

# Comparison of Legislation in the 115<sup>th</sup> Congress Affecting the Rulemaking Process



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# Introduction

- The 115<sup>th</sup> Congress is considering a number of bills that would transform how administrative agencies promulgate regulations, and enhance the roles that Congress and the courts play in the rulemaking process.
- The slides that follow compare key provisions of six legislative proposals that would:
  - mandate more rigorous (sometimes quantified) [cost-benefit analysis](#) for new regulations;
  - subject previously enacted regulations to [retroactive review](#);
  - eliminate [judicial deference](#) to agency interpretations of statutes and regulations; and
  - require [Congressional preapproval of “major” regulations](#).
- These slides provide a direct comparison of the language in select provisions of each bill, and are not a comprehensive summary of the bills.
- General familiarity with rulemaking requirements under current law is assumed.

# Cost-Benefit Analysis: Comparison of Key Bills

## Background, Application, Cost-Benefit Analysis Standard

	<b>CHOICE Act</b>	<b>Regulatory Accountability Act</b>	<b>SEC Regulatory Accountability Act</b>	<b>Commodity End-User Relief Act</b>	<b>FORM Act</b>
<b>Background</b>	<ul style="list-style-type: none"> <li>Commonly perceived as the key House starting point for financial reform</li> <li>Introduced in the 114<sup>th</sup> Congress as <a href="#">H.R. 5983</a></li> <li>A CHOICE Act 2.0 is expected shortly</li> </ul>	<ul style="list-style-type: none"> <li>Passed in the House in the 115<sup>th</sup> Congress on 1/11/2017 as <a href="#">H.R. 5</a></li> <li>Promoted in Speaker Paul Ryan's <i>A Better Way</i></li> </ul>	<ul style="list-style-type: none"> <li>Passed in the House in the 115<sup>th</sup> Congress on 1/12/2017 as <a href="#">H.R. 78</a></li> </ul>	<ul style="list-style-type: none"> <li>Passed in the House in the 115<sup>th</sup> Congress on 1/12/2017 as <a href="#">H.R. 238</a></li> </ul>	<ul style="list-style-type: none"> <li>Passed in the House in the 114<sup>th</sup> Congress as <a href="#">H.R. 3189</a></li> <li>As of 1/23/2017, has not been introduced to 115<sup>th</sup> Congress</li> </ul>
<b>Application</b>	<ul style="list-style-type: none"> <li>Federal Reserve, OCC, FDIC, CFTC, SEC, CFPB, FHFA, NCUA</li> </ul>	<ul style="list-style-type: none"> <li>All executive and independent agencies</li> </ul>	<ul style="list-style-type: none"> <li>SEC</li> </ul>	<ul style="list-style-type: none"> <li>CFTC</li> </ul>	<ul style="list-style-type: none"> <li>Federal Reserve</li> </ul>
<b>Cost-Benefit Analysis Standard</b>	<ul style="list-style-type: none"> <li>May <u>not</u> adopt a regulation if agency determines that <u>quantified</u> costs <u>outweigh</u> <u>quantified</u> benefits</li> <li>Congress may waive this requirement by joint resolution<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>May propose or adopt a regulation <u>only</u> upon a reasoned determination that the benefits <u>justify</u> the costs</li> </ul>	<ul style="list-style-type: none"> <li>May propose or adopt a regulation <u>only</u> upon a reasoned determination that benefits <u>justify</u> costs</li> </ul>	<ul style="list-style-type: none"> <li>Must <u>assess and publish</u> analysis of the costs and benefits (both quantitative and qualitative) of the proposed or adopted regulation</li> </ul>	<ul style="list-style-type: none"> <li>May propose or adopt a regulation <u>only</u> upon a reasoned determination that the benefits <u>outweigh</u> the costs</li> </ul>

1. As discussed on [Slide 7](#), other provisions of the CHOICE Act require Congressional approval of all "major" rules (as defined in the bill).

# Cost-Benefit Analysis: Comparison of Key Bills

## Alternatives and Judicial Review of Cost-Benefit Analysis

	<b>CHOICE Act</b>	<b>Regulatory Accountability Act</b>	<b>SEC Regulatory Accountability Act</b>	<b>Commodity End-User Relief Act</b>	<b>FORM Act</b>
<b>Alternatives</b>	<ul style="list-style-type: none"> <li>Must <u>identify and analyze all available</u> alternatives and explain why the regulation meets the objectives of the regulation <u>more effectively</u> than the alternatives</li> </ul>	<ul style="list-style-type: none"> <li>Must <u>consider reasonable</u> alternatives and adopt the <u>least costly</u> alternative, <u>unless</u> additional benefits of a more costly rule <u>justify</u> additional costs <i>and</i> the agency explains its reasons in the interests of <u>public health, safety or welfare</u> relevant under the authorizing statute</li> </ul>	<ul style="list-style-type: none"> <li>Must <u>assess</u> costs and benefits of <u>available</u> regulatory alternatives and <u>choose</u> approach that <u>maximizes net benefits</u></li> </ul>	<ul style="list-style-type: none"> <li>Must <u>consider available</u> alternatives to direct regulation</li> <li>Must <u>consider</u> which approaches, among alternative regulatory approaches, will <u>maximize net benefits</u></li> </ul>	<ul style="list-style-type: none"> <li>Must <u>assess</u> costs and benefits of <u>available</u> regulatory alternatives and <u>choose</u> approach that <u>maximizes net benefits</u></li> <li>Must <u>evaluate</u> whether the regulation is <u>tailored</u> to impose the <u>least impact</u> on the availability of credit and economic growth and to impose the <u>least burden</u> on society</li> </ul>
<b>Judicial Review of Cost-Benefit Analysis</b>	<ul style="list-style-type: none"> <li>If agency has not complied with cost-benefit analysis requirements, a court shall vacate regulation <u>unless</u> the agency shows by clear and convincing evidence that vacating would result in irreparable harm<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>Court “shall not defer to the agency’s determination of costs and benefits” if the agency failed to conform to OIRA guidelines (required by the bill to be promulgated) when conducting a cost-benefit analysis<sup>1, 2</sup></li> </ul>	<ul style="list-style-type: none"> <li>Default to general APA judicial review principles</li> </ul>	<ul style="list-style-type: none"> <li>Court shall <u>affirm</u> CFTC’s assessment of costs and benefits, <u>unless</u> it finds an “abuse of discretion”</li> </ul>	<ul style="list-style-type: none"> <li>Default to general APA judicial review principles</li> </ul>

1. As discussed on [Slide 6](#), other provisions of the CHOICE Act and the Regulatory Accountability Act attempt to eliminate *Chevron* and *Auer* deference to agencies on questions of law. Such provisions would not alter the application of arbitrary and capricious review of final agency action to agency determinations made under the applicable cost-benefit standard.

2. The Regulatory Accountability Act also contains provisions that require an agency to defer the effective date of a high-impact rule until the final disposition of all actions seeking judicial review of the rule. While related to cost-benefit analysis, these provisions are separable and appear independent of cost-benefit analysis provisions in other bill proposals (e.g., the Require Evaluation Before Implementing Executive Wishlists (“REVIEW”) Act of 2017 (introduced in the 115<sup>th</sup> Congress)).

# Cost-Benefit Analysis: Comparison of Key Bills

## Look-Back Review of Each Promulgated Rule and Review of Existing Regulations

	<u>CHOICE Act</u>	<u>Regulatory Accountability Act</u>	<u>SEC Regulatory Accountability Act</u>	<u>Commodity End-User Relief Act</u>	<u>FORM Act</u>
<b>Agency Look-Back Review of Each Promulgated Rule</b>	<ul style="list-style-type: none"> <li>Review of <u>all</u> rules required within <u>five years</u> of their adoption</li> <li>Must be submitted to Congressional committees and published on agency website</li> </ul>	<ul style="list-style-type: none"> <li>Must review each <u>major, high-impact, and negative-impact on jobs and wages rules</u> (as defined in bill) no less than <u>every ten years</u><sup>2</sup></li> <li>For every <u>major</u> rule (as defined in the bill), a report on the costs and benefits to regulated entities must be revised <u>every five years</u></li> </ul>	<ul style="list-style-type: none"> <li>Review of <u>major</u> rules (as defined in bill) required no later than <u>two years</u> after adoption</li> <li>After assessment, SEC must propose to <u>amend or rescind</u> rule, or <u>publish notice that no change</u> is necessary (reviewable as final agency action)</li> </ul>	<ul style="list-style-type: none"> <li>N/A</li> </ul>	<ul style="list-style-type: none"> <li>Review of <u>major</u> rules (as defined in the bill) required no later than <u>two years</u> after adoption</li> <li>After assessment, Federal Reserve must propose to <u>amend or rescind</u> rule, or <u>publish notice that no change</u> is necessary (reviewable as final agency action)</li> </ul>
<b>Agency Review of Existing Regulations</b>	<ul style="list-style-type: none"> <li>Within one year of enactment of the bill and every five years thereafter, the agencies must review their rules and <u>develop a plan to amend or repeal</u> existing regulations so as to make the regulatory program of the agency more effective or less burdensome<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>N/A<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>Within one year of enactment of the bill and every five years thereafter, SEC must review its rules and <u>amend or repeal</u> outmoded, ineffective, insufficient or excessively burdensome regulations</li> </ul>	<ul style="list-style-type: none"> <li>N/A</li> </ul>	<ul style="list-style-type: none"> <li>N/A</li> </ul>

1. A second agency review provision in a separate section of the CHOICE Act would require agencies to review all regulations adopted in the five years prior to the enactment of the bill along criteria that are related to cost-benefit analysis.

2. Other provisions of the Regulatory Accountability Act amending the Regulatory Flexibility Act of 1980 would require agencies to assess existing and new rules that the head of the agency determines have a significant economic impact on a substantial number of small entities. Although related to cost-benefit analysis, these provisions are separable and appear independent of cost-benefit analysis provisions in other bill proposals (e.g., the Small Business Regulatory Flexibility Improvements Act of 2015 (introduced in 114<sup>th</sup> Congress)).

# Changes to Judicial Review of Regulations: Comparison of Key Bills

## Current Law

### Chevron Deference

Under *Chevron v. NRDC*, courts defer to an agency's interpretation of a statute it administers, provided that:

- the statutory provision in question is ambiguous;
- the agency's interpretation is reasonable; and
- the agency is exercising its Congressionally delegated lawmaking authority.

### Auer Deference

Under a line of cases dating back to the 1940s but commonly attributed to *Auer v. Robbins*, courts will defer to an agency's interpretation of its own regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation."

## Background

## Application

## Judicial Review Provisions

## CHOICE Act

- Commonly perceived as the key House starting point for financial reform
- Introduced in the 114<sup>th</sup> Congress as [H.R. 5983](#)
- A CHOICE Act 2.0 is expected shortly

- Federal Reserve, OCC, FDIC, CFTC, SEC, CFPB, FHFA, NCUA

- When reviewing agency actions under any provision of law (including the Administrative Procedure Act ("APA")), courts must decide de novo all relevant questions of law, including the interpretation of constitutional, statutory and regulatory provisions, unless Congress exempts certain actions from this requirement by specific reference
- Dodd-Frank provisions specifically recognizing deference to the CFPB with respect to its interpretations of any provision of Federal consumer financial law are repealed

## Regulatory Accountability Act

- Passed in the House in the 115<sup>th</sup> Congress on 1/11/2017 as [H.R. 5](#)
- Promoted in Speaker Paul Ryan's *A Better Way*

- All executive and independent agencies

- When reviewing agency actions under any provision of law (including the APA), courts must decide de novo all relevant questions of law, including the interpretation of constitutional, statutory and regulatory provisions, unless Congress exempts certain actions from this requirement by specific reference
- Courts may not infer from the existence of statutory ambiguity that:
  - Congress intended to confer legislative rulemaking authority on the agency;
  - the agency's authority should be interpreted expansively; or
  - courts should defer to agency interpretations of law

# Congressional Review of Regulations: Comparison of Key Bills

	CHOICE Act	REINS Act <sup>1</sup>
<p><b>Current Law</b></p> <p>The <a href="#">Congressional Review Act</a> (“CRA”) permits Congress, with the assent of the President, to disapprove recently enacted regulations that were:</p> <ul style="list-style-type: none"> <li>submitted to Congress within the last 60 days, excluding days that either house adjourned for more than three days; or</li> <li>submitted in the last 60 session or legislative days of the previous session of Congress.</li> </ul> <p>No requirement for Congressional preapproval of regulations under current law.</p>		
<b>Background</b>	<ul style="list-style-type: none"> <li>Commonly perceived as the key House starting point for financial reform</li> <li>Introduced in the 114<sup>th</sup> Congress as <a href="#">H.R. 5983</a></li> <li>A CHOICE Act 2.0 is expected shortly</li> </ul>	<ul style="list-style-type: none"> <li>Passed in the House in the 115<sup>th</sup> Congress on 1/5/2017 as <a href="#">H.R. 26</a></li> </ul>
<b>Application</b>	<ul style="list-style-type: none"> <li>Federal Reserve, OCC, FDIC, CFTC, SEC, CFPB, FHFA, NCUA</li> </ul>	<ul style="list-style-type: none"> <li>All agencies, except for Federal Reserve with respect to monetary policy</li> </ul>
<b>Congressional Review Provisions</b>	<ul style="list-style-type: none"> <li><u>Major</u> rules<sup>2</sup> <u>only</u> take effect if Congress enacts a <a href="#">joint resolution of approval</a> within 70 session or legislative days after submission of specified reports to Congress and the Comptroller General (the head of the Government Accountability Office); after 70 days, the same rule may not be reconsidered in the same Congress</li> <li><u>Non-major</u> rules take effect upon (i) adoption by the relevant agency and (ii) submission of specified reports to Congress and the Comptroller General; however, non-major rules may be rendered ineffective by a <a href="#">joint resolution of disapproval</a></li> </ul>	<ul style="list-style-type: none"> <li><u>Major</u> rules<sup>2</sup> <u>only</u> take effect if Congress enacts a <a href="#">joint resolution of approval</a> within 70 session or legislative days after submission of specified reports to Congress and the Comptroller General; after 70 days, the same rule may not be reconsidered in the same Congress</li> <li><u>Non-major</u> rules take effect upon (i) adoption by the relevant agency and (ii) submission of specified reports to Congress and the Comptroller General; however, non-major rules may be rendered ineffective by a <a href="#">joint resolution of disapproval</a></li> <li>Agencies must submit annual reports covering 10% of their <a href="#">existing regulations</a> to Congress for affirmative approval. Regulations not approved through a joint resolution within 10 years of the enactment of the REINS Act will be <a href="#">sunset</a></li> </ul>
<b>Exemptions</b>	<ul style="list-style-type: none"> <li>Major rules may take effect for one 90-day period, if the President issues an Executive Order stating that the rule is necessary (i) due to an <a href="#">emergency</a>, (ii) to enforce <a href="#">criminal laws</a> or (iii) for <a href="#">national security</a>, or if the rule was issued pursuant to a statute implementing an <a href="#">international trade agreement</a></li> </ul>	<ul style="list-style-type: none"> <li>Major rules may take effect for one 90-day period, if the President issues an Executive Order stating that the rule is necessary (i) due to an <a href="#">emergency</a>, (ii) to enforce <a href="#">criminal laws</a> or (iii) for <a href="#">national security</a>, or if the rule was issued pursuant to a statute implementing an <a href="#">international trade agreement</a></li> </ul>

1. For more on the REINS Act, see our blog post “[Possible Changes in How Regulations Get Made and Unmade](#)” (Jan. 9, 2017). The Regulatory Accountability Act, discussed on [Slide 6](#), would not meaningfully alter the CRA but would require the Administrator of OIRA to publish the number and lists of rules submitted to the Comptroller General, as well as those for which a resolution of disapproval was introduced, under the CRA.

2. “Major rules” are defined as those designated by the Administrator of OIRA as resulting or likely to result in: (1) annual economic effects of \$100 million or more; (2) major increases in costs or prices; or (3) certain other significant adverse effects on the economy.

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