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Legislative Bulletin……..……August 1, 2013

Contents:

H.R. 367 — Regulations From the Executive in Need of Scrutiny Act of 2013
(Young, R-IN)

Order of Business: The bill is scheduled to be considered on Thursday, August 1, 2013, under a structured rule (H.Res. 322) making twelve amendments in order for consideration of the bill and described within this Legislative Bulletin. The Rule provides for one hour of general debate equally divided and controlled by the Chair and Ranking Minority Member of the Committee on the Judiciary. Upon adoption of the Rule, a technical amendment offered by Rep. Pete Sessions (R-TX) related to Congressional disapproval procedures for non-major rules is considered adopted. It provides for one motion to recommit with or without instructions.

Summary: H.R. 367 (the REINS Act) 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. Under current law, Congress can repeal—with expedited voting procedures in the Senate—a federal agency's 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). As required by the U.S. Constitution, the President must sign the joint resolution of disapproval for it to have the force of law, and therefore, negate the federal agency rule.

Since the CRA's enactment, federal regulatory agencies have finalized over 60,000 new rules including more than 1,000 major rules, while Congress has overturned only one regulation under CRA authority.[1] The Congressional Budget Office (CBO) explains that

[1] Page 7 of the House Committee Report Number 113-160, Part I. Footnote 5 on Page 8 of the same report lists S.J. Res 6, 107th Congress (enacted 2001) as the only successful CRA disapproval resolution regarding a President Clinton Department of Labor workforce ergonomics rule addressing ergonomics standards. Under the rule, employers would have been required to eliminate or reduce workplace conditions that might lead to carpal tunnel syndrome, tendinitis, and back injuries. Similar controversial proposals developed in the 90's that led to Congressional appropriation riders enacted in fiscal years 1995, 1996, and

historical data shows 68 major rules were published in 2012, while about 85 major rules have been issued per year, on average, over the past five years.[2] All signs point to an increase in regulations as significant laws such as Obamacare and the Dodd-Frank Wall Street Reform and Consumer Protection Act are being implemented. Testimony by former CBO Director Douglas Holtz-Eakin, Ph.D. explains that, taking into account the costs imposed by Obama Administration regulations and those currently proposed, "[d]uring the past 4 years, the cumulative regulatory cost burden has increased by more than $520 billion."[3] Last week alone, regulators added $133 million in regulatory costs.

H.R. 367 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. Major rules are defined under the CRA[4] 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.

The bill requires Congress to 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:

1998. In 2000, a final rule took effect, which ultimately resulted in President Bush and a new Congress disapproving of it in 2001.

[2] CBO's cost estimate for H.R. 367, May 17, 2013, page two, citing GAO Federal Rules Database, http://www.gao.gov/legal/congressact/fedrule.html

[3] Statement of Douglas Holtz-Eakin at "Hearing on the Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness," February 28, 2013, at 3, available at http://judiciary.house.gov/hearings/113th/02282013/Holtz-Eakin%2002282013.pdf . Also, last term, the Small Business' Office of Advocacy reported that federal rulemaking imposed a cumulative burden of $1.75 trillion on our economy—a figure that equaled fourteen percent of national income (Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Report No. SBAHQ-08-M-0466, Sept. 2010, at 6, 48.

[4] 5 U.S.C. 804(2).

- introduction of the joint resolution of approval by the respective Majority Leaders (or a designee) of each chamber within three legislative 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 days;
- discharge from the committees of jurisdiction of the joint resolution if it 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 bill also puts in place limits on a 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.

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.

H.R. 367 is essentially the same bill that the House passed by a vote of 241-184 last Congress when it considered H.R. 10 on December 7, 2011. This Congress' version of the REINS Act differs in a few respects. It does not include a reporting requirement, added to H.R. 10 as a floor amendment, requiring federal agencies to include in a proposed rule's cost-benefit analysis an analysis describing whether the proposed rule would add or reduce jobs (differentiating between public and private sector jobs). H.R. 367 includes a new Comptroller General study not included in H.R. 10. The study is due to Congress within a year of enactment and shall determine how many rules are in effect, how many major rules are in effect, and the total estimated economic costs imposed by all such rules as of the date of enactment of the bill.

Additional Background: Section 2 of H.R. 367 explains the stated purpose of the bill below:

> "The purpose of this Act is to increase accountability for and transparency in the Federal regulatory process. Section 1 of article I of the United States Constitution grants all legislative powers to Congress. Over time, Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes. By requiring a vote in Congress, the REINS Act will result in more carefully drafted and detailed legislation, an improved regulatory process, and a legislative branch that is truly accountable to the American people for the laws imposed upon them."

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 REINS Act is not distinguishable from the Supreme Court's ruling in *INS v. Chadha*[5] (Chadha), where the court held that a unicameral legislative veto is unconstitutional. In other words, some may argue that 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 of 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 presented to the President for signature, can negate an executive branch major rule. Testimony taken in the 112th Congress 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."[6]

> "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."[7]

Amendments Made in Order: The following twelve 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. **Scalise (R-LA)** – The amendment prohibits the Administration from acting without the consent of Congress with respect to a carbon tax. This amendment is modeled after the RSC's Anti-Carbon Tax Resolution (H.Con.Res.24), which is cosponsored by 149 Members. The text of the amendment can be viewed here. The following groups support the amendment: American Commitment, American Conservative Union, American Energy Alliance, American Fuel and Petrochemical Manufacturers, Americans for Limited Government, Americans for Prosperity (***scoring as a key vote***), Americans for Tax Reform, American Tradition Institute, Citizens Against Government Waste, Competitive Enterprise

[5] 462 U.S. 919 (1983) discussed beginning on page eight of House Committee report number 112-278 Part I. in the 112th Congress.
[6] *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 Claeyes, page 132).
[7] *Id.* at 134 (Testimony of David Shoenbrod).

Institute, Congress of Racial Equality, Freedom Action, FreedomWorks (***scoring as a key vote***), Frontiers for Freedom, Heritage Action for America, High Impact Leadership Coalition, Industrial Energy Consumers of America, Latino Partnership for Conservative Principles, National Association of Manufacturers, National Black Chamber of Commerce, National Taxpayers Union (***scoring as a key vote***), Positive Growth Alliance, Taxpayers Protection Alliance, Tea Party Nation, and the 60 Plus Association. Additionally, a coalition letter was sent this morning in support of the amendment, which can be viewed here.

2. **Davis (R-IL)**, ***Peterson (D-MN)*** – This amendment adds to the definition[8] of a federal agency major rule as one promulgated by the Administrator of the Environmental Protection Agency (EPA) that would have a significant impact on a substantial number of agricultural entities, as determined by the Secretary of Agriculture (who shall publish such determination in the *Federal Register*). The amendment defines an "agricultural entity" to mean any "entity involved in or related to agriculture enterprise, including enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries." **The amendment sponsors' Dear Colleague states**, "We believe this amendment would improve communication between EPA and USDA, give agriculture a stronger voice during the process, and provide EPA with a better understanding of agriculture." It further describes that a top concern of farmers and producers is EPA regulatory actions.

3. **Smith (R-MO)** – This amendment requires Congressional approval of **all** rules promulgated under the authority of Obamacare (P.L. 111-148). The Committee report explains that the Congressional Research Service (CRS) has identified 40 provisions in the laws that permit or require the issuance of regulations. Thousands of pages of Obamacare regulations have already been finalized with many more expected to be promulgated by federal agencies.

4. **Latham (R-IA)** – This amendment requires federal agencies to include, in their submission of the rule to both Houses of Congress and the Comptroller General, a list of any other related regulatory actions taken by or that will be taken by any other federal agency with authority to implement the same statutory provision or regulatory objective intended to implement such provision or objective as well as the individual and aggregate economic effects of those actions before any rule can take effect.

5. **Sessions (R-TX), Davis (R-IL), Barr (R-KY), Wenstrup (R-OH), Coffman (R-CO)** – This amendment requires the federal agency submitting the report on a proposed federal rule as part of the cost-benefit analysis submitted to both Houses of Congress and the Comptroller General to include an assessment of anticipated

[8] Current law (5 U.S.C. 804(2)) defines major rules by federal agency as rules that result in an annual effect on the economy of at least $100 million, increases costs or prices on consumers, or causes significant adverse effects on competition and employment.

jobs gained or lost and to specify whether those jobs will come from the public or private sector. *This amendment passed by voice in last Congress' consideration of H.R. 10 (REINS Act).*

6. ***Nadler (D-NY)*** – This amendment exempts from the bill's definition of a major rule any rule pertaining to nuclear reactor safety standards.

7. ***Johnson (D-GA)*** – This amendment exempts from the bill's definition of a major rule any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget determines would result in net job growth. *This amendment failed at the Judiciary Committee markup of the bill by a vote of 9-18.*

8. ***Jackson Lee (D-TX)*** – This amendment exempts from the bill's Congressional approval requirement all rules promulgated by the Homeland Security Department (DHS). **Note**: As of August 1, 2013, DHS has issued 190 rules out of a total of 870 rules issued, according to the Congressional Research Service.[9] *This same amendment failed by a vote of 177-242 during last Congress' consideration of the REINS Act (H.R. 10).*

9. **McKinley (R-WV)** – This amendment reduces the annual effect on the economy of the term "major rule" from $100 million or more to $50 million or more. The amendment sponsor offered and then withdrew the same amendment in last Congress' consideration of the REINS Act (H.R. 10). **According to the amendment sponsor**, the bill's $100 million threshold incorporates 2-3 percent of all proposed federal rules. *A similar amendment to H.R. 4078, the Red Tape Reduction Act, reducing the term "significant regulatory action" from $100 million to $50 million passed the House last Congress by a 240-178.*

10. **Cole (R-OK)** – This amendment adds tribal government agencies to the list of entities (currently including consumers, individual industries, federal/state/local government agencies or geographic regions) that are required to be considered as experiencing a major increase in costs or prices included in the definition of a major rule requiring Congressional approval before taking effect.

11. **Webster (R-FL)** – This amendment removes the bill's exceptions to the definition of a federal rule relating to a federal agency's management or personnel or its organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. Essentially, the amendment increases the number of potential regulations subject to Congressional approval under the REINS Act.

12. ***Moore (D-WI)*** – This amendment exempts from the bill any rule that relates to veterans or veterans affairs. *The same amendment failed by a vote of 183-240 during last Congress' consideration of the REINS Act (H.R. 10).*

[9] CRS references the Government Accountability Office (GAO) Federal Rules Database.

Outside Organizations "Key Voting" an AYE Vote on Passage: Council for Citizens Against Government Waste (CCAGW), Freedom Works, Heritage Action, the National Taxpayers Union, and the U.S. Chamber of Commerce

Other Outside Groups Supporting: American Commitment; American Conservative Union (ACU); Americans for Prosperity; Americans for Tax Reform Cost of Government Center; Association for Manufacturing Technology; Competitive Enterprise Institute; Home School Legal Defense Association; Industrial Energy Consumers of America; Heating, Air-Conditioning & Refrigeration Distributors International; National Association of Electrical Distributors (NAED); National Cattlemen's Beef Association (NCBA); National Utility Contractors Association; and Western Energy Alliance.

Committee Action: Representative Todd Young (R-IN) introduced H.R. 367 on January 23, 2013, which was then referred to the House Committees on the Judiciary, Budget, and Rules. The Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a legislative hearing on the bill on March 5, 2013. Also, in the 112th Congress, the Judiciary Subcommittee on Courts, Commercial and Administrative Law held two legislative hearings on essentially the same bill (H.R. 10) on January 24 and March 8, 2011. On March 20, 2013, the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law favorably reported the bill by a 6 to 3 vote. On April 11, 2013, the full Judiciary Committee favorably reported the amended bill by a 20-9 vote.

Administration Position: The Administration released a Statement of Administration Policy (SAP) "strongly" opposing H.R. 367.

Cost to Taxpayers: The Congressional Budget Office (CBO) released a cost estimate of H.R. 367 on May 17, 2013. It states 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. 367 would have significant effects on both direct spending and revenues." CBO also expects that the bill could have a significant impact on spending subject to appropriation, although they can't determine the magnitude of that effect.

Does the Bill Expand the Size and Scope of the Federal Government?: No. The bill effectively "constrains the delegation of Congressional authority by limiting the size and scope of rulemaking permission."[10]

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. 367 does

[10] Page 11 of Committee report 113-160, Part I.

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."

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