

November 15, 2016

No. 223

## REINing In Regulatory Overreach

The Regulations from the Executive in Need of Scrutiny Act Would Help Restore Transparency and Accountability to Federal Rulemaking

By Ryan Young\*

The Regulations from the Executive In Need of Scrutiny (REINS) Act would require Congress to vote on all new executive branch regulations that cost \$100 million or more in any given year, what the bill calls “major rules.”<sup>1</sup> It has passed the House during the past three Congresses, though it has never passed the Senate, and has drawn veto threats from President Obama.<sup>2</sup> REINS is a modest reform, but it would have positive effects on both congressional and agency behavior for two reasons.

First, REINS would help restore the separation of powers outlined in the U.S. Constitution by making Congress accountable for the regulatory costs it imposes on the American people. Article I, Section 1 of the Constitution states: “All legislative Powers herein granted shall be vested in a Congress of the United States[.]” Yet, Congress has increasingly delegated away its legislative powers to executive branch agencies. For example, Congress passed, and the President signed, 114 bills in 2015. Meanwhile, agencies issued 3,406 final regulations—a 30-fold difference. The Competitive Enterprise Institute’s Wayne Crews calls this multiple the Unconstitutionality Index. It has averaged 26 over the last decade, and reached as high as 51 in 2013.<sup>3</sup>

All too often, members of Congress are quite happy to delegate their responsibilities to agencies by passing vaguely worded statutes that give agencies broad discretion to implement mandates and restrictions. If a regulation backfires or turns out to be controversial or unpopular, lawmakers can shift the blame to the agencies. Members of Congress must face voters every few years. Agency officials do not, and they often enjoy decades-long careers under multiple administrations from both parties. If Members of Congress must publicly put their name to an unpopular or burdensome regulation, they are less likely to let it stand.

Second, the REINS Act would increase transparency and accountability in the rulemaking process. Agencies would be less inclined to issue regulations that violate the letter and spirit of their authorizing legislation, knowing that Congress could hold them accountable.

Notably, REINS can provide common ground for conservatives and progressives to work together. Progressives tend to support an active approach to regulation, but that support depends on the content of each individual regulation. REINS would likely still let most, if not all major agency regulations pass—but with some democratic accountability.

---

\* Ryan Young is a Fellow at the Competitive Enterprise Institute.

**Why REINS Is Needed.** Checks on agencies' abuse of power are needed more than ever. REINS is no panacea, but it is an essential step on the road to reform. Agencies are not allowed to issue regulations unless Congress passes legislation authorizing them to do so. Since 2003, every year's *Federal Register* has devoted more than 20,000 pages to final regulations from executive branch agencies.<sup>4</sup> The *Code of Federal Regulations*, in which all current executive branch regulations are compiled, now exceeds 178,000 pages. The print edition consists of 237 volumes and features a 1,170-page index.<sup>5</sup> The trouble is that more and more of these rules either stretch the agency's statutory authority to the limit, or skirt the formal rulemaking process as outlined under the Administrative Procedure Act.

**What REINS Does.** The REINS Act is a 24-page bill, which is rather short by modern standards. By comparison, the Dodd-Frank financial regulation bill is 848 pages long.<sup>6</sup> The Patient Protection and Affordable Care Act is 906 pages long.<sup>7</sup> In the 114<sup>th</sup> Congress, REINS was sponsored by Rep. Todd Young (R-Ind.) and Sen. Rand Paul (R-Ky.).

Currently, agencies publish proposed and final versions of all of their regulations in the daily *Federal Register*. Agencies publish new rule proposals in the *Federal Register* and solicit public comment. By law, agencies must take that input into consideration, but this is typically just pro forma. As long as an agency explains why it has disregarded the public's recommendations when publishing the final rule, the statutory obligation is met. Thus, there is some transparency, but little real accountability.<sup>8</sup>

REINS adds the requirement that agencies send copies of their regulations, along with cost-benefit analysis and other related documents, to the relevant congressional committees, which then have an opportunity to vote on the rules before they go into effect.

Most rules do not qualify for REINS review—out of the more than 3,400 regulations issued each year, usually only 40 to 50 meet REINS' \$100 million annual cost threshold for a Congressional vote. This amounts to roughly three to four monthly votes on average on the Congressional calendar—hardly a major burden on Congress' time and resources. If a regulation meets REINS' threshold, the Comptroller General has 15 days to send a report to the relevant committees. Congress then has 70 legislative days for both chambers to pass a resolution of approval. If it passes both chambers, the rule goes into effect. If the vote fails, it does not.

Each new Congress begins with a blank legislative slate. Congress operates on a two-year cycle, under which all bills not yet voted on at the end of a session die. Executive branch agencies are not beholden to this schedule. Therefore, REINS allows a grace period of 60 legislative days into the new session of Congress for a REINS-subject regulation vote if the previous session had expired during the original voting time frame.

Agencies often indulge in a "midnight rush" of rulemaking at the end of an administration, especially if White House control changes parties. This provision would ensure that none of these midnight regulations evade congressional review.

REINS gives the President limited powers to overturn a congressional rejection. If a rejected rule addresses national security concerns, urgent health and safety issues, or is necessary to comply with an international treaty, the President may issue an Executive Order that will finalize the rule, but only for a 90-day period.

Additionally, in order to preserve the Federal Reserve's nominal political independence, rules affecting monetary policy are exempt from REINS reviews altogether.

Regulations must stand or fall exactly as agencies write them, with no amendments allowed during the REINS review process. Senate debate, renowned for its seemingly unlimited time, would be limited to two hours in these cases, with equal time allotted to both sides of the debate. In addition, if no votes have been taken on the REINS resolution by the end of the deadline, a Senate vote is automatically scheduled for the final deadline day. Thus, the majority party in the Senate could not block rules merely by failing to schedule a vote.

Congress would also gain the power to strike non-major rules, though with stricter procedures for deadlines and debate that make such actions unlikely. Unlike major rules, which would not go into effect without a congressional vote in their favor, non-major rules would go into effect unless Congress expressly votes them down.

The House must pass a joint resolution within 60 days of it receiving a report on the rule, reading as follows: "That Congress disapproves the non-major rule submitted by the \_\_\_\_\_ relating to \_\_\_\_\_, and such rule shall have no force or effect." If that passes, then the relevant Senate committee must follow suit within 15 days. If it passes the committee, then 30 Senators must give their approval before the joint resolution moves to the Senate floor, with 10 hours of debate allowed, equally split between both sides of the debate.

REINS also has provisions for judicial review. Courts may not review and overrule decisions by Congress to repeal regulations, but they may ensure that agencies comply with Congress' will, and do not simply promulgate new rules substantially similar to the ones rejected by Congress.

The final provision in the bill instructs the Government Accountability Office (GAO) to conduct a study that tallies up how many total federal regulations are currently in effect, and how many of them qualify as major.

**Potential Improvements.** Reformers must keep in mind an important law of politics: Rules are not necessarily made to be broken, but non-reformers will bend the heck out of them. If the trigger for a REINS vote is set at \$100 million per year for a given regulation, then agencies have a natural incentive to bend that rule by splitting their larger regulations into smaller parts or lowballing cost estimates to come in below the threshold.

This implies the need for a lower threshold. The current \$100 million annual cost threshold would mean 40 to 50 extra votes in an average year—Congress already holds more than 700 votes per year even during its slowest years.<sup>9</sup> Lowering the vote trigger to rules with annual

costs of \$50 million or even \$25 million would add more votes to the congressional calendar, but still would not impose an undue burden. A lower voting threshold would not eliminate the problems of Congress over-delegating to the executive branch or end agencies' usurpation of legislative authority, but it would be an improvement over the status quo.

At its outermost limit, a REINS-inspired reform would require Congress to vote on each and every new agency regulation, regardless of cost. With more than 3,400 new regulations finalized each year, this is not practical. Short of having fewer agencies issue fewer regulations, one possible way to keep REINS voting requirements to a minimum is to exempt agency rules with built-in sunsets from REINS votes. However, this gives agencies another loophole. Agencies can simply add sunsets to all of their regulations, and then renew them shortly before they expire a few years later, in perpetuity.

As a general principle, reformers need to be as vigilant about potential loopholes in REINS as agencies will be in finding and exploiting them. The loopholes listed above are almost certainly not the only ones that may arise from the bill's structure. Hopefully, future iterations of REINS—or new reform bills—will anticipate and fix potential loopholes.

Congress also needs to broaden the REINS objection to any rule the public finds controversial, whether or not tied to a cost estimate that deems it a major rule. There are several possible triggering mechanisms that could be adopted, such as the proposed rule receiving a certain number of adverse comments during the public comment period.

Furthermore, in recent years, as much as a third of regulating now takes place outside of the Administrative Procedure Act's notice-and-comment process—a phenomenon CEI's Wayne Crews calls “regulatory dark matter.”<sup>10</sup> It takes many forms.

One common type is agency guidance documents. Many statutes and regulations are ambiguously worded, and courts have to step in to clarify the precise meaning of an ambiguous clause. But many laws and regulations are highly technical, and judges typically lack specialized expertise, so agencies will provide guidance documents clarifying how they interpret the requirements or suggesting how they recommend covered groups and individuals comply with the rules. These guidance documents technically are not legally binding, but judges nearly always defer to them, giving them the de facto force of law.

Another form of dark matter is agency notices. These are published in the *Federal Register*, but are not subject to public comment or any of the other checks in the standard rulemaking process. Most notices are as benign as an agency announcing it will hold a hearing or public meeting, but other notices are essentially new regulations in all but name. Recent examples of notices that could have potential regulatory impacts range from renewable energy to truck driver qualifications.<sup>11</sup>

Yet another form of dark matter is a scheme known as sue-and-settle. Here is how it works. Congress enacts a law instructing an agency, say the Environmental Protection Agency (EPA), to implement particular rules according to priorities and deadlines written into the statute. Some statutes give the agency discretion over setting priorities subject to notice-and-

comment rulemaking, but agency officials believe they cannot justify their preferred course of action.

Next, an allied activist group that, along with the EPA staff, hopes to change the statutory priorities or deadlines sues the agency for some real or perceived procedural irregularity. The agency happily admits guilt, and as part of the settlement, agrees to a new schedule or priorities—which the agency had preferred all along. And because the settlement agreement is enforced by court order, the agency and its allies get to implement their preferred policies without having to go through the rulemaking process, during which the agency’s choices could be challenged.<sup>12</sup>

The REINS Act must expand to cover such dark matter, which is even less transparent and less accountable than the traditional rulemaking process.<sup>13</sup> If it does not, agencies have an incentive to enact their major rules through unaccountable dark matter methods instead of the REINS-subject rulemaking process. Even if dark matter decrees are voted on *en bloc* by Congress, at least the principle of eradicating arbitrary agency power is retained. At the very least, Congress should take a look at notices classified as “economically significant,” which average about half a dozen per year.<sup>14</sup> The ideal solution is for agencies to stop regulation by guidance document in the first place. For now, however, applying the REINS model to agency proclamations that impose obligations on the private sector can help curb the proliferation of regulatory “dark matter” out of Washington.

**Conclusion.** Regulatory reform is one of the federal government’s most pressing issues, and restoring a proper separation of powers is one of the most important planks of any reform agenda. The REINS Act, by requiring Congress to reclaim some of its legislative responsibilities from the executive branch, would partially restore this skewed balance of powers. REINS is a modest reform, which, as currently written, would require four or five extra congressional votes per month.

The REINS Act’s basic principles—transparency and democratic accountability—have natural appeal to both conservatives and progressives. The GAO study REINS would commission, to identify just how many existing regulations qualify as “major,” would give the bill additional value in promoting transparency.

REINS is not a perfect bill. Areas for improvement include lowering the \$100 million voting threshold, closing possible loopholes agencies might try to exploit, and expanding the bill to cover regulatory dark matter. REINS should be reintroduced and voted on in the next Congress, preferably with the reforms proposed in this paper. Regulatory reform is a long game. Even if the bill fails to pass, it is worthwhile to keep reform ideas such as REINS alive and conveniently available in case political winds shift in a more favorable direction.

The REINS Act has already passed the House; the Senate should also give it a try. And if President Obama or the next U.S. president vetoes it, he or she would have to justify opposing greater transparency and democratic accountability for federal regulations to the American people.

## Notes

---

<sup>1</sup> H.R. 427, 114<sup>th</sup> Congress, Regulations from the Executive In Need of Scrutiny Act of 2015, <https://www.congress.gov/114/bills/hr427/BILLS-114hr427pcs.pdf>.

<sup>2</sup> Executive Office of the President, Office of Management and Budget, “Statement of Administration Policy: H.R. 427, Regulations from the Executive In Need of Scrutiny Act of 2015,” July 27, 2015, [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr427r\\_20150727.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr427r_20150727.pdf).

<sup>3</sup> Clyde Wayne Crews, *Ten Thousand Commandments 2016: An Annual Snapshot of the Regulatory State*, Competitive Enterprise Institute, pp. 60-61, [82.https://cei.org/sites/default/files/10%2C000%20Commandments%202015%20-%2005-12-2015.pdf](https://cei.org/sites/default/files/10%2C000%20Commandments%202015%20-%2005-12-2015.pdf).

<sup>4</sup> *Ibid*, p. 19.

<sup>5</sup> *Ibid*, pp. 21, 65.

<sup>6</sup> 111<sup>th</sup> Congress, H.R. 4173, “Dodd-Frank Wall Street Reform and Consumer Protection Act,” July 15, 2010, <https://www.gpo.gov/fdsys/pkg/BILLS-111hr4173enr/pdf/BILLS-111hr4173enr.pdf>.

<sup>7</sup> 111<sup>th</sup> Congress, H.R. 3590, “Patient Protection and Affordable Care Act,” March 23, 2010, <https://www.gpo.gov/fdsys/pkg/BILLS-111hr3590enr/pdf/BILLS-111hr3590enr.pdf>.

<sup>8</sup> For a detailed look at the federal rulemaking process, see Susan E. Dudley and Jerry Brito, *Regulation: A Primer, Second Edition* (Arlington, Virginia and Washington, DC: Mercatus Center at George Mason University and The George Washington University Regulatory Studies Center, 2012), [https://www.mercatus.org/system/files/RegulatoryPrimer\\_DudleyBrito\\_0.pdf](https://www.mercatus.org/system/files/RegulatoryPrimer_DudleyBrito_0.pdf).

<sup>9</sup> In 2015, Congress held 705 roll call votes. They are listed online at <http://clerk.house.gov/evs/2015/index.asp>.

<sup>10</sup> The phrase “regulatory dark matter” was coined by Wayne Crews, who explores the phenomenon in two recent papers. Clyde Wayne Crews, “Mapping Washington’s Lawlessness 2016: A Preliminary Inventory of ‘Regulatory Dark Matter,’” *Issue Analysis* 2015 No. 6, Competitive Enterprise Institute, December 2015, <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf>. Clyde Wayne Crews, “Why Congress Must End Regulation by Guidance Document,” *OnPoint* No. 215, Competitive Enterprise Institute, April 19, 2016, <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Why%20Congress%20Must%20End%20Regulation%20by%20Guidance%20Document.pdf>.

<sup>11</sup> Energy Efficiency and Renewable Energy Office, “Supporting Clean Energy Startups-Industry and Investment Partnerships for Scaling Innovation,” *Federal Register* Vol. 81, No. 206, October 25, 2016, 73,386, <https://www.federalregister.gov/documents/2016/10/25/2016-25763/supporting-clean-energy-startups-industry-and-investment-partnerships-for-scaling-innovation>, and Federal Motor Carrier Safety Administration, “Qualification of Drivers; Exemption Applications; Diabetes,” *Federal Register* Vol. 81, No. 206, October 25, 2016, <https://www.federalregister.gov/documents/2016/10/25/2016-25766/qualification-of-drivers-exemption-applications-diabetes>.

<sup>12</sup> William Yeatman, “EPA’s Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, ‘Sue and Settle,’” Web Memo No. 23, Competitive Enterprise Institute, July 20, 2013, <https://cei.org/web-memo/epas-woeful-deadline-performance-raises-questions-about-agency-competence-climate-change-re>. William L. Kovacs, Keith W. Holman, and Jonathan A. Jackson, “A Report on Sue and Settle: Regulating behind Closed Doors,” U.S. Chamber of Commerce, May 2013, <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

<sup>13</sup> Crews, “Mapping Washington’s Lawlessness”. See also Clyde Wayne Crews, Jr., “All I Want for Christmas Is a Less Naughty Government,” *Forbes.com*, December 19, 2013, <http://www.forbes.com/sites/waynecrews/2013/12/19/all-i-want-for-christmas-is-a-less-naughty-government/>.

<sup>14</sup> Crews, “Mapping Washington’s Lawlessness 2016,” p. 29.