

Possible Changes in How Regulations Get Made and Unmade

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Last week, the House of Representatives passed two bills and considered another that would dramatically expand Congress's role in the oversight of agency rulemaking. Although we think that these bills are unlikely to become law in the near term, they are strong indicators of increased Congressional focus on how regulations get made and unmade.

The Midnight Rules Relief Act of 2017

On Wednesday, the House passed the [Midnight Rules Relief Act of 2017](#), which would give Congress greater practical ability to nullify regulations submitted to Congress in the last year of a President's term. Under the [Congressional Review Act](#) (CRA), Congress can invalidate a regulation by enacting a joint resolution of disapproval that is signed by the President or passed by a veto-proof supermajority. Such a disapproval resolution is not subject to a Senate filibuster and, if successful, not only renders the disapproved regulation void but also bars the responsible agency from issuing any substantially similar regulations without new statutory authorization.[1]

The CRA is a potentially powerful regulatory review tool, but two aspects of the law limit its usefulness in unwinding recently finalized regulations. First, the CRA only permits the new Congress to invalidate final regulations submitted to Congress by agencies within the last 60 days of the current session of Congress (excluding days either House of Congress is adjourned for more than three days) or the last 60 legislative or session days of the previous Congress (i.e., since [June 13, 2016](#), according to the Congressional Research Service). Second, because each joint resolution of disapproval can only target one regulation, floor debate on separate resolutions of disapproval could clog Congressional calendars at a time when Republicans are aiming to enact an ambitious statutory agenda. Consequently, some regulatory experts have predicted that Congress will be able to invalidate fewer than "[a half-dozen](#)" regulations across all industries.

The Midnight Rules Relief Act would mitigate both of these obstacles by enabling Congress to pass omnibus disapproval resolutions that cover multiple regulations submitted during the final year of a President's term (i.e., in the case of President Obama, since January 20, 2016). We remain of the view that the CRA, even if used, would be of limited use in financial services regulatory reform because few significant financial regulations have been finalized since June and because the CRA is a blunt tool that can only be used to invalidate whole regulations, not to excise or amend unduly burdensome provisions.

The Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017

On Thursday, the House also passed a bill that would transform Congress's role in agency rulemaking. The [REINS Act](#) provides that "major rules"—those identified by the Office of Information and Regulatory Affairs (OIRA) as causing, or as likely to cause, annual economic effects of \$100 million or more, or certain other adverse economic impacts—could only take effect if Congress adopted a joint resolution approving of the rule.[2]

The REINS Act would be a paradigm shift for how regulations are made or amended because it would give the House and Senate veto power over new major regulations, including new major amendments. In the short term, the likely effect of such a measure would be a moratorium on significant new regulations or amendments. In the long term, however, such a measure could have the unintended consequence of impeding financial regulatory reform, especially if Democrats retook either house of Congress. The House passed the REINS Act with amendments proposed by Reps. Luke Messer

and Steve King, which would make the Act a retrospective, not just a prospective, tool for regulatory reform:

- Rep. Messer’s amendment would require that agencies fully offset the economic costs of new rules by amending or repealing existing rules; and
- Rep. King’s amendment would require agencies to submit all currently effective regulations for Congressional approval on a rolling basis over the next ten years. Regulations not affirmatively approved by Congress within ten years would cease to be effective.

The Require Evaluation Before Implementing Executive Wishlists (REVIEW) Act of 2017

Rep. Tom Marino also introduced a more limited measure to curb agency rulemaking. The [REVIEW Act](#) would require agencies to postpone the effective date of “high-impact” rules—those determined by OIRA to impose annual economic costs of \$1 billion or more—until after the final disposition of all actions seeking judicial review of the rule. This measure would shield businesses from some of the costs of complying with new regulations that are later struck down in court.

Conclusion

So long as the Senate retains the filibuster, it is unlikely that any of these three bills will become law. Both the Midnight Rules Relief Act and the REINS Act passed the House on nearly party-line votes, and versions of all three bills introduced in the previous Congress were passed by the House only to fail to make headway in the Senate. It is also not clear that, despite his opposition to burdensome regulation, President-Elect Trump would cede so much executive authority over the rulemaking process.

It is safe to say, however, that Congressional Republicans are both eager to unwind the Obama Administration’s regulatory agenda and cognizant of the difficulties of doing so through notice-and-comment rulemaking.^[3] Moreover, these bills signal the desire of many in Congress to play a greater role in the regulatory process and a view that, according to the Purpose section of the REINS Act, “Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes.” Since enacting the Administrative Procedure Act in 1946, Congress has made incremental changes to, but has not fundamentally reconsidered, the processes by which regulations are made and unmade. We expect Congress to attempt to assert greater control over executive and independent agencies in the coming months and years, though we do not expect regulatory reform measures to be as sweeping as the REINS Act.

Law clerk Conrad Scott contributed to this post.

[1] For more on the CRA, see our earlier blog post “[More than Just Midnight Regulations.](#)”

[2] The bill would not apply to any Federal Reserve rules concerning monetary policy, and it would permit the President to make major rules effective for 90 days without Congressional approval in limited circumstances, including when a rule is issued pursuant to a statute implementing an international trade agreement. Per an amendment by Rep. Bob Goodlatte, the \$100 million figure would be inflation-adjusted.

[3] For more on the difficulties of amending or repealing existing final regulations, see our earlier blog post “[How Regulatory Rollback Works.](#)”

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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