-bill/26/text>.
- <sup>2</sup> MAEVE P. CAREY, CONGRESSIONAL RESEARCH SERVICE R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS 5-6, 11-12 (2016), available at <https://fas.org/sgp/crs/misc/R43056.pdf>.
- <sup>3</sup> H.R. 26, *supra* note 1, at § 801.
- <sup>4</sup> See CAREY, *supra* note 2, at 5-6 (showing nearly 191,304 rules issued, just since 1976).
- <sup>5</sup> INSTITUTE FOR POLICY INTEGRITY, STRENGTHENING REGULATORY REVIEW: RECOMMENDATIONS FOR THE TRUMP ADMINISTRATION FROM FORMER OIRA LEADERS 8 (2016).
- <sup>6</sup> H.R. 26, *supra* note 1, at § 808.
- <sup>7</sup> President Trump has issued an executive order calling for the repeal of two rules for each rule introduced during Fiscal Year 2017, as well as regulatory cost offsets. Exec. Order. No. 13,771, 83 Fed. Reg. 9339 (Feb. 3, 2017). It remains unclear how this Executive Order will work in practice, and the order is already being challenged in courts. See Tim Devaney, *Trump Sued Over “1-in-2-out” Regulations Order*, THE HILL (Feb. 8, 2017). If a similar concept is codified through the REINS Act, it will be more difficult to unwind if it proves to be unfeasible or illegal.
- <sup>8</sup> H.R. 26, *supra* note 1, at § 801(a)(5).
- <sup>9</sup> See, e.g., Sally Katzen with Julian Ginos, *A Response to Professors Adler and Siegel Addressing the Constitutionality of the REINS Act*, 2013 NYU J. LEGIS. & PUB. POL’Y QUORUM 13; Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 THE GEORGE WASHINGTON L. REV. 1446 (2015).
- <sup>10</sup> 462 U.S. 919 (1983).
- <sup>11</sup> See, e.g., *Branch v. Smith*, 538 U.S. 254, 273 (2003).



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