

The REINS Act Is Burdensome, Irrational, and Legally Questionable

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One of the most problematic bills before the Senate¹ is the Regulations from the Executive in Need of Scrutiny (“REINS”) Act of 2017.² The REINS Act 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 failed to act, not only would the rule be blocked, but the agency would also be prohibited from promulgating another related rule for the duration of that congressional session.

Rules from federal agencies help save lives and money. The REINS Act would hamper agencies’ ability to carry out their statutory duties and protect the public. The REINS Act would put a tremendous 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

- Both chambers of Congress would need to approve each “major” rule—those with an annual effect on the economy of \$100 million or more, or with significant effects on employment, among other things—before that rule could go into effect.
- If Congress failed 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.

The 2017 REINS Act Would Impose a Substantial 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

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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 agency staff members. The agency must conduct a careful review of scientific evidence, respond to comments from the regulated industry and the protected citizens, and articulate their basis for the rule in the Federal Register. Congress, with its wider docket of issues and its relative lack of expertise on each given regulatory matter, is not well equipped to make these highly technical decisions.

Hundreds of major rules and thousands of non-major rules are issued each year,³ and reviewing these rules would require a tremendous time commitment from members of Congress. Allowing either chamber of Congress to unilaterally block a rule from taking effect would also open up another avenue for special interests that could derail the regulatory process and elevate corporate profits over the well-being of the public. This process could put at risk vital health and safety protections, including some that are required by law.

Further, the REINS Act could foreclose agencies from regulating entire topic areas. If Congress failed to approve a rule under the REINS Act, the bill would irrationally prohibit the agency from promulgating any other rule “relating to the same rule” during the same Congress.⁴ “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 provision could needlessly and senselessly delay vital rules that could save lives and money.

The REINS Act Raises Serious Legal Questions and Constitutional Red Flags

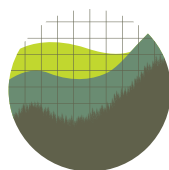
The REINS Act is legally questionable and potentially unconstitutional. The major rule review process could result in situations where Congress would be implicitly repealing earlier statutes by omission alone. In particular, in situations where regulations have been issued pursuant to mandatory requirements in earlier statutes, especially those with specific deadlines, Congress would, by failing to approve a rule, effectively be striking down the requirements in those earlier statutes without ever voting directly on an amendment. Courts strongly disfavor implied repeals of statutes.⁵

Additionally, the major rule review procedures raise constitutional red flags.⁶ The Supreme Court found a one-chamber legislative veto of a rule to be unconstitutional in *INS v. Chadha*.⁷ 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*.

*To learn more about the REINS Act, please contact the
Institute for Policy Integrity at the New York University School of Law—derek.sylvan@nyu.edu.*

Endnotes

- ¹ The version of the REINS Act passed by the House of Representatives is even more problematic, as it would also require Congress to review and retroactively approve all existing regulations to prevent them from being automatically repealed after 10 years. It would also require an agency to repeal an existing rule to offset the costs of each new rule it issues. For more information on the House bill, see http://policyintegrity.org/files/media/REINS_Fact_Sheet.pdf.
- ² S. 21, 115th Cong. (2017) (reported without amendment by the Committee on Homeland Security and Governmental Affairs on May 17, 2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/21/text>.
- ³ 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>.
- ⁴ S. 21 § 801(a)(5).
- ⁵ See, e.g., *Branch v. Smith*, 538 U.S. 254, 273 (2003).
- ⁶ See, e.g., Sally Katzen with Julian Ginos, *A Response to Professors Adler and Siegel Addressing the Constitutionality of the REINS Act*, 2013 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 13; Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446 (2015).
- ⁷ 462 U.S. 919 (1983).



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