



Legislative Bulletin.....December 7, 2011

Contents:

H.R. 10—Regulations From the Executive in Need of Scrutiny Act of 2011 (REINS)

**H.R. 10 — Regulations From the Executive in Need of Scrutiny
Act of 2011
(Davis, R-KY)**

Order of Business: The bill is scheduled to be considered on Wednesday, December 7, 2011, under a structured rule ([H.Res. 479](#)). The rule provides one hour of general debate equally divided and controlled by the chair and ranking member of the Committee on the Judiciary. It makes seven amendments in order described within this legislative bulletin and provides for one motion to recommit.

Summary: H.R. 10 amends the Congressional Review Act of 1996 (CRA, 5 U.S.C. § 801-808) to require a joint resolution of approval signed into law within a specified period of time before an Executive branch agency’s major rule can take effect and have the force of law. Under current law, Congress can repeal—with expedited voting procedures in the Senate—a federal agency major or non-major final rule by passing a joint resolution of disapproval within 60 days of publication of the rule in the *Federal Register* (or the date the federal agency submits the rule to Congress and the Government Accountability Office, as required under the CRA).

Since the CRA’s enactment, there have been close to 59,000 new rules reported by federal agencies including approximately 1,050 major rules.¹ Major rules are defined under the CRA as those rules that the Office of Management and Budget determines 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.

¹ Page 11 of the House Committee Report Number [112-278](#), Part I.

While federal agencies' rulemaking has proliferated, Congress has repealed only one federal agency final rule since the CRA became law—a President Clinton Department of Labor workforce ergonomics rule.²

H.R. 10 is a featured bill of the [House Republican Plan for America's Job Creators](#). It is also a key provision of the RSC's [Jobs Through Growth Act \(H.R. 3400\)](#).

Additional Background: According to the bill's text, the stated purpose of H.R. 10 is "...to increase accountability and transparency in the federal regulatory process..." since "...Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes."

The bill keeps in place the current CRA process for disapproving non-major rules promulgated by federal agencies while establishing Congressional-approval procedures for approving major rules promulgated by federal agencies. Principally, Congress must enact a joint resolution of approval on all major rules within 70 legislative days of receiving the major rule and accompanying report from a federal agency, **or the major rule will not take effect**. Congress is prohibited from reconsidering a joint resolution of approval relating to that same major rule in the same Congress. An exemption is permitted for 90 calendar days for those major rules that are necessary to either respond to an imminent threat to health or safety, to enforce criminal laws, to protect national security, or to implement an international trade agreement as declared by a Presidential Executive Order.

Section 3 of the bill outlines the House and Senate required procedures to vote on any new major rules including:

- introduction of the joint resolution of approval by the respective Majority Leaders of each chamber within three legislative or session days of the major rule's publication in the *Federal Register* and submission to Congress by the federal agency that promulgated the rule;
- consideration of the joint resolution in each House of Congress to committees of jurisdiction over the provision of law for which the rule has been issued for up to 15 legislative or session days;
- discharge from the committees of jurisdiction of the joint resolution that has not been considered after the 15 day time limit; and
- scheduling of a vote on the joint resolution in both Houses of Congress immediately after the 70th legislative day if the deadline has been reached.

The legislation also puts in place limits on federal courts ability to review any "determination, finding, action, or omission" under the bill while preserving judicial review of whether a federal agency has complied with H.R. 10's requirements placed on them in order for a rule to take effect.

² *Ibid.*

Additionally, the bill exempts any major rules concerning monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee as well as certain rules related to hunting, fishing, or camping.

Constitutional/Separation of Powers Discussion: Discussion on the REINS Act’s constitutionality has involved the question of whether the bill violates the Constitution’s separation of powers between the Legislative and Executive branches of the federal government. Some have claimed that the REIN’s act is not distinguishable from the Supreme Court’s ruling in *INS v. Chadha*³ (Chadha) where the court held that a unicameral legislative veto is unconstitutional. In other words, permitting Congress to provide itself the prerogative to repeal Executive branch agencies’ major rules violates the Supreme Court’s Chadha precedent.

Others maintain that the Chadha precedent does not apply to the REINS act since Chadha answered the question whether the Constitution permits Congress to reserve to the House of Representatives *alone* the power to veto an Executive branch action. The constitutional analysis presented in enacting the REINS act is a different one--whether Congress through a *bicameral* resolution with presentment to the President can negate an Executive branch major rule. Testimony taken from Subcommittee witnesses who maintain the REINS Act’s constitutionality includes:

“Agencies have no power to promulgate legislative rules unless it is given to them by Congress...[arguments against REINS’ constitutionality] runs off of the assumption that there is some core inherent prerogative of the President in relation to legislative rulemaking that is threatened by the REINS Act. However, if all of executive branch agencies’ rulemakings powers must come from Congress, there can’t be any such core Article 2 prerogative.”⁴

“The regulations that agencies promulgate are rules of Conduct. And in fact, courts talk about these regulations all the time as ‘legislative rules.’ So we are not talking about here about Executive power fundamentally; we are talking here about legislative power. So it is a question of Congress reclaiming some of its legislative powers.”⁵

Amendments Made in Order: The following seven amendments ruled in order by the Committee on Rules will each be debatable for 10 minutes equally divided by a proponent and opponent of the amendment:

1. **Sessions (R-TX)** – This amendment requires the agency submitting the report on a proposed federal rule as part of the cost-benefit analysis submitted to Congress and the Government Accountability Office (GAO) to include an assessment of

³ 462 U.S. 919 (1983) discussed beginning on page eight of House Committee report number [112-278 Part I](#).

⁴ *Regulations From the Executive in Need of Scrutiny Act of 2011: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law*, 112th Cong. (Jan. 24, 2011 testimony of Eric Claeys, page 132).

⁵ *Id.* at 134 (Testimony of David Shoenbrod).

anticipated jobs gained or lost and to specify whether those jobs will come from the public or private sector.

2. **Johnson (D-GA), Jackson Lee (D-TX), and Hastings (D-FL)** – This amendment exempts from the bill any rule that the Director of the Office of Management and Budget determines would result in net job creation. This amendment failed in the full Committee markup by a vote of [14-21](#).
3. **Shraeder (D-OR)** – This amendment requires a cost benefit analysis to be included with the required reports to Congress and the GAO. It also requires federal agencies to submit appropriate criteria for conducting cost benefit analyses to Congress for each rule within 12 months of enactment or January 1, 2013 (whichever date is later).
4. **McKinley (R-WV)** – This amendment reduces the annual effect on the economy of the term “major rule” from “\$100,000,000 or more” to “\$50,000,000 or more.”
5. **McCarthy (D-NY)** – This amendment exempts from the bill any proposed rule, final rule, or agency guidance that relates to the safety of food, the safety of the workplace, air quality, the safety of consumer products, or water quality.
6. **Jackson Lee (D-TX)** – This amendment exempts from the bill all rules promulgated by the Homeland Security Department (DHS). **Note:** DHS is one of four federal agencies that promulgate most of the 3,000 to 4,000 final rules each year (according to the Congressional Research Service).
7. **Moore (D-WI)** – This amendment exempts from the bill any rule that relates to veterans or veterans affairs.

Outside Organizations “Key Voting” Passage: Associated Builders and Contractors, Inc., Council for Citizens Against Government Waste (CCAGW), Freedom Works, Heritage Action, National Taxpayers Union, and the U.S. Chamber of Commerce.

Outside Groups Supporting: American Foundry Society; Americans for Prosperity; Americans for Tax Reform & the Center for Fiscal Accountability; Associated General Contractors of America (AGC); Association for Manufacturing Technology; Forging Industry Association (FIA); Heating, Airconditioning & Refrigeration Distributors International (HARDI); HR Policy Association; Independent Petroleum Association of America; Industrial Energy Consumers of America; Kentucky Chamber of Commerce; Motor & Equipment Manufacturers Association; National Association of Electrical Distributors (NAED); National Association of Wholesaler-Distributors (NAW); National Cattlemen's Beef Association (NCBA); National Mining Association; National Retail Federation; National Utility Contractors Association; Northern Kentucky Chamber of Commerce; Partnership for Affordable Clean Energy (PACE); Small Business and Entrepreneurship Council; and Western Energy Alliance.

Outside Groups Opposing: The Dissenting Views included in House Report number [112-278 Part I](#) explain that H.R. 10 is “strongly opposed by a broad coalition of 72 environmental, labor, and consumer organizations, including the AFL-CIO, the American Federation of State, County, and Municipal Employees, the American Lung Association, Families USA, the National Association of Consumer Advocates, the League of Conservation Voters, and the Union of Concerned Scientists, Science Integrity division. Additionally, 66 respected academics in the fields of administrative and environmental law...”

Committee Action: Representative Geoff Davis (R-KY) introduced H.R. 10 on January 20, 2011, which was then referred to the Committees on the Judiciary and Rules. The Judiciary Subcommittee on Courts, Commercial and Administrative Law held two legislative hearings on the bill on January 24 and March 8, 2011. On October 24, 2011, the full Judiciary committee reported the amended bill favorably by a roll call vote of [22-14](#). The Rules committee marked up the amended bill and reported it out favorably by a vote of 7-3 on November 16, 2011.

Administration Position: The Administration released a Statement of Administration Policy (SAP) on December 6, 2011 “strongly” opposing the bill.

Cost to Taxpayers: The Congressional Budget Office (CBO) released a cost [estimate](#) on November 9, 2011, stating that CBO and the staff of the Joint Committee on Taxation (JCT) “cannot determine the budgetary effects of preventing all future major rules going to effect, but we expect that enacting H.R. 10 would have effects on both direct spending and revenues.” CBO expects that the bill would not have any significant impact on spending subject to appropriation.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: CBO expects that the bill would not impose any intergovernmental or private-sector mandates.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: According to the Committee report, H.R. 10 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Constitutional Authority: The Constitutional Authority Statement accompanying the bill upon introduction states:

“Congress has the power to enact this legislation pursuant to the following: This bill is enacted pursuant to the power granted Congress under article I of the United States Constitution, including the power granted Congress under article I, section 8, clause 18, of the United States Constitution, and the power granted to

each House of Congress under article I, section 5, clause 2, of the United States Constitution.”

RSC Staff Contact: Joe Murray, joe.murray@mail.house.gov, (202) 226-0678

###