

REGULATIONS FROM THE EXECUTIVE IN NEED OF  
SCRUTINY ACT OF 2011

NOVEMBER 10, 2011.—Ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 10]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 10) to amend chapter 8 of title 5, United States Code, to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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## The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Regulations From the Executive in Need of Scrutiny Act of 2011”.

### SEC. 2. PURPOSE.

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.

### SEC. 3. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING.

Chapter 8 of title 5, United States Code, is amended to read as follows:

#### “CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

“Sec.

“801. Congressional review.

“802. Congressional approval procedure for major rules.

“803. Congressional disapproval procedure for nonmajor rules.

“804. Definitions.

“805. Judicial review.

“806. Exemption for monetary policy.

“807. Effective date of certain rules.

#### “§ 801. Congressional review

“(a)(1)(A) Before a rule may take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

“(i) a copy of the rule;

“(ii) a concise general statement relating to the rule;

“(iii) a classification of the rule as a major or nonmajor rule, including an explanation of the classification specifically addressing each criteria for a major rule contained within sections 804(2)(A), 804(2)(B), and 804(2)(C);

“(iv) a list of any other related regulatory actions intended to implement the same statutory provision or regulatory objective as well as the individual and aggregate economic effects of those actions; and

“(v) the proposed effective date of the rule.

“(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

“(i) a complete copy of the cost-benefit analysis of the rule, if any;

“(ii) the agency’s actions pursuant to sections 603, 604, 605, 607, and 609 of this title;

“(iii) the agency’s actions pursuant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

“(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

“(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

“(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency’s compliance with procedural steps required by paragraph (1)(B).

“(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General’s report under subparagraph (A).

“(3) A major rule relating to a report submitted under paragraph (1) shall take effect upon enactment of a joint resolution of approval described in section 802 or as provided for in the rule following enactment of a joint resolution of approval described in section 802, whichever is later.

“(4) A nonmajor rule shall take effect as provided by section 803 after submission to Congress under paragraph (1).

“(5) If a joint resolution of approval relating to a major rule is not enacted within the period provided in subsection (b)(2), then a joint resolution of approval relating to the same rule may not be considered under this chapter in the same Congress by either the House of Representatives or the Senate.

“(b)(1) A major rule shall not take effect unless the Congress enacts a joint resolution of approval described under section 802.

“(2) If a joint resolution described in subsection (a) is not enacted into law by the end of 70 session days or legislative days, as applicable, beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), then the rule described in that resolution shall be deemed not to be approved and such rule shall not take effect.

“(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a major rule may take effect for one 90-calendar-day period if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

“(2) Paragraph (1) applies to a determination made by the President by Executive order that the major rule should take effect because such rule is—

“(A) necessary because of an imminent threat to health or safety or other emergency;

“(B) necessary for the enforcement of criminal laws;

“(C) necessary for national security; or

“(D) issued pursuant to any statute implementing an international trade agreement.

“(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802.

“(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

“(A) in the case of the Senate, 60 session days, or

“(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress is scheduled to adjourn a session of Congress through the date on which the same or succeeding Congress first convenes its next session, sections 802 and 803 shall apply to such rule in the succeeding session of Congress.

“(2)(A) In applying sections 802 and 803 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

“(i) such rule were published in the Federal Register on—

“(I) in the case of the Senate, the 15th session day, or

“(II) in the case of the House of Representatives, the 15th legislative day, after the succeeding session of Congress first convenes; and

“(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

“(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

“(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

#### “§ 802. Congressional approval procedure for major rules

“(a) For purposes of this section, the term ‘joint resolution’ means only a joint resolution introduced on or after the date on which the report referred to in section 801(a)(1)(A) is received by Congress (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: ‘That Congress approves the rule submitted by the \_\_\_\_\_ relating to \_\_\_\_\_.’ (The blank spaces being appropriately filled in).

“(1) In the House, the majority leader of the House of Representatives (or his designee) and the minority leader of the House of Representatives (or his designee) shall introduce such joint resolution described in subsection (a) (by request), within 3 legislative days after Congress receives the report referred to in section 801(a)(1)(A).

“(2) In the Senate, the majority leader of the Senate (or his designee) and the minority leader of the Senate (or his designee) shall introduce such joint resolution described in subsection (a) (by request), within 3 session days after Congress receives the report referred to in section 801(a)(1)(A).

“(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction under the rules of the House

of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

“(2) For purposes of this section, the term ‘submission date’ means the date on which the Congress receives the report submitted under section 801(a)(1).

“(c) In the Senate, if the committee or committees to which a joint resolution described in subsection (a) has been referred have not reported it at the end of 15 session days after its introduction, such committee or committees shall be automatically discharged from further consideration of the resolution and it shall be placed on the calendar. A vote on final passage of the resolution shall be taken on or before the close of the 15th session day after the resolution is reported by the committee or committees to which it was referred, or after such committee or committees have been discharged from further consideration of the resolution.

“(d)(1) In the Senate, when the committee or committees to which a joint resolution is referred have reported, or when a committee or committees are discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

“(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion to further limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

“(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

“(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

“(e)(1) In the House of Representatives, if the committee or committees to which a joint resolution described in subsection (a) has been referred have not reported it at the end of 15 legislative days after its introduction, such committee or committees shall be automatically discharged from further consideration of the resolution and it shall be placed on the appropriate calendar. A vote on final passage of the resolution shall be taken on or before the close of the 15th legislative day after the resolution is reported by the committee or committees to which it was referred, or after such committee or committees have been discharged from further consideration of the resolution.

“(2)(A) A motion in the House of Representatives to proceed to the consideration of a resolution shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

“(B) Debate in the House of Representatives on a resolution shall be limited to not more than two hours, which shall be divided equally between those favoring and those opposing the resolution. A motion to further limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order. It shall not be in order to reconsider the vote by which a resolution is agreed to or disagreed to.

“(C) Motions to postpone, made in the House of Representatives with respect to the consideration of a resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

“(D) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to a resolution shall be decided without debate.

“(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply with respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

“(1) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

“(2) the vote on final passage shall be on the joint resolution of the other House.

“(g) This section and section 803 are enacted by Congress—

“(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

“(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

**“§ 803. Congressional disapproval procedure for nonmajor rules**

“(a) For purposes of this section, the term ‘joint resolution’ means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: ‘That Congress disapproves the nonmajor rule submitted by the \_\_\_ relating to \_\_\_, and such rule shall have no force or effect.’ (The blank spaces being appropriately filled in).

“(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

“(2) For purposes of this section, the term submission or publication date means the later of the date on which—

“(A) the Congress receives the report submitted under section 801(a)(1); or

“(B) the nonmajor rule is published in the Federal Register, if so published.

“(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 15 session days after the date of introduction of the joint resolution, such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

“(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

“(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion to further limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

“(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

“(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

“(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a nonmajor rule—

“(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

“(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

“(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

“(1) The joint resolution of the other House shall not be referred to a committee.

“(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

“(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

“(B) the vote on final passage shall be on the joint resolution of the other House.

**“§ 804. Definitions**

“For purposes of this chapter—

“(1) The term ‘Federal agency’ means any agency as that term is defined in section 551(1).

“(2) The term ‘major rule’ means any rule, including an interim final rule, that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

“(A) an annual effect on the economy of \$100,000,000 or more;

“(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

“(C) 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.

“(3) The term ‘nonmajor rule’ means any rule that is not a major rule.

“(4) The term ‘rule’ has the meaning given such term in section 551, except that such term does not include—

“(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

“(B) any rule relating to agency management or personnel; or

“(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

**“§ 805. Judicial review**

“(a) No determination, finding, action, or omission under this chapter shall be subject to judicial review.

“(b) Notwithstanding subsection (a), a court may determine whether a Federal agency has completed the necessary requirements under this chapter for a rule to take effect.

“(c) The enactment of a joint resolution of approval under section 802 shall not be interpreted to serve as a grant or modification of statutory authority by Congress for the promulgation of a rule, shall not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule, and shall not form part of the record before the court in any judicial proceeding concerning a rule except for purposes of determining whether or not the rule is in effect.

**“§ 806. Exemption for monetary policy**

“Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

**“§ 807. Effective date of certain rules**

“Notwithstanding section 801—

“(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping; or

“(2) any rule other than a major rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,

shall take effect at such time as the Federal agency promulgating the rule determines.”.

## Purpose and Summary

H.R. 10, the “Regulations From the Executive in Need of Scrutiny Act of 2011,” also known as the REINS Act, reforms the Congressional Review Act of 1996<sup>1</sup> (“CRA”). The CRA was adopted to increase accountability of regulatory agencies by creating a fast-track legislative process for Congress to overturn a final rule within 60 days of the rule’s publication in the Federal Register. But in the 15 years since it was adopted, Federal regulatory agencies have issued nearly 59,000 rules, including some 1,050 major rules, while Congress has overturned only one rule using the CRA. Further, the number of major rules has increased markedly in recent years, and this trend shows no signs of abating. The REINS Act reforms the CRA only insofar as the CRA applies to major rules. The REINS Act would require Congress to pass within 60 days, and the President to sign, a joint resolution approving new major rules issued by a regulatory agency before that rule could take effect.

## Background and Need for the Legislation

### I. INTRODUCTION

H.R. 10, the “Regulations From the Executive in Need of Scrutiny Act of 2011” (“REINS Act” or “the bill”), was introduced on January 20, 2011, by Representative Geoff Davis of Kentucky. The bill currently has 192 cosponsors. Its Senate companion is S.299.

In the 111th Congress, Rep. Davis introduced the “Regulations From the Executive in Need of Scrutiny Act of 2009,” H.R. 3765, which was referred to the Committee on the Judiciary and to the Subcommittee on Commercial and Administrative Law. Similar legislation had been introduced in previous Congresses.<sup>2</sup> The REINS Act garnered substantial support in the 111th Congress. CRA reform also was discussed in the Commercial and Administrative Law Subcommittee’s *Administrative Law, Process and Procedure Project for the 21st Century* during the 108th and 109th Congresses. The first recommendation for CRA reform noted in this report was to require congressional approval of agency rules before the rules could become effective.<sup>3</sup> Various administrative law scholars also have suggested requiring Congressional approval of new agency regulations.<sup>4</sup>

<sup>1</sup>See Contract with America Advancement Act of 1996, H.R. 3136, 104th Cong., §251 (1996) (enacted as 104 P.L. 121, codified at 5 U.S.C. §§ 801–808).

<sup>2</sup>See, e.g., Congressional Responsibility Act of 2003, H.R. 110, 108th Cong.; Congressional Regulatory Reform Act of 2000, S.2670, 106th Cong.; Congressional Responsibility Act of 1999, S.1348, 106th Cong.

<sup>3</sup>House Judiciary Committee, Subcommittee on Commercial and Administrative Law, *Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century*, Comm. Print No. 10 (Dec. 2006) at 104.

<sup>4</sup>See, e.g., Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rule-making?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1083–84 (“The CRA is not working. . . . Agency lawmaking as a surrogate for the Congress is, and should be, political in nature and is openly recognized and treated as such. . . . All covered rules should be subject to approval by the Congress on an expedited basis, with rules deemed significant receiving more intensive scrutiny and floor deliberation.”) (Fall 1999); Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 457 (Summer 1995) (Proposing “to have major rules—those that are subject to ossification—come back to Congress on a fast-track basis to be enacted into statutes.”); Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 794 (Feb. 1984) (“In its main features then, the substitute fast track approach closely resembles the legislative veto. . . . The method by which this is done, however, is different from that followed by the traditional legislative veto; the Constitution’s language is followed as a matter of form. Thus, whatever legal questions might arise, they

Continued

The Subcommittee on Courts, Commercial and Administrative Law heard testimony from six witnesses during two hearings on the REINS Act. On January 24, 2011, the Subcommittee heard testimony from the Honorable David McIntosh, former Member of Congress (1995–2001) and partner at Mayer Brown LLP; Professor Jonathan Adler, Case Western Reserve University School of Law and Director, Center for Business Law and Regulation; and, the Honorable Sally Katzen, Visiting Professor, New York University School of Law and former Administrator of the Office of Information and Regulatory Affairs (1993–1998).<sup>5</sup> On March 8 the Subcommittee received testimony from Professor David Schoenbrod, New York Law School and Visiting Scholar, American Enterprise Institute; Professor Eric R. Claeys, George Mason University School of Law; and, Mr. David Goldston, Director of Government Affairs, Natural Resources Defense Council.<sup>6</sup>

## II. BACKGROUND AND NEED FOR THE LEGISLATION

The REINS Act is the latest chapter in Congress’ struggle to hold regulatory agencies accountable to the public. “As early as the 1930’s, Members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable. Yet they also realized that Congress could not pass enough specific legislation to regulate the increasingly complex world. The legislative veto was seen as a partial solution to this dilemma.”<sup>7</sup>

### A. *The legislative veto and INS v. Chadha*

A legislative veto reserved to Congress the unilateral power to nullify an exercise of executive authority. “Apparently, the first time Congress enacted a veto clause was in 1932 when it gave President Hoover the authority to reorganize executive departments subject to a one-House veto.”<sup>8</sup> Some form of a legislative veto subsequently appeared in some 200 statutes.<sup>9</sup> Eventually, however, the Supreme Court ruled the unicameral legislative veto unconstitutional in the case of *INS v. Chadha*, 462 U.S. 919 (1983). In doing so, “the Supreme Court invalidated more Federal statutes in a single day than it had in all of its prior history.”<sup>10</sup>

should not be the same as those at issue in *Chadha*.”); see also Hon. Abner J. Mivka, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 120 (Spring 1986) (Citing then-Judge Breyer: “[T]he fast track is a reasonable facsimile of the one-House veto that complies with the principles of bicameralism and presentment.”); Girardeau A. Spann, *Spinning the Legislative Veto*, 72 GEO. L.J. 813, 816 (1984) (“Judge Breyer’s fast-track alternative is appealing because it closely approximates the political compromise that is struck by the legislative veto.”).

<sup>5</sup> *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law*, 112th Cong. (Jan. 24, 2011).

<sup>6</sup> *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. (Mar. 8, 2011).

<sup>7</sup> Note: *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (June 2009) (citations omitted).

<sup>8</sup> Breyer, note 4 *supra*, at 786.

<sup>9</sup> *Id.* (citing *Chadha*, 462 U.S. at 968 (White, J., dissenting)); see also Senator James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (Winter 1977) (“Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type provisions have been inserted into 196 different statutes. . . .”).

<sup>10</sup> Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 473 (Feb. 1984).

*Chadha* involved an alien whom the INS ordered deported for overstaying his visa. The statute in question allowed the Attorney General to suspend Chadha's deportation, which he did, but also allowed the House of Representatives to veto the Attorney General's decision, which the House also did. The Supreme Court acknowledged that Congress has "plenary authority" over aliens,<sup>11</sup> which Congress exercised in part by authorizing the INS to deport aliens and by authorizing the Attorney General to suspend an INS deportation order. The question was whether the Constitution permits Congress to reserve to the House alone the power to veto the Attorney General's decision.

The Court began its constitutional analysis by observing, "When any branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Article II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere."<sup>12</sup> The Supreme Court further recognized that, by passing a resolution overturning the Attorney General's decision to deport Chadha, the House had engaged in an act "that was essentially legislative in purpose and effect," i.e., to reverse an act of the Executive Branch.<sup>13</sup> The Supreme Court acknowledged that, instead of delegating part of its power to the Attorney General, Congress could have reserved the power to suspend deportation orders, through the private bill procedure.<sup>14</sup> Or Congress could have passed legislation overturning the Attorney General's decision, and presented the same to the President for his signature or veto.<sup>15</sup> Either way, Congress was required to follow the constitutional process for legislative action established by Article I, Section 7: bicameral passage of legislation and presentment to the President.<sup>16</sup>

The unicameral legislative veto represented an attempt by Congress to hold regulatory agencies accountable, although the Court in *Chadha* held that it is an unconstitutional method of achieving this goal. In other words, under *Chadha* the goal of enabling Congress to overturn an agency decision is not unconstitutional, but the process by which Congress tried to achieve that goal—a single-

<sup>11</sup> 462 U.S. at 940–41.

<sup>12</sup> *Id.* at 951–52.

<sup>13</sup> *Id.* at 952.

<sup>14</sup> *Id.* at 954–55 ("After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.")

<sup>15</sup> *Cf. id.* at 952–54 ("Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation.")

<sup>16</sup> *Id.* at 956–57 ("Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I. . . . To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.")

chamber legislative veto, without presentment—was unconstitutional.

*B. The Congressional Review Act of 1996*

One effect of *Chadha* was to “to chill future attempts by Congress to interfere with autonomous creation of new rules by administrative agencies,” and the 104th Congress certainly was “mindful” of *Chadha* as it drafted the Congressional Review Act.<sup>17</sup> “The plain, overarching purpose of the CRA is to assure that all covered final rulemaking actions of agencies come before Congress for scrutiny and possible nullification through joint resolutions of disapproval.”<sup>18</sup> Senators Nickels (R–OK), Reid (D–NV) and Stevens (R–AK) explained in their joint statement, summarizing the legislative history of the CRA,

As more and more of Congress’ legislative functions have been delegated to Federal regulatory agencies, many have complained the Congress has effectively abdicated its constitutional role as the national legislature in allowing Federal agencies so much latitude in implementing and interpreting congressional enactments. . . . This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.<sup>19</sup>

The CRA requires agencies to file all new rules with Congress and with the GAO.<sup>20</sup> For a major rule (e.g., one with an annual impact on the economy of \$100 million or more), within 15 days the GAO is required to report to Congress on the agency’s compliance with the various steps of the rulemaking process.<sup>21</sup> Major rules are delayed from becoming effective for 60 days from the later of either the date they are published in the Federal Register or the date they are submitted to Congress and the GAO<sup>22</sup>; non-major rules are not delayed beyond the general 30-day delay established by the APA.<sup>23</sup> For major and non-major rules, at any time during this 60-day period Congress can nullify the rule by adopting a joint resolution drafted according to a textual formula established by the statute.<sup>24</sup> The statute contains expedited procedures for the statute in the Senate, although not in the House.<sup>25</sup> If Congress adjourns less than 60 days after a rule is submitted to it, then a new 60-day pe-

<sup>17</sup>James T. O’Reilly, *EPA Rulemaking after the 104th Congress: Death from Four Near-Fatal Wounds?*, 3 ENVTL. LAW. 1, 11–12 (Sept. 1996); see also 142 CONG. REC. E575 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of House Sponsors) (“In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down as unconstitutional any procedure where executive action could be overturned by less than the full process required under the Constitution to make laws—that is, approval by both houses of Congress and presentment to the President.”); 142 CONG. REC. S3684 (daily ed. Apr. 18, 1996) (Joint Statement of Sens. Nickels, Reid and Stevens) (same).

<sup>18</sup>Rosenberg, note 4 *supra*, at 1070 (citing 142 CONG. REC. E575 (daily ed. Apr. 19, 1996)) (Joint Explanatory Statement of House Sponsors) (“This legislation establishes a government-wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects.”).

<sup>19</sup>142 CONG. REC. S3683 (daily ed. Apr. 18, 1996).

<sup>20</sup>5 U.S.C. § 801(a)(1).

<sup>21</sup>*Id.* § 801(a)(2).

<sup>22</sup>*Id.* § 801(a)(3).

<sup>23</sup>*Id.* § 801(a)(4); 5 U.S.C. § 553(d).

<sup>24</sup>*Id.* §§ 801(b), 802(a).

<sup>25</sup>*Id.* § 802.

riod begins on the 15th legislative day of the next session.<sup>26</sup> If Congress adopts the resolution, then the rule is null and “shall be treated as though such rule had never taken effect.”<sup>27</sup> Moreover, the rule “may not be reissued in substantially the same form” by the agency.<sup>28</sup> Certain rules are exempt from the CRA altogether, such as those “necessary for national security” and “rules that concern monetary policy.”<sup>29</sup>

Senator Levin (D–MI) was enthusiastic about the CRA’s potential for Congress to hold regulatory agencies accountable: “No longer will we be able to tell our constituents who complain about regulations that do not make sense, ‘talk to the agency,’ or ‘your only recourse is the courts.’ Now we are in a position to do something ourselves.”<sup>30</sup> Fifteen years of experience with the CRA, however, has not matched Senator Levin’s high hopes for bringing regulatory agencies to heel. Since the CRA was enacted in March 1996, more than 58,900 new rules have been reported to GAO by regulatory agencies, including some 1,050 new major rules.<sup>31</sup> But in that same time period, a scant 72 joint resolutions of disapproval have been introduced in the House and Senate, targeting 49 different rules.<sup>32</sup> Of these 72 joint resolutions, only one was enacted.<sup>33</sup> This single instance of the CRA being utilized by Congress may have been an anomaly, relating to a highly controversial workplace ergonomics rule issued by the Department of Labor in the final days of the Clinton Administration and overturned by the next Congress with the Bush Administration’s support.<sup>34</sup>

It stands to reason that a sitting president would veto a joint resolution of disapproval adopted against a new rule issued by his administration. Experience and common sense dictate that the CRA’s utility may be limited to “midnight regulations” issued when both the incoming administration and both chambers of the incoming Congress are not of the same party as the outgoing administration, as occurred in 2000–01.<sup>35</sup> The CRA theoretically could be used

<sup>26</sup> *Id.* § 802(e).

<sup>27</sup> *Id.* § 801(f).

<sup>28</sup> *Id.* § 801(b)(2).

<sup>29</sup> *Id.* §§ 801(c), 807.

<sup>30</sup> 142 CONG. REC. S3123 (daily ed. Mar. 28, 1996); see also *REINS Act*, note 5 *supra*, at 68 (Jan. 24, 2011) (Testimony of David McIntosh) (“It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author.”) (quoting THE FEDERALIST NO. 70, at 517 (Alexander Hamilton) (Jacob E. Cooke ed., 1984)); Richard J. Pierce, Jr., *Past and Prologue: Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 198 (Winter 1996) (“With the addition of the [CRA], we now have in place two-thirds of a new legal environment that would combine our social values in a new way so as to maximize our ability to further those values simultaneously. We have had systematic Presidential review of major rules for over a dozen years. Beginning in 1996, Presidential review will coexist with systematic Congressional review. As a result, an agency can issue a major rule only if it survives review by both of the politically accountable branches of government. That process certainly should satisfy our desire for accountability of rules. We can hold the elected officials of both branches accountable for any rule that we dislike.”).

<sup>31</sup> GAO Federal Rules Database Search, <http://www.gao.gov/legal/congressact/fedrulen.html> (last accessed Oct. 28, 2011).

<sup>32</sup> Morton Rosenberg, *The Congressional Review Act After 15 Years: Background and Considerations for Reform 10–11* (Draft Report Prepared for the Admin. Conf. of the United States, Sept. 16, 2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/09/COJR–Draft-CRA–Report-9–16–11.pdf> (last accessed Oct. 28, 2011).

<sup>33</sup> See S.J. Res. 6, 107th Cong., 115 Stat. 7 (2001) (overturning 65 Fed. Reg. 68261 (2000)).

<sup>34</sup> See generally Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (Winter 2003).

<sup>35</sup> See Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 190 (Winter 2009) (“However, the CRA will only be an effective check on

when one party possesses veto-proof majorities in both chambers of Congress against a president belonging to another party, but apparently this never has occurred in American history and seems unlikely to come to pass in the foreseeable future. Speculation about the CRA's potential utility against rules issued by independent agencies, on the theory that a President would be less likely to veto such a joint resolution, is simply belied by 15 years of experience.<sup>36</sup> Ultimately, it appears that the CRA largely has become, as two of its early critics predicted, "nothing more than another procedural hurdle for an agency to jump, further increasing the costs and uncertainties of rulemaking, with little, if any, added benefit."<sup>37</sup> (It also may be a procedural hurdle that agencies regularly choose to bypass, by simply ignoring the CRA's requirement to submit new rules to Congress and to the GAO.<sup>38</sup>)

*C. The overall regulatory burden on American taxpayers and job creators, including the threat of future regulation, is increasing*

The need for increased Congressional oversight also is apparent from the dramatic increase in Federal regulatory activity. Agencies are ever issuing more regulations, including major regulations that have a larger impact on the economy. According to former OIRA Administrator Susan E. Dudley,

Over the first 2 years of President Obama's term, executive branch agencies published 112 economically significant regulations (defined as having impacts of \$100 million or more per year). That averages out to 56 major regulations per year, which is almost 25 percent higher than President Clinton and President Bush, who each published an average of 45 major regulations per year over their terms. When one includes the independent agencies (over which presidents exercise less direct oversight) the contrast is greater, with an average of 84 major regulations issued over the last 2 years, a 35 percent increase over the average of 62 per year in the Bush Administration and a 50 percent increase over the 56 per year average in the Clinton Administration.<sup>39</sup>

Further, President Obama's Spring 2011 Unified Agenda of Regulatory and Deregulatory Activity lists 144 major regulations, representing at least a \$14 billion burden to the economy. "This is an increase of 15.2 percent in the number of economically significant rules in the agenda between spring 2010 and spring 2011. Moreover, in the past decade, the number of such rules has increased

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midnight regulations if the incoming president and the Congress are of the same party. If not, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules. It should not be surprising that the CRA has only been used once to successfully repeal a regulation.").

<sup>36</sup> See Note, note 7 *supra*, at 2181.

<sup>37</sup> Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Rulemaking*, 49 ADMIN. L. REV. 95, 106 (Winter 1997).

<sup>38</sup> See generally Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907 (Fall 2010).

<sup>39</sup> Susan E. Dudley, "Prospects for Regulatory Reform in 2011," ENGAGE 11:1, at 9 (June 2011).

a whopping 102 percent, rising from 71 to 144 since 2001.”<sup>40</sup> The threat of a new wave of major regulations to implement the Patient Protection and Affordable Care Act<sup>41</sup> and the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>42</sup> is an added burden on the economy that threatens to undermine the economic recovery. Now more than ever, Congress—not unelected bureaucrats in regulatory agencies—should take responsibility for the difficult policy choices reflected in every new major rulemaking.

*D. The REINS Act is a constitutional and logical reform to the CRA*

The REINS Act would improve the CRA’s effectiveness against excessive agency rulemaking by taking the logical next step beyond the CRA’s current structure. That step is to require Congress to approve new major rules by joint resolution before they can become legally effective. In essence, the REINS Act operates as a new condition on the delegation of legislative rulemaking authority to the agencies, much as other statutes, such as the Administrative Procedure Act and the CRA itself, condition the delegation of that authority. With respect to major rules, Congress’ delegation would, under the REINS Act, no longer include a delegation to the agencies of authority to place legislative rules into legal effect. Instead, that final step would be reserved to Congress to take through a bicameral resolution with presentment to the President. The REINS Act does not withdraw from the agencies the delegation of authority to place into effect new, non-major rules.

The Subcommittee heard extensive testimony regarding the constitutionality of the REINS Act. Sally Katzen, former Administrator of the Office of Information and Regulatory Affairs (1993–1998), questioned the constitutionality of the REINS Act under *Chadha*. Specifically, Ms. Katzen suggests that the REINS Act cannot be distinguished easily from the one-house legislative veto overturned in *Chadha*: “It may not be enough to say that H.R. 10 incorporates bi-cameral and presentment (the requirements for constitutionality in *Chadha*) because [under the REINS Act] one house alone would stop final agency action from becoming effective.”<sup>43</sup> To the response that Congress is simply revoking previously delegated legislative power, Ms. Katzen suggests it may still be unconstitutional because it “involve[s] an attempt by Congress to increase its power at the expense of the executive branch,” quoting dicta in *Morrison v. Olson*, 487 U.S. 654, 694 (1988).<sup>44</sup>

<sup>40</sup> James L. Gattuso & Diane Katz, “Red Tape Rising: A 2011 Mid-Year Report on Regulation,” HERITAGE FOUNDATION (July 25, 2011), available at <http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report> (last accessed Oct. 28, 2011).

<sup>41</sup> 111 P.L. 148 (Mar. 23, 2010). “The health care law provides for the creation of nearly 160 boards, bureaus, bureaucracies, and commissions. . . . Overall, the Federal Government is expected to issue roughly 10,000 pages of new regulations to govern the implementation of the new law.” *ObamaCare: A Budget-Busting, Job-Killing Health Care Law*, Jan. 6, 2011, at 7–8, available at <http://www.speaker.gov/UploadedFiles/ObamaCareReport.pdf> (last accessed Oct. 28, 2011).

<sup>42</sup> 111 P.L. 203 (July 21, 2010). “[T]he Dodd-Frank Act is the most farreaching financial regulatory undertaking since the 1930’s, authorizing or requiring agencies to enact 447 new rules and complete 63 reports and 59 studies.” Michael J. Ryan, Jr., *U.S. Capital Markets Competitiveness: The Unfinished Agenda*, Summer 2011, at 3, available at [https://www.uschamber.com/sites/default/files/reports/1107\\_UnfinishedAgenda\\_WEB.pdf](https://www.uschamber.com/sites/default/files/reports/1107_UnfinishedAgenda_WEB.pdf) (last accessed Oct. 28, 2011).

<sup>43</sup> *REINS Act*, note 5 *supra*, at 95 (Testimony of Sally Katzen).  
<sup>44</sup> *Id.* at 96.

Professors Adler, Claeys and Schoenbrod, as well as former Representative McIntosh (a “key sponsor”<sup>45</sup> of the Congressional Review Act in the 104th Congress), each testified in support of the bill’s constitutionality and rebutted this argument. Professor Adler observed that the REINS Act follows the constitutional requirements for bicameralism and presentment, which were fatal to the legislative veto in *Chadha*.<sup>46</sup> In other words, the legislative veto in *Chadha* was overturned because of a defective *process*—Congress had tried to take a shortcut around Article I of the Constitution—and not because invalidating a new regulation is an impermissible *outcome*. If the REINS Act effectively allows Congress to accomplish the same goal as in *Chadha*, but follows the Constitution, then under *Chadha* it is not constitutionally suspect. Professor Adler further notes that the REINS Act is somewhat more limited than the historical legislative veto in that it only applies to major rules, of which there have been typically (although the number is increasing) fewer than 200 every year.<sup>47</sup>

Professor Claeys responded to the suggestion that the REINS Act is constitutionally questionable per *Morrison v. Olson*, in which the Supreme Court upheld the independent counsel statute against a separation-of-powers constitutional challenge. As Professor Claeys testified,

[A]gencies have no power to promulgate legislative rules unless it is given to them by Congress. So the *Morrison* argument 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. Maybe the most helpful precedent here would be *Youngstown Sheet and Tube v. Sawyer*, a 1952 case. President Truman tried to order a seizure of the steel mills and he didn’t have an act of Congress to support it. The Court held that in the absence of that statute—such a statute or other kind of authorization from Congress—that the President had no authority.<sup>48</sup>

Professor Schoenbrod expanded on this point: “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 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. So, therefore, *Morrison v. Olson* is not implicated.”<sup>49</sup> In other words, regulatory agencies are performing a legislative task when they make rules and regulations. Unlike the prosecutorial power at issue in *Morrison*, rulemaking is not a “core executive function.” On the contrary, it is a legislative function that was delegated to the agency by Congress.

<sup>45</sup> Rosenberg, note 4 *supra*, at 1072.

<sup>46</sup> REINS Act, note 5 *supra*, at 84 (Testimony of Jonathan Adler).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Regulations From the Executive in Need of Scrutiny Act of 2011*, note 6 *supra*, at 132 (Testimony of Eric Claeys).

<sup>49</sup> *Id.* at 134 (Testimony of David Schoenbrod).

And when Congress delegates to the Executive Branch, it may do so conditionally.<sup>50</sup>

Mr. McIntosh defended the REINS Act against the charge that it is unconstitutional because it requires Congress to follow certain procedures for legislation approving a new major rule.<sup>51</sup> According to Mr. McIntosh,

The two Houses of Congress have adopted internal rules jointly in the form of statutes since the earliest days of the Republic. In fact, the very first statute enacted by the First Congress on June 1, 1789, addressed the procedures for administering oaths in the House and Senate, a matter that was within the power of each House to determine independently. As the Supreme Court has recognized, the decisions of the First Congress provide “contemporaneous and weighty evidence of the Constitution’s meaning since many of the Members of the First Congress had taken part in framing that instrument.” And as noted above, Congress has exercised the power to create fast-track procedure many times since then, including in the existing text of the CRA.<sup>52</sup>

In the Committee’s judgment, the REINS Act is undoubtedly constitutional. The procedure prescribed by the REINS Act for Congress to approve major rules follows the legislative process spelled out in the Constitution and explained in *Chadha*, and does not encroach on any core executive power. Rather, the REINS Act makes conditional the delegation of legislative power, which regulatory agencies use to make rules and regulations but which originates in Congress. Nor is the statutory fast-track process constitutionally suspect. Like the CRA, the REINS Act is an ordinary statute that prescribes binding internal rules for the houses of Congress acting separately. Congress has made its rules in this fashion many times since the Founding.<sup>53</sup> The Committee believes the REINS Act is constitutional in this respect as well.

At the Subcommittee’s hearing on March 8, David Goldston of the Natural Resources Defense Council testified that the REINS Act will hamper regulatory agencies’ ability to act in the public interest by politicizing the regulatory process.<sup>54</sup> Reflecting this point of view, during the Committee’s markup of H.R. 10 several amendments were introduced to exempt various types of regulations from the REINS Act.

The Committee reiterates that the REINS Act only applies to major rules, not to all new rules. Further, the Act establishes a fast-track legislative process to ensure that joint resolutions do not become delayed by parliamentary maneuvering in either house of Congress. The REINS Act’s purpose is to increase Congressional

<sup>50</sup>See *id.* at 132 (Testimony of Eric Claeys) (“The Chada [sic] decision doesn’t rule out the possibility that Congress may ever attach strings. It merely states if Congress does attach such a string, Congress must do so by a genuine bona fide legislative act that is passed by the House and the Senate and then either signed by the President or passed by two-thirds supermajority in both Houses.”).

<sup>51</sup>See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings. . . .”).

<sup>52</sup>REINS Act, note 5 *supra*, at 62 (Testimony of David McIntosh).

<sup>53</sup>See, e.g., 5 U.S.C. § 912 (government reorganization); 19 U.S.C. § 2191 (trade agreements); 2 U.S.C. § 359 (congressional pay).

<sup>54</sup>Regulations From the Executive in Need of Scrutiny Act of 2011, note 6 *supra*, at 124.

accountability for the difficult legislative policy choices that Congress too often delegates to regulatory agencies; the Committee does not expect that the Act necessarily will produce more, fewer, better, or worse regulations. Rather, the Act will return responsibility for making major rules to Congress, to which the Constitution assigns “all legislative Powers”<sup>55</sup> and whence the rulemaking power originates.

In his testimony to the Subcommittee, Professor Schoenbrod described how Congress too often shirks taking responsibility for difficult decisions by assigning them to the regulatory process instead. Agencies then become the focus of the “political calculations, log-rolling, and dealmaking” that Mr. Goldston decries in Congress<sup>56</sup>—except that these conversations occur entirely behind the agencies’ closed door with unelected, unaccountable bureaucrats. Professor Schoenbrod specifically discussed Congress’s decision to charge the EPA with regulating leaded gasoline in the 1970’s, and how the EPA “went into a stall” when faced with such a controversial and difficult decision. “The upshot is that lead came out of gasoline much more slowly than if Congress had made the hard choice itself,” with significant negative consequences for public health in the United States.<sup>57</sup> Under the REINS Act, Professor Schoenbrod predicts what common sense alone dictates: Agencies and Congress will work together throughout the rulemaking process to ensure that the final major rule will enjoy majority support among the American people’s elected representatives in Congress. “This is how we should get the sensible results in a democracy, not by elected lawmakers hiding behind unelected agency officials.”<sup>58</sup>

In summary, the REINS Act is a constitutional, “next logical step”<sup>59</sup> to reform the Congressional Review Act of 1996.

### Hearings

The Subcommittee on Courts, Commercial and Administrative Law held two legislative hearings on H.R. 10, on January 24 and March 8, 2011.

### Committee Consideration

On October 24, 2011, the Committee met in open session and ordered the bill H.R. 10 favorably reported with an amendment, by a rollcall vote of 22 to 14, a quorum being present.

### Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 10.

<sup>55</sup> U.S. CONST. art. I § 1.

<sup>56</sup> *Regulations From the Executive in Need of Scrutiny Act of 2011*, note 6 *supra*, at 122.

<sup>57</sup> *Id.* at 87 (Testimony of David Schoenbrod).

<sup>58</sup> *Id.* at 81–82 (Testimony of David Schoenbrod) (Quoting “James Landis, the New Deal’s sage of administrative law, who urged in 1938 that agency regulations be presented to Congress for approval: ‘It is an act of political wisdom to put back upon the shoulders of Congress responsibility for controversial choices.’”).

<sup>59</sup> *Id.* at 98 (Testimony of Jonathan Adler).

1. Amendment #2, offered by Mr. Conyers. The Amendment exempts from the REINS Act “any rule that protects or saves lives.” The Amendment failed by a rollcall of 13–20.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....			
Mr. Goodlatte .....		X	
Mr. Lungren .....		X	
Mr. Chabot .....		X	
Mr. Issa .....		X	
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....		X	
Ms. Adams .....		X	
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....			
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	13	20	

2. Amendment #5, offered by Mr. Cohen. The Amendment exempts from the REINS Act “any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget determines would result in greater benefits than costs to society.” The Amendment failed by a rollcall vote of 13–22.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Lungren .....		X	
Mr. Chabot .....		X	
Mr. Issa .....		X	
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....		X	
Ms. Adams .....		X	
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....			
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	13	22	

3. Amendment #6, offered by Mr. Johnson. The Amendment exempts from the REINS Act “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.” The Amendment failed by a rollcall vote of 14–21.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....		X	
Mr. Lungren .....		X	
Mr. Chabot .....		X	
Mr. Issa .....		X	
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Jordan .....		X	
Mr. Poe .....			
Mr. Chaffetz .....		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....		X	
Ms. Adams .....		X	
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
<b>Total .....</b>	<b>14</b>	<b>21</b>	

4. Amendment #4, offered by Ms. Jackson Lee. The Amendment exempts from the REINS Act “any rule relating to infant formula, as defined under” the Federal Food, Drug, and Cosmetic Act. The Amendment failed by a rollcall vote of 13–22.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....		X	
Mr. Lungren .....		X	
Mr. Chabot .....		X	
Mr. Issa .....		X	
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....		X	
Ms. Adams .....		X	
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....			
Mr. Watt .....	X		
Ms. Lofgren .....	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	13	22	

5. Amendment #7, offered by Mr. Quigley. The Amendment directs the Government Accountability Office to submit to Congress a report describing the cumulative benefits of major rules regarding air quality, water quality and food safety. The Amendment failed by a rollcall vote of 12–21.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....		X	
Mr. Lungren .....		X	
Mr. Chabot .....		X	
Mr. Issa .....		X	
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....		X	
Ms. Adams .....		X	
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....			
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....			
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			

## ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Total .....	12	21	

6. Reporting H.R. 10 as amended. The bill will increase accountability and transparency in the Federal regulatory process. Reported by a rollcall of 22–14.

## ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman .....	X		
Mr. Sensenbrenner, Jr. ....	X		
Mr. Coble .....	X		
Mr. Gallegly .....	X		
Mr. Goodlatte .....	X		
Mr. Lungren .....	X		
Mr. Chabot .....	X		
Mr. Issa .....	X		
Mr. Pence .....			
Mr. Forbes .....	X		
Mr. King .....	X		
Mr. Franks .....	X		
Mr. Gohmert .....	X		
Mr. Jordan .....	X		
Mr. Poe .....	X		
Mr. Chaffetz .....	X		
Mr. Griffin .....	X		
Mr. Marino .....	X		
Mr. Gowdy .....	X		
Mr. Ross .....	X		
Ms. Adams .....	X		
Mr. Quayle .....	X		
Mr. Amodei .....	X		
Mr. Conyers, Jr., Ranking Member .....		X	
Mr. Berman .....		X	
Mr. Nadler .....		X	
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson Lee .....			
Ms. Waters .....		X	
Mr. Cohen .....		X	
Mr. Johnson .....		X	
Mr. Pierluisi .....		X	
Mr. Quigley .....		X	
Ms. Chu .....		X	
Mr. Deutch .....		X	
Ms. Sánchez .....		X	
(Vacant) .....			
Total .....	22	14	

### Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

### **Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 10, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, November 9, 2011.*

Hon. LAMAR SMITH, CHAIRMAN,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 10, the “Regulations From the Executive in Need of Scrutiny Act of 2011.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Sarah Anders, who can be reached at 226–9010.

Sincerely,

DOUGLAS W. ELMENDORF,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

*H.R. 10—Regulations From the Executive in Need of Scrutiny Act of 2011.*

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As ordered reported by the House Committee on the Judiciary on  
October 25, 2011

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#### SUMMARY

Under current law, the Congress can prevent a rule from taking effect by enacting a *joint resolution of disapproval*. In contrast, H.R. 10 would require enactment of a *joint resolution of approval* prior to any major rule taking effect. Therefore, H.R. 10 would make major regulations dependent on future legislation.

About 80 major rules have been issued per year, on average, over the past five years. Major rules vary greatly in their nature and scope. CBO and the staff of the Joint Committee on Taxation (JCT) cannot determine the budgetary effects of preventing all future major rules from going into effect, but we expect that enacting H.R. 10 would have effects on both direct spending and revenues. Pay-as-you-go procedures apply because enacting the legislation would affect direct spending and revenues.

CBO expects that implementing H.R. 10 would not have any significant impact on spending subject to appropriation.

CBO expects that H.R. 10 would impose no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

#### ESTIMATED COST TO THE FEDERAL GOVERNMENT

##### *Background*

The Congressional Review Act (CRA) of 1996 requires Federal agencies to submit final rules to Congress and the Comptroller General before they may take effect. Final rules may only be annulled by Congress if a joint resolution of disapproval is enacted into law. H.R. 10 would amend current law by requiring Congress to enact a joint resolution of approval before any major rule may take effect. The definition of a major rule, which was originally set by the CRA and is left unchanged by H.R. 10, is any rule that the Office of Management and Budget determines would have:

- An annual effect on the economy of \$100,000,000 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 the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.<sup>1</sup>

H.R. 10 specifies special Congressional procedures and explicit timelines for enacting a joint resolution of approval for major rules. Under H.R. 10, if the Congress fails to enact a joint resolution of approval within 70 legislative (or session) days of receiving the major rule and accompanying report from a Federal agency, the rule may not take effect. Further, the Congress may not reconsider a joint resolution of approval relating to that rule in the same Congress. However, a major rule may take effect for one 90-calendar-day period without Congressional approval if the President determines via an executive order that the major rule is necessary for one of four reasons. These reasons are: to respond to an imminent threat to health or safety, to enforce criminal laws, to protect national security, or to implement an international trade agreement.

Since 1997, which was the first full calendar year following the enactment of the CRA, Federal agencies have published 50 or more major rules each year. One hundred major rules were issued in 2010, and 79 major rules have been issued, on average, over the past five full calendar years. Fifty major rules have been issued so far in 2011 (as of November 8, 2011). Major rules vary greatly in scope and in their effect on the Federal budget. For example, major rules issued in 2011 include required warnings for cigarette packages and advertisements, Medicare payment rates for inpatient psychiatric facilities, and national emission standards for haz-

<sup>1</sup> See 5 USC § 804(2).

ardous air pollutants from industrial, commercial and institutional boilers.<sup>2</sup>

In general, most major rules with budgetary effects are issued to implement current law; therefore, the budgetary effects of such anticipated rules are reflected in CBO's baseline projections. For example, routine annual rules establish new payment rates for a variety of Medicare services. Such updated payment rates reflect changes in the price indices specified to be used for those services by current law; the result is often an increase in payment rates and thus an increase in spending.

If H.R. 10 is enacted, baseline projections would no longer reflect the budgetary impact of major rules. Accordingly, if the Congress later considers a joint resolution of approval for a major rule, the estimated budgetary effect of that resolution would include the cost or savings of implementing that rule. For example, if H.R. 10 is enacted, baseline projections would no longer assume that payment rates for Medicare providers would rise over time without Congressional action. As a result, a Congressional resolution of approval for a major rule raising such rates would be estimated as having a cost to reflect those higher rates.

#### *Impact on Federal Spending and Revenues*

**Direct Spending.** H.R. 10 would prevent all major rules from taking effect unless subsequent legislation is enacted. Therefore, in assessing the budgetary effects of H.R. 10, CBO considered the costs and savings that would be realized if anticipated major rules do not take effect. Preventing some major rules from taking effect would result in costs, while preventing others would result in savings. CBO expects that the rules with the largest effects on Federal spending will be those related to Federal health programs, particularly Medicare, and that enacting H.R. 10 would significantly reduce Medicare spending relative to current law.

On net, CBO estimates that enacting H.R. 10 would result in savings for direct spending over the 2012–2021 period. Such budgetary effects would largely be driven by: (1) preventing annual updates to payment schedules for provision of Medicare services and other routine revisions to aspects of selected government programs; and (2) significantly altering the implementation of legislation with substantial budget effects.

Many routine major rules are health-related and in particular pertain to Medicare. Some examples include rules that establish annual increases in payment rates for services provided by hospitals, physicians, and other Medicare providers. Enacting H.R. 10 would freeze payment structures for those providers at current levels, which would, on net, result in hundreds of billions of dollars in savings over the 2012–2021 period. Preventing some major rules from taking effect would result in an increase in direct spending (from an increase in spending or from a reduction in offsetting receipts). For example, preventing annual increases in premiums paid by beneficiaries for Medicare Part B would reduce premium collections, and preventing scheduled reductions in payments for hospitals that serve a disproportionate share of low-income patients under the Medicaid program would increase costs relative to

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<sup>2</sup>GAO Federal Rules Database, <http://www.gao.gov/legal/congressact/fedrule.html>.

current law. However, CBO estimates that overall savings would likely offset those costs by a substantial amount.

Enacting H.R. 10 would also affect the implementation of significant legislation for which final rules have not been issued. For example, H.R. 10 would make some major rules related to implementing the Patient Protection and Affordable Care Act (PPACA, Public Law 111–148) subject to a joint resolution of approval because a number of rules have not yet taken effect. Many of these rules relate to health insurance exchanges, which will become operational in 2014 under current law. Preventing rules governing exchanges from taking effect would, at a minimum, delay implementation of health insurance exchanges, which would in turn result in significant savings.

**Revenues.** Enacting H.R. 10 would also affect revenues, and JCT expects that preventing regulations from going into effect could reduce collections of revenues in some cases and increase collections in other cases. JCT cannot determine the sign or magnitude of the possible effects on revenues.

#### *Impact on Future Legislation*

If H.R. 10 is enacted, the budgetary effect of any joint resolution of approval for a major rule would include any direct spending and revenue effects of implementing that rule. Further, for future legislation whose implementation would be contingent upon the promulgation of major rules, CBO would estimate the budgetary effects assuming those major rules did not take effect. The costs or savings associated with those major rules would instead be estimated and counted for budget enforcement purposes at the time that joint resolutions to approve those major rules were being considered.

#### PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Pay-as-you-go procedures apply to H.R. 10 because enacting the legislation would affect direct spending and revenues. CBO and JCT cannot determine the sign or magnitude of those effects.

#### INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

CBO expects that H.R. 10 would impose no intergovernmental or private-sector mandates as defined in UMRA. By requiring major rules to be approved by a joint resolution of Congress and potentially delaying or halting the implementation of those rules, the bill could affect public or private entities in a number of ways, including slowing reimbursements and eliminating or changing regulatory requirements. While the costs and savings tied to those individual effects could be significant, CBO has no basis for estimating either the overall direction or magnitude of those effects on public or private entities because of uncertainty about the nature and number of regulations affected.

#### ESTIMATE PREPARED BY:

Federal Costs: Sarah Anders

Impact on State, Local, and Tribal Governments: Elizabeth Cove  
Delisle  
Impact on the Private Sector: Paige Piper-Bach

ESTIMATE APPROVED BY:

Holly Harvey  
Deputy Assistant Director for Budget Analysis

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 10 increase accountability and transparency in the Federal regulatory process by reforming the Congressional Review Act of 1996 to require Congress to approve all new major regulations.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, 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.

### **Section-by-Section Analysis**

#### *Section 1. Short Title.*

This Act may be cited as the “Regulations From the Executive in Need of Scrutiny Act of 2011.”

#### *Section 2. Purpose.*

Section 2 explains that the purpose of the REINS Act is to increase accountability and transparency in the Federal regulatory process by requiring Congress to approve all new major regulations.

#### *Section 3. Congressional Review of Agency Rule-Making.*

Chapter 8 of title 5, U.S. Code, is amended to create the following method for congressional review of new major Federal rules:

**801. Congressional review:** This section requires enhanced reporting of all Federal rules to Congress and the Comptroller General and provides that a major rule shall not take effect without a Joint Resolution of approval under section 802. Section 801 also caps the time to enact a Joint Resolution of approval at 70 legislative days, and empowers the President to grant 90-day waivers for certain emergency situations. Finally, Section 801 outlines carry-over provisions from one session of Congress to the next.

**802. Congressional approval procedure for major rules:** Section 802 establishes House and Senate procedures to require both chambers to approve major rules by Joint Resolution, requiring the signature of the President, before such major rules can take effect. Section 802 also provides expedited procedural mechanisms to ensure that all Joint Resolutions are given efficient consideration in both chambers.

**803. Congressional disapproval procedure for nonmajor rules:** Section 803 preserves the existing disapproval process under the Congressional Review Act for all non-major rules. This section permits Congress to disapprove a rule if both houses of Congress pass a joint resolution of disapproval that the President signs (or if Congress overrides the veto). Section 803 also provides expedited procedural mechanisms in the Senate.

**804. Definitions:** Consistent with long-standing Executive Orders, this section defines “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) finds may result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers; or significant adverse effects on the economy. Section 804 defines “non-major rule” as any rule other than a major rule. Rules of particular applicability, rules relating to agency management, or rules relating to agency organization, are exempt from the REINS Act.

**805. Judicial Review:** This section provides that no determination, finding, action or omission under this chapter will be subject to judicial review. For example, the section would preclude from judicial review a determination by the OIRA Administrator that a rule is a “major rule” or not; a Presidential determination that a rule should become effective immediately; an agency determination that “good cause” requires a rule to go into effect at once; or, a question as to the adequacy of a Comptroller General’s assessment of an agency’s report. The Committee intends that a court may consider, however, whether a Federal agency has satisfied the requirements under the REINS Act for a rule to take effect. Section 805 also preserves the ability to challenge a rule based on a lack of statutory authority to adopt the rule or a procedural defect during rule-making.

**806. Exemption for monetary policy:** Like the Congressional Review Act, Section 806 exempts any rules concerning monetary policy promulgated by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

**807. Effective date of certain rules:** Section 807 permits certain rules relating to hunting, fishing, or camping and certain non-major rules to take effect notwithstanding Section 801.

#### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

#### **TITLE 5, UNITED STATES CODE**

\* \* \* \* \*

## PART I—THE AGENCIES GENERALLY

\* \* \* \* \*

### [CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

- [Sec.
- [801. Congressional review.
- [802. Congressional disapproval procedure.
- [803. Special rule on statutory, regulatory, and judicial deadlines.
- [804. Definitions.
- [805. Judicial review.
- [806. Applicability; severability.
- [807. Exemption for monetary policy.
- [808. Effective date of certain rules.

#### [§ 801. Congressional review

[(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

[(i) a copy of the rule;

[(ii) a concise general statement relating to the rule, including whether it is a major rule; and

[(iii) the proposed effective date of the rule.

[(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

[(i) a complete copy of the cost-benefit analysis of the rule, if any;

[(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

[(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

[(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

[(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

[(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

[(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

[(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

[(A) the later of the date occurring 60 days after the date on which—



before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

[(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

[(i) such rule were published in the Federal Register (as a rule that shall take effect) on—

[(I) in the case of the Senate, the 15th session day, or

[(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

[(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

[(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

[(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

[(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

[(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though—

[(A) such rule were published in the Federal Register on the date of enactment of this chapter; and

[(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

[(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

[(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

[(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

### **§ 802. Congressional disapproval procedure**

[(a) For purposes of this section, the term “joint resolution” means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: “That Congress disapproves the rule submitted by the — — relating to — —, and such rule shall have no force or effect.” (The blank spaces being appropriately filled in).

[(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

[(2) For purposes of this section, the term “submission or publication date” means the later of the date on which—

[(A) the Congress receives the report submitted under section 801(a)(1); or

[(B) the rule is published in the Federal Register, if so published.

[(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

[(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

[(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

[(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

[(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

[(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule—

[(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

[(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

[(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

[(1) The joint resolution of the other House shall not be referred to a committee.

[(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

[(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

[(B) the vote on final passage shall be on the joint resolution of the other House.

[(g) This section is enacted by Congress—

[(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

[(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

### **§ 803. Special rule on statutory, regulatory, and judicial deadlines**

[(a) In the case of any deadline for, relating to, or involving any rule which does not take effect (or the effectiveness of which is terminated) because of enactment of a joint resolution under section 802, that deadline is extended until the date 1 year after the date of enactment of the joint resolution. Nothing in this subsection shall be construed to affect a deadline merely by reason of the postponement of a rule's effective date under section 801(a).

[(b) The term “deadline” means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute or regulation, or by or under any court order implementing any Federal statute or regulation.

### **§ 804. Definitions**

[For purposes of this chapter—

[(1) The term “Federal agency” means any agency as that term is defined in section 551(1).

[(2) The term “major rule” means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

[(A) an annual effect on the economy of \$100,000,000 or more;

[(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

[(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the abil-

ity of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

[(3) The term “rule” has the meaning given such term in section 551, except that such term does not include—

[(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

[(B) any rule relating to agency management or personnel; or

[(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

#### **[§ 805. Judicial review**

[No determination, finding, action, or omission under this chapter shall be subject to judicial review.

#### **[§ 806. Applicability; severability**

[(a) This chapter shall apply notwithstanding any other provision of law.

[(b) If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

#### **[§ 807. Exemption for monetary policy**

[Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.]

### **CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING**

*Sec.*

801. *Congressional review.*

802. *Congressional approval procedure for major rules.*

803. *Congressional disapproval procedure for nonmajor rules.*

804. *Definitions.*

805. *Judicial review.*

806. *Exemption for monetary policy.*

807. *Effective date of certain rules.*

#### **§ 801. Congressional review**

(a)(1)(A) *Before a rule may take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—*

*(i) a copy of the rule;*

*(ii) a concise general statement relating to the rule;*

*(iii) a classification of the rule as a major or nonmajor rule, including an explanation of the classification specifically ad-*

*addressing each criteria for a major rule contained within sections 804(2)(A), 804(2)(B), and 804(2)(C);*

*(iv) a list of any other related regulatory actions intended to implement the same statutory provision or regulatory objective as well as the individual and aggregate economic effects of those actions; and*

*(v) the proposed effective date of the rule.*

*(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—*

*(i) a complete copy of the cost-benefit analysis of the rule, if any;*

*(ii) the agency's actions pursuant to sections 603, 604, 605, 607, and 609 of this title;*

*(iii) the agency's actions pursuant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and*

*(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.*

*(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.*

*(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).*

*(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).*

*(3) A major rule relating to a report submitted under paragraph (1) shall take effect upon enactment of a joint resolution of approval described in section 802 or as provided for in the rule following enactment of a joint resolution of approval described in section 802, whichever is later.*

*(4) A nonmajor rule shall take effect as provided by section 803 after submission to Congress under paragraph (1).*

*(5) If a joint resolution of approval relating to a major rule is not enacted within the period provided in subsection (b)(2), then a joint resolution of approval relating to the same rule may not be considered under this chapter in the same Congress by either the House of Representatives or the Senate.*

*(b)(1) A major rule shall not take effect unless the Congress enacts a joint resolution of approval described under section 802.*

*(2) If a joint resolution described in subsection (a) is not enacted into law by the end of 70 session days or legislative days, as applicable, beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), then the rule described in that resolution shall be deemed not to be approved and such rule shall not take effect.*

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a major rule may take effect for one 90-calendar-day period if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the major rule should take effect because such rule is—

- (A) necessary because of an imminent threat to health or safety or other emergency;
- (B) necessary for the enforcement of criminal laws;
- (C) necessary for national security; or
- (D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

- (A) in the case of the Senate, 60 session days, or
- (B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress is scheduled to adjourn a session of Congress through the date on which the same or succeeding Congress first convenes its next session, sections 802 and 803 shall apply to such rule in the succeeding session of Congress.

(2)(A) In applying sections 802 and 803 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

- (i) such rule were published in the Federal Register on—
  - (I) in the case of the Senate, the 15th session day, or
  - (II) in the case of the House of Representatives, the 15th legislative day,
 after the succeeding session of Congress first convenes; and
- (ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

#### **§ 802. Congressional approval procedure for major rules**

(a) For purposes of this section, the term “joint resolution” means only a joint resolution introduced on or after the date on which the report referred to in section 801(a)(1)(A) is received by Congress (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: “That Congress approves the rule submitted by the \_\_\_\_\_ relating to \_\_\_\_\_.” (The blank spaces being appropriately filled in).

(1) In the House, the majority leader of the House of Representatives (or his designee) and the minority leader of the House of Representatives (or his designee) shall introduce such

joint resolution described in subsection (a) (by request), within 3 legislative days after Congress receives the report referred to in section 801(a)(1)(A).

(2) In the Senate, the majority leader of the Senate (or his designee) and the minority leader of the Senate (or his designee) shall introduce such joint resolution described in subsection (a) (by request), within 3 session days after Congress receives the report referred to in section 801(a)(1)(A).

(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2) For purposes of this section, the term "submission date" means the date on which the Congress receives the report submitted under section 801(a)(1).

(c) In the Senate, if the committee or committees to which a joint resolution described in subsection (a) has been referred have not reported it at the end of 15 session days after its introduction, such committee or committees shall be automatically discharged from further consideration of the resolution and it shall be placed on the calendar. A vote on final passage of the resolution shall be taken on or before the close of the 15th session day after the resolution is reported by the committee or committees to which it was referred, or after such committee or committees have been discharged from further consideration of the resolution.

(d)(1) In the Senate, when the committee or committees to which a joint resolution is referred have reported, or when a committee or committees are discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion to further limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

(e)(1) In the House of Representatives, if the committee or committees to which a joint resolution described in subsection (a) has been referred have not reported it at the end of 15 legislative days after its introduction, such committee or committees shall be automatically discharged from further consideration of the resolution and it shall be placed on the appropriate calendar. A vote on final passage of the resolution shall be taken on or before the close of the 15th legislative day after the resolution is reported by the committee or committees to which it was referred, or after such committee or committees have been discharged from further consideration of the resolution.

(2)(A) A motion in the House of Representatives to proceed to the consideration of a resolution shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(B) Debate in the House of Representatives on a resolution shall be limited to not more than two hours, which shall be divided equally between those favoring and those opposing the resolution. A motion to further limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order. It shall not be in order to reconsider the vote by which a resolution is agreed to or disagreed to.

(C) Motions to postpone, made in the House of Representatives with respect to the consideration of a resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(D) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to a resolution shall be decided without debate.

(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply with respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

(1) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

(2) the vote on final passage shall be on the joint resolution of the other House.

(g) This section and section 803 are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure

of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

**§ 803. Congressional disapproval procedure for nonmajor rules**

(a) For purposes of this section, the term “joint resolution” means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: “That Congress disapproves the nonmajor rule submitted by the \_\_\_\_\_ relating to \_\_\_\_\_, and such rule shall have no force or effect.” (The blank spaces being appropriately filled in).

(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

(2) For purposes of this section, the term submission or publication date means the later of the date on which—

(A) the Congress receives the report submitted under section 801(a)(1); or

(B) the nonmajor rule is published in the Federal Register, if so published.

(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 15 session days after the date of introduction of the joint resolution, such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion to further limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accord-

ance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a nonmajor rule—

(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

(1) The joint resolution of the other House shall not be referred to a committee.

(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

(B) the vote on final passage shall be on the joint resolution of the other House.

#### **§ 804. Definitions**

For purposes of this chapter—

(1) The term “Federal agency” means any agency as that term is defined in section 551(1).

(2) The term “major rule” means any rule, including an interim final rule, that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

(A) an annual effect on the economy of \$100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) 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.

(3) The term “nonmajor rule” means any rule that is not a major rule.

(4) The term “rule” has the meaning given such term in section 551, except that such term does not include—

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefore, corporate or financial structures, reorganizations, mergers, or acquisitions

thereof, or accounting practices or disclosures bearing on any of the foregoing;

(B) any rule relating to agency management or personnel;  
or

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

#### **§ 805. Judicial review**

(a) No determination, finding, action, or omission under this chapter shall be subject to judicial review.

(b) Notwithstanding subsection (a), a court may determine whether a Federal agency has completed the necessary requirements under this chapter for a rule to take effect.

(c) The enactment of a joint resolution of approval under section 802 shall not be interpreted to serve as a grant or modification of statutory authority by Congress for the promulgation of a rule, shall not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule, and shall not form part of the record before the court in any judicial proceeding concerning a rule except for purposes of determining whether or not the rule is in effect.

#### **§ 806. Exemption for monetary policy**

Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

#### **§ 807. Effective date of certain rules**

Notwithstanding section 801—

(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping; or

(2) any rule other than a major rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,

shall take effect at such time as the Federal agency promulgating the rule determines.

\* \* \* \* \*

### **Dissenting Views**

#### INTRODUCTION

H.R. 10, the “Regulations From the Executive in Need of Scrutiny Act of 2011,” (REINS Act) is a flawed attempt to make the rulemaking process more subject to Congressional oversight and accountability. In effect, however, the bill will substantially delay and potentially prevent agency rulemaking, at great risk to public health and safety, by requiring that any major new rule be affirmatively approved by Congress and the President. The bill effectuates this process by amending the Congressional Review Act<sup>1</sup> (CRA) to

<sup>1</sup> 5 U.S.C. §§ 801–08 (2011).

require Congressional approval of major rules (i.e., rules with an annual impact on the economy of at least \$100 million) before they may become effective.

This legislation is based on the false premise that regulation is bad for business, only results in costs, and stifles job creation. H.R. 10 is unnecessary because Congress already has sufficient tools to conduct effective oversight, which include narrowing delegations of authority to agencies, controlling agency appropriations, and conducting oversight of agency activity. In addition, H.R. 10 presents serious Constitutional concerns as it may violate inherent separation of powers principles.

By requiring Congressional approval of major rules, H.R. 10 would serve as a procedural “chokehold” in multiple ways on Federal agency rulemaking and undermine the ability of agencies to provide essential protections to Americans. This legislation is a thinly disguised attempt to prevent the implementation of critical laws, such as the Patient Protection and Affordable Care Act<sup>2</sup> and the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>3</sup>

The REINS Act 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.<sup>4</sup> Additionally, 66 respected academics in the fields of administrative and environmental law also oppose the REINS Act because it is “unnecessary to establish agency accountability and unwise as a matter of public policy because it undercuts the implementation of laws intended to protect people and the environment.”<sup>5</sup>

For the foregoing reasons and others discussed more fully below, we must respectfully dissent and urge opposition to H.R. 10.

<sup>2</sup>Pub. L. No. 111–148, 124 Stat. 119 (2010).

<sup>3</sup>Pub. L. No. 111–203, 124 Stat. 1376 (2010).

<sup>4</sup>The other organizations include: 350.org, AhEeCOSH, Alliance for a Just Society, American Federation of Government Employees, American Rivers, ARISE CHICAGO, Arkansas Interfaith Committee for Worker Justice, Association of Flight Attendants-CWA, BlueGreen Alliance, Breast Cancer Action, California Rural Legal Assistance Foundation, Center for Biological Diversity, Center for Science in the Public Interest, Clean Air Watch, Clean Water Action, Community Organizations in Action, Consumer Federation of America, Consumers Union, Defenders of Wildlife, Demos, Earth Day Network, Earthjustice, Easter Seals, Environment America, Environmental Defense Fund, Equal Justice Center, Friends of the Earth, Gray Panthers, Greenpeace USA, Health Access California, Health Care for America Now, Interfaith Worker Justice, Interfaith Worker Justice Committee of Colorado, International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW), 3 of 3, National Audubon Society, National Consumers League, National Council for Occupational Safety and Health, National Gay and Lesbian Task Force Action Fund, National Women’s Health Network, Natural Resources Defense Council, OMB Watch, Our Bodies Ourselves, People for the American Way, Pesticide Action Network North America, Physicians for Social Responsibility, ProgressNow, Public Citizen, Reproductive Health Technologies Project, Republicans for Environmental Protection, RICOSH, Safe Tables Our Priority (S.T.O.P.), Sierra Club, South Florida Interfaith Worker Justice, Southern Environmental Law Center, The National Consumer Voice for Quality Long-Term Care, The TMJ Association, The Wilderness Society, Transport Workers Union of America AFL–CIO, U.S. PIRG, United Steelworkers, United Support & Memorial for Workplace Fatalities, USAction, Voces de la Frontera, Women’s Voices for the Earth, Workers Interfaith Network. See Letter from 72 organizations to Representative John Conyers, Jr., Ranking Member, Committee on the Judiciary (Feb. 11, 2011) (on file with the United States House of Representatives, Comm. on the Judiciary, Democrats). The American Association for Justice also submitted a letter opposing H.R. 10 to Representative John Conyers, Jr., Ranking Member, Committee on the Judiciary (Feb. 1, 2011) (on file with the United States House of Representatives, Comm. on the Judiciary, Democrats).

<sup>5</sup>See Letter from 66 law professors to Members of the United States Senate and United States House of Representatives (Feb. 8, 2011) (on file with the United States House of Representatives, Comm. on the Judiciary, Democrats).

## DESCRIPTION AND BACKGROUND

The REINS Act would dramatically change agency rulemaking by requiring all new major regulations to be affirmatively approved by both Houses of Congress and the President before they can take effect. It should be noted, however, that Congress already has the authority under the CRA to disapprove such rules.<sup>6</sup> Pursuant to the CRA, any agency rule automatically takes effect absent a joint resolution of disapproval enacted by Congress within 60 legislative days from receipt of the rule.<sup>7</sup> H.R. 10 amends the CRA to create a new process for major rules whereby they may only take effect upon Congressional and Presidential approval. By imposing this unrealistic and unworkable requirement, the REINS Act will effectively prevent Federal rulemaking and thereby threaten public health and safety as well as the economic soundness of our Nation.

Section 2 of the REINS Act sets forth the substantive provisions of the legislation. New Section 801(a)(1)(A) requires a Federal agency to submit a report to each House of Congress and to the Comptroller General of the Government Accountability Office (GAO) a report containing: (1) a copy of the rule; (2) a concise general statement relating to the rule; (3) a classification of the rule as a major or non-major rule, including the rule's classification specifically addressing each element of the definition of a "major rule;" (4) a list of any other related regulatory actions intended to implement the same statutory provision or regulatory objective, together with a description of the rule's individual and aggregate effects; and (5) the rule's proposed effective date. With respect to the rule's classification as a major rule, the report must indicate: (1) whether the rule has an annual effect on the economy of \$100 million or more; (2) whether the rule imposes a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) whether the rule imposes significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

In addition, new section 801(a)(1)(B) requires an agency to submit to GAO and both Houses of Congress: (1) a cost-benefit analysis of the rule, if any; (2) actions taken pursuant to the Regulatory Flexibility Act;<sup>8</sup> (3) actions taken to comply with the Unfunded Mandates Reform Act of 1995;<sup>9</sup> and (4) any other relevant information or requirement under any other act or executive order.

Under new section 801(a)(1)(C), each House of Congress must provide copies of the report required by 801(a)(1)(A) to the Chair and Ranking Member of each House and Senate standing committee with jurisdiction to report a bill to amend the provision of law under which the rule is issued (hereinafter "Committees of Jurisdiction").

Pursuant to new section 801(a)(2)(A), the GAO must provide a report on each major rule to the Committees of Jurisdiction within 15 calendar days from the date on which an agency submitted the report required by section 801(a)(1)(A). The GAO's report must in-

<sup>6</sup> 5 U.S.C. § 801(b) (2011).

<sup>7</sup> See 5 U.S.C. § 802 (2011) (outlining congressional disapproval procedure).

<sup>8</sup> 5 U.S.C. §§ 601 *et seq.* (2011).

<sup>9</sup> Pub. L. No. 104-4, 109 Stat. 48 (1995).

clude an assessment of the agency's compliance with 801(a)(1)(B). New section 801(a)(2)(B) specifies that agencies must cooperate with the GAO in providing information relevant to preparing its report required under 801(a)(2)(A).

New section 801(a)(3) provides that a major rule takes effect upon enactment of a joint resolution of approval or whatever the enactment date is in the rule following enactment of the joint resolution, whichever is later.

New section 801(a)(4) retains current law; i.e., nonmajor rules take effect after 60 days if Congress does not enact a joint resolution of disapproval.

New section 801(a)(5) clarifies that if a joint resolution of approval is not enacted, a joint resolution relating to the same rule cannot be considered in the same Congress by either House.

New section 801(b)(1) prohibits a major rule from taking effect unless Congress enacts a joint resolution of approval pursuant to the Act. In turn, new section 801(b)(2) deems a major rule as not approved and without effect if a joint resolution of approval concerning that rule is not enacted within 70 legislative or session days beginning on the date on which Congress receives the report required by section 801(a)(1)(A), excluding days that either House is adjourned for more than three days during session.

New section 801(c) sets forth certain temporary exceptions to the Congressional approval process for major rules. New section 801(c)(1) provides that a major rule may take effect for one 90-calendar-day period if the President makes a determination under section 801(c)(2). New section 801(c)(2), in turn, authorizes the President to determine by executive order that a major rule should take effect notwithstanding the requirements of this statute if such rule is: (1) necessary because of an imminent threat to health or safety or other emergency; (2) necessary for the enforcement of criminal laws; (3) necessary for national security; or (4) issued pursuant to a statute implementing an international trade agreement. New section 801(c)(3), however, clarifies that the President's exercise of authority under this subsection does not affect Congressional approval procedures outlined in new section 802.

New section 801(d) addresses instances when major rules are submitted to Congress within 60 legislative or session days prior to the adjournment of a Congressional session through the date Congress first convenes its next session. New section 801(d)(1) states that any rule submitted within such period is subject to the Act's approval and disapproval procedures in the succeeding session. New section 801(d)(2)(A) specifies that, in such a circumstance, the rule must be treated as if it were published in the Federal Register on the 15th session or legislative day after the succeeding session convenes and considers the report on such a rule to have been submitted on such day. New section 801(d)(2)(B) specifies that this subsection should not be construed to affect the requirement that a rule be submitted to Congress before it can take effect. Finally, new section 801(d)(3) provides that a rule in this circumstance takes effect as otherwise provided for by law, including pursuant to the other provisions of the Act.

Although new Section 802 is not within the jurisdiction of our Committee, an explanation of this provision is necessary to place the remainder of the bill in perspective. Subsections (c) and (d) de-

tail the expedited Senate procedures for consideration of joint resolutions of approval. Subsection (c) requires that a Committee of Jurisdiction be automatically discharged from further consideration of a joint resolution if it has not reported the joint resolution within 15 session days after the joint resolution's introduction. The vote on final passage of the joint resolution must take place on or before the 15th session day after the relevant Committees of Jurisdiction report the joint resolution or are discharged from further consideration of such joint resolution.

New section 802(d)(2) limits total Senate debate time on a joint resolution of approval (including all debatable motions and related appeals) to a mere two hours, to be divided evenly between those in support and those in opposition to the joint resolution. A motion to further limit debate is in order, but not debatable. Amendments and motions to postpone, to proceed to consideration of other business, or to recommit the joint resolution are not in order.

New section 802(e) details expedited procedures in the House of Representatives for consideration of joint resolutions of approval. New section 802(e)(1) requires that a Committee of Jurisdiction be automatically discharged from further consideration of a joint resolution if it has not reported the joint resolution by the end of 15 legislative days after the joint resolution's introduction. The vote on final passage of the joint resolution must take place on or before the 15th legislative day after the relevant Committee of Jurisdiction report the joint resolution or are discharged from further consideration of such joint resolution, further limiting the Committee's time for consideration.

New section 802(e)(2)(B) limits total debate time in the House of Representatives on a joint resolution of approval to a mere two hours, divided evenly between those in support and those in opposition to the joint resolution. A motion to further limit debate is not debatable. Amendments to and motions to recommit the joint resolution as well as motions to reconsider the vote on the joint resolution are not in order.

New section 802(f) concerns the instance when one House of Congress, before it passes a joint resolution of approval, receives a joint resolution of approval from the other chamber. In such an instance, the House that has not yet passed the joint resolution will continue following its procedures as if no joint resolution had been received from the other chamber, but the vote on final passage must be on the other chamber's joint resolution.

New section 803 sets forth an expedited procedure for consideration of non-major rules. Our Committee does not have jurisdiction over this section.

Although new section 805(a) prohibits judicial review of any determination, finding, action, or omission under the Act, subsection (b) clarifies that, notwithstanding subsection (a), a court may review an agency's compliance with the Act's requirements.

New section 807 excepts from the Act's requirements any major or nonmajor rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping. Notably, this exception is not extended to other important matters such as those implicating critical public health and safety issues. With respect to a nonmajor rule, section 807 retains the exception for instances where an agency finds good cause that notice and proce-

sure are impracticable, unnecessary, or contrary to the public interest.

#### CONCERNS WITH H.R. 10

##### I. THE REINS ACT IS BASED ON FALSE PREMISES ABOUT REGULATORY COSTS

Proponents of the REINS Act assert that Federal agency regulations impose excessive costs on businesses, stifle job creation, and hobble the Nation's economic growth. The facts are otherwise.

###### A. *The Benefits of Regulations Significantly Outweigh Their Costs*

In support of their arguments concerning the costs of regulation, proponents regularly cite<sup>10</sup> a widely debunked study by economists Nicole and Mark Crain, which claims that Federal rulemaking imposes a cumulative burden of \$1.75 trillion a year.<sup>11</sup>

Critics of this study note its flawed assumptions and methodologies.<sup>12</sup> For example, the Center for Progressive Reform (CPR) observed that the study does not account for any benefits of regulation.<sup>13</sup> Additionally, CPR documented that the study did not rely on actual data on costs imposed by Federal regulation in the United States.<sup>14</sup> Indeed, the CPR found that the Crain study's methodology was defective because, in calculating economic costs, it relied on World Bank international public opinion polling on how friendly a particular country was to business interests.

Likewise, the independent, nonpartisan Congressional Research Service (CRS) criticized much of the Crain study's methodology.<sup>15</sup> CRS reported that the authors of the study admitted that it was "not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)"<sup>16</sup> CRS concluded that "a valid, reasoned policy decision can only be made after considering information on both costs and benefits" of regulation.<sup>17</sup>

Further, the Office of Management and Budget (OMB) has annually estimated the costs of regulations, which have been substan-

<sup>10</sup> See, e.g., Unofficial Tr. of Markup of H.R. 10, the "Regulations of the Executive in Need of Scrutiny Act of 2011," by the H. Comm. on the Judiciary, 112th Cong., at 16 (Oct. 25, 2011).

<sup>11</sup> Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Rep. No. SBAHQ-08-M-0466 (Sept. 2010), available at <http://archive.sba.gov/advo/research/rs371tot.pdf>.

<sup>12</sup> See *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Sally Katzen, former OIRA Administrator); see also Sidney Shapiro *et al.*, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (2011), available at [http://www.progressivereform.org/articles/SBA\\_Regulatory\\_Costs\\_Analysis\\_1103.pdf](http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf).

<sup>13</sup> Sidney Shapiro *et al.*, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (2011), available at [http://www.progressivereform.org/articles/SBA\\_Regulatory\\_Costs\\_Analysis\\_1103.pdf](http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> Congressional Research Service, *Analysis of an Estimate of the Total Costs of Federal Regulations*, R41763 (2011).

<sup>16</sup> *Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

<sup>17</sup> *Id.* The Economic Policy Institute also issued a critique of the Crain study outlining similar concerns with the study's methodology and data. See John Irons & Andrew Green, *Flaws Call for Rejecting Crain and Crain Model: Cited \$1.75 Trillion Cost of Regulations Is Not Worth Repeating* (2011), available at <http://w3.epi-data.org/temp2011/IssueBrief308.pdf>.

tially lower estimates than those reported in the Crain study. Significantly, OMB's reports to Congress include data on the benefits of regulations. The latest such report concluded that for fiscal year 2010, Federal regulations cost between \$6.5 billion and \$12.5 billion and generated between \$18.8 billion and \$86.1 billion in benefits.<sup>18</sup> According to OMB, the costs of regulations during the ten-year period from FY 1999 through FY 2009 were between \$43 billion and \$55 billion, while their benefits ranged from \$128 billion to \$616 billion.<sup>19</sup> Therefore, even if one uses OMB's highest estimate of costs and its lowest estimate of benefits, the regulations issued over the past ten years have produced net benefits of \$73 billion to our society. Such estimates were consistent across Democratic and Republican administrations.<sup>20</sup> Given that the benefits of regulations consistently exceed the costs, the need for any legislation that would make the issuance of regulations more difficult or time consuming is certainly in question.

The benefits of regulation are also apparent when viewed through the lens of prevention. For example, a 2011 Environmental Protection Agency report found that the public health benefits of clean air regulations far outweigh the compliance cost to industry.<sup>21</sup> The report concluded that restrictions on fine particle and ground-level ozone pollution mandated by the 1990 Clean Air Act amendments would prevent 230,000 deaths and produce benefits of about \$2 trillion by 2020.<sup>22</sup>

Alternatively, the costs of not regulating can be significant. *The New York Times* recently published a series of articles highlighting the danger of natural gas extraction practices that led to toxic contamination of the drinking water of potentially millions of people. This contamination was the result of a lack of regulation, often because regulatory authorities were fearful of confronting a lucrative and politically powerful industry.<sup>23</sup>

While a cost-benefit analysis of the current regulatory process clearly establishes the fact that the benefits well exceed the costs, the REINS Act itself will definitely result in more costs than benefits. The real costs of the REINS Act will be the resultant delay, uncertainty, and actual harm to the economy and society from the Congressional approval process dictated by the legislation. Highly beneficial rules will be delayed or even abandoned as a result of the failure of Congressional action. The benefit of imposing yet another significant procedural step before a major rule may become effective is ephemeral, evidenced by the fact that the CRA has only been used once to disapprove a rule in the 15 years it has been in effect.

<sup>18</sup> Office of Management and Budget, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 21, available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf).

<sup>19</sup> See *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Sally Katzen, former OIRA Administrator).

<sup>20</sup> *Id.*

<sup>21</sup> Environmental Protection Agency, Benefits and Costs of the Clean Air Act, Second Prospective Study—1990 to 2020 (2011) available at <http://www.epa.gov/air/sect812/prospective2.html>

<sup>22</sup> *Id.*

<sup>23</sup> See Ian Urbina, *Drilling Down: Regulation Lax as Gas Wells' Tainted Water Hits Rivers*, N.Y. Times, Feb. 26, 2011; Ian Urbina, *Drilling Down: Wastewater Recycling No Cure-All in Gas Process*, N.Y. Times, Mar. 1, 2011; Ian Urbina, *Drilling Down: A Tainted Water Well, and Concern There May Be More*, N.Y. Times, Aug. 3, 2011 (investigative series on the dangers associated with the controversial natural gas drilling technique known as fracking).

In an effort to quantify the cumulative benefits of major rules regarding air quality, water quality, and food safety, Representative Mike Quigley (D–IL) offered an amendment to have the independent, nonpartisan GAO conduct a study of this matter. Similarly, Representative Steve Cohen (D–TN) offered an amendment to exempt from H.R. 10’s Congressional approval requirement any proposed rule that OMB determines would result in a net benefit to society. Both Members observed that when the benefits of a rule to society outweigh its costs, society has an interest in ensuring that the rule take effect without unnecessary delay.<sup>24</sup> Representative Quigley’s amendment failed by a vote of 12 to 21 and Representative Cohen’s amendment also failed by a vote of 13 to 22.

### *B. Regulations Do Not Hinder Job Creation*

Proponents of H.R. 10 claim government regulations interfere with job creation because they create uncertainty for businesses, thereby preventing them from investing and hiring.<sup>25</sup>

To the contrary, regulations have no determinable effect on job creation. For instance, a survey from the Bureau of Labor Statistics that tracks companies’ reasons for large layoffs found that during the first and second quarters of 2011, 144,746 layoffs were attributable to poor “business demand,” while only 1,119 were attributable to “government regulations.”<sup>26</sup>

Indeed, one of the Majority’s own witnesses, during a recent hearing on another anti-regulatory bill, testified that when it comes to linking jobs and regulations, the “focus on jobs . . . can lead to confusion in regulatory debates” and that the employment effects of regulation “are indeterminate.”<sup>27</sup> Similarly, the National Federation of Independent Business’s latest monthly survey of its members reveals that poor sales, not regulations, are by far the biggest deterrent to hiring.<sup>28</sup> In addition, the *Wall Street Journal’s* July 2011 survey of business economists found that “The main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies, according to a majority of economists.”<sup>29</sup>

According to Bruce Bartlett, an economist who worked in the Administrations of both Presidents Ronald Reagan and George H.W. Bush, the idea that cutting regulations will lead to significant job growth is “just nonsense. It’s just made up.”<sup>30</sup> He further opined that “regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an

<sup>24</sup> Unofficial Tr. of Markup of H.R. 10, the “Regulations of the Executive in Need of Scrutiny Act of 2011,” by the H. Comm. on the Judiciary, 112th Cong., at 50, 119 (Oct. 25, 2011).

<sup>25</sup> See, e.g., Memorandum from Eric Cantor to House Republicans (Aug. 29, 2011) (on file with the House Majority Leader) available at <http://majorityleader.gov/blog/2011/08/memo-on-upcoming-jobs-agenda.html>. (“By pursuing a steady repeal of job-destroying regulations, we can help lift the cloud of uncertainty hanging over small and large employers alike, empowering them to hire more workers.”)

<sup>26</sup> Bureau of Labor Statistics, Economic News Release, Extended Mass Layoffs (Quarterly) News Release (Aug. 10, 2011), available at [http://www.bls.gov/news.release/archives/mslo\\_08102011.htm](http://www.bls.gov/news.release/archives/mslo_08102011.htm).

<sup>27</sup> *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Christopher DeMuth, American Enterprise Institute).

<sup>28</sup> See William C. Dunkelberg & Holly Wade, NFIB Small Business Economic Trends (2011) available at <http://www.nfib.com/Portals/0/PDF/sbet/sbet201109.pdf>.

<sup>29</sup> See Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring*, Wall St. J., July 18, 2011.

<sup>30</sup> Bruce Bartlett, *Misrepresentations, Regulations and Jobs*, N.Y. Times, Oct. 4, 2011 available at <http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment>.

agenda supported by the business community year in and year out. In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment.”<sup>31</sup>

Rather than hindering growth, regulations actually play a role in promoting job growth. A report by Northeast States for Coordinated Air Use Management (NESCAUM) demonstrates a direct correlation between environmental regulations and job growth in the Northeast. It found that by enacting stricter fuel economy standards and pursuing cleaner forms of energy, more jobs would be created.<sup>32</sup> Specifically, NESCAUM found that stricter fuel economy standards and regulations governing cleaner forms of energy would increase employment from 9,490 to 50,700 jobs; increase gross regional product, a measure of the states’ economic output, by \$2.1 billion to \$4.9 billion; and increase household disposable income increases by \$1 billion to \$3.3 billion.<sup>33</sup>

According to a recent report from the Natural Resources Defense Council (NRDC), the United Auto Workers (UAW), and the National Wildlife Federation (NWF), vehicle emissions standards and clean vehicle research, development and production are already responsible for 155,000 jobs at 504 facilities in 43 states and the District of Columbia.<sup>34</sup> According to the same report, 119,000 jobs have been created in this industry since 2009 alone.<sup>35</sup>

By preventing the promulgation of rules, the REINS Act would seriously stifle economic growth and the creation of new jobs. To highlight this issue, Representative Hank Johnson (D-GA) offered an amendment during the Committee markup of H.R. 10 to exempt from the bill’s Congressional approval requirement any proposed rule that OMB determines would result in job growth.<sup>36</sup> Representative Johnson’s amendment, however, failed by a vote of 14 to 21.

## II. THE REINS ACT IS UNNECESSARY BECAUSE CONGRESS ALREADY HAS OVERSIGHT AUTHORITY OVER FEDERAL AGENCY RULEMAKING

Congress already has various mechanisms at its disposal to oversee and influence the Federal agency rulemaking process. In its simplest and most straightforward form, Congress can delegate rulemaking authority to agencies with greater specificity or restriction, which would limit an agency’s rulemaking authority either from the outset or through later amendment of an agency’s organic statute. Indeed, Congress can simply pass legislation to stay the effect of an existing rule, as the House recently voted to do with respect to the Environmental Protection Agency’s cement manufacturing standards.<sup>37</sup>

Further, Congress can impose restrictions on agency rulemaking through the appropriations process. These restrictions can take a variety of forms, including restrictions on the finalization of par-

<sup>31</sup> *Id.*

<sup>32</sup> Northeast States for Coordinated Air Use Management (NESCAUM), *Economic Analysis of a Program to Promote Clean Transportation Fuels in the Northeast/Mid-Atlantic Region* (2011) (on file with Natural Resources Defense Council) available at <http://switchboard.nrdc.org/blogs/ngreene/CFS%20Economic%20Analysis%20Report%20INTERNAL.PDF>.

<sup>33</sup> *Id.*

<sup>34</sup> Natural Resources Defense Council et al., *Supplying Ingenuity: U.S. Suppliers of Clean, Fuel-Efficient Vehicle Technologies* (2011), available at <http://www.nrdc.org/transportation/autosuppliers/files/SupplierMappingReport.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> Unofficial Tr. of Markup of H.R. 10, the “Regulations of the Executive in Need of Scrutiny Act of 2011,” by the H. Comm. on the Judiciary, 112th Cong., at 62 (Oct. 25, 2011).

<sup>37</sup> Cement Sector Regulatory Relief Act of 2011, H.R. 2681, 112th Cong. (2011).

ticular proposed rules, restrictions on regulatory activity within certain areas, restrictions on implementation or enforcement of certain rules, and conditional restrictions that prevent a rule from taking effect until an agency takes certain steps.<sup>38</sup> For instance, no fewer than 19 out of the 67 amendments to H.R. 1, the “Full-Year Continuing Appropriations Act, 2011,” were aimed at de-funding the promulgation or implementation of existing and proposed regulations.<sup>39</sup>

Congress can also prescribe rulemaking procedures. Prior examples include the Administrative Procedure Act,<sup>40</sup> which was enacted in 1946 to establish baseline procedures for rulemaking. Others include the Unfunded Mandates Reform Act,<sup>41</sup> the Regulatory Flexibility Act,<sup>42</sup> the Paperwork Reduction Act,<sup>43</sup> and the Small Business Regulatory Enforcement Fairness Act,<sup>44</sup> all of which added procedural and analytical requirements to the agency rulemaking process. In addition, the CRA already allows Congress to disapprove of an agency rule.

Finally, Congress can exert influence over rulemaking through its oversight activities, whether through periodic oversight hearings, GAO reports, or informal contacts with the agencies. Such oversight activity can ensure that agencies are subject to democratic accountability for their actions.

### III. THE REINS ACT WILL SEVERELY RESTRICT FEDERAL RULEMAKING, THEREBY UNDERMINING THE ABILITY OF AGENCIES TO PROTECT PUBLIC HEALTH AND SAFETY

The REINS Act will severely restrict agency rulemaking by adding a significant procedural step to the rulemaking process and, through expedited procedures for Congressional consideration of major rules, will afford industry another opportunity to stop major rules from going into effect. In so doing, the REINS Act threatens agencies’ ability to protect public health and safety.

#### A. *The Congressional approval requirement adds an unnecessary and dangerous additional step to the rulemaking process for major rules that will further ossify the rulemaking process and create even more opportunities for private special interests to intervene*

The REINS Act effectively acts as a chokehold on major Federal agency rulemaking by requiring Congressional assent to major rules before they can take effect. This approval process would be in addition to an already heavily proceduralized rulemaking process that often takes years to conclude. Worse yet, Congressional inertia would effectively constitute a veto of even critically needed rules.<sup>45</sup>

<sup>38</sup> See Congressional Research Service, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, RL 34354 (2008).

<sup>39</sup> These amendments primarily targeted environmental regulations and regulations implementing health care reform legislation. H.R. 1, 112th Cong. (2011).

<sup>40</sup> 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2011).

<sup>41</sup> 2 U.S.C. §§ 1501 *et seq.* (2011).

<sup>42</sup> 5 U.S.C. §§ 601 *et seq.* (2011).

<sup>43</sup> 44 U.S.C. §§ 3501 *et seq.* (2011).

<sup>44</sup> Pub. L. No. 104–121, § 242, 110 Stat. 847, 857 (1996).

<sup>45</sup> *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary*, 112th

Additionally, the REINS Act would allow well-subsidized business interests to further influence the rulemaking process. As a result of H.R. 10's Congressional approval mechanism, Congress will need to pass judgment on major rules often without the opportunity to make a well-informed decision about their merits. Major rules generally involve highly technical and complex scientific data as well as other types of evidence that require substantive expertise to decipher. Simply put, Congress lacks the time and the resources to provide meaningful review of such rules<sup>46</sup> and it will be susceptible to well-funded lobbying efforts by special interests.

Adding to the concern about Congress's ability to provide meaningful review of major rules is the fact that Congress would have *only 70* legislative days within which to act, and Committees of Jurisdiction would have *only 15* legislative days to consider a proposed rule's merits. Moreover, floor time in each chamber is limited to just *two hours* of debate, evenly divided. As former OIRA Administrator Sally Katzen explained, "Experience during the 111th Congress compels the conclusion that there will not be time to consider and approve even the most worthy rules [under the REINS Act]."<sup>47</sup>

This is not the first time that a congressional approval mechanism for agency rulemaking has been considered. In the early 1980's, Congress held a number of hearings on this concept<sup>48</sup> and a bill was introduced that would have required affirmative Congressional assent to all major rules.<sup>49</sup> Wisely, Congress chose not to pursue such a mechanism. Chief Justice John G. Roberts, Jr., when he was an Associate White House Counsel in 1983, criticized this legislation for "hobbling agency rulemaking by requiring affirmative Congressional assent to all major rules."<sup>50</sup> He further noted that such a provision "would seem to impose excessive burdens on the regulatory agencies in a manner that could well impede the achievement of Administration objectives."<sup>51</sup>

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Cong. (2011) (statement of David Goldston, Director of Government Affairs, Natural Resources Defense Council) ("Agencies often take several years to formulate a particular safeguard, reviewing hundreds of scientific studies, drawing on their own experts in science and economics, empaneling outside expert advisors, gathering thousands of public comments, and going through many levels of executive branch review").

<sup>46</sup>*Id.*

<sup>47</sup>*REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Sally Katzen, former OIRA Administrator).

<sup>48</sup>See *Constitutional Amendment to Restore Legislative Veto: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. (1984); *An Amendment to Sec. 13 of S. 1080, The Regulatory Reform Act, to Provide for Congressional Review of Agency Rules: Hearing Before the Subcomm. on Admin. Practice and Proc. of the S. Comm. on the Judiciary*, 98th Cong. (1984); *On the Impact of the Supreme Court Decision in the Case of Immigration and Naturalization Service v. Chadha Which Found the Legislative Veto Unconstitutional: Hearing Before the H. Comm. on Rules* 98th Cong. (1983); *Legislative Veto and the "Chadha" Decision: Hearing Before the Subcomm. on Admin. Practice and Proc. of the S. Comm. on the Judiciary* 98th Cong. (1983); *The Supreme Court Decision in INS v. Chadha and its Implications for Congressional Oversight and Agency Rulemaking: Hearing Before the Subcomm. on Admin. Law and Gov't Rels. of the H. Comm. on the Judiciary*, 98th Cong. (1983).

<sup>49</sup>H.R. 3939, 98th Cong. Title II (1983). Then-Rep. Trent Lott (R-MS) was the sponsor of this legislation, which was cosponsored by 79 Members, all but five of them Republicans.

<sup>50</sup>OMB Watch, *Roberts Showed Prudence in Reg Reform Initiative* (2005), available at [www.ombwatch.org/node/2652](http://www.ombwatch.org/node/2652); see also Alliance for Justice, *Report on the Nomination of John G. Roberts to the United States Supreme Court 78*, available at [http://www.afj.org/afj\\_roberts\\_prehearing\\_report.pdf](http://www.afj.org/afj_roberts_prehearing_report.pdf) ("In general, Judge Roberts disagreed with proposals to require Congress to approve regulations before they took effect. . . .").

<sup>51</sup>OMB Watch, *Roberts Showed Prudence in Reg Reform Initiative* (2005), available at [www.ombwatch.org/node/2652](http://www.ombwatch.org/node/2652).

*B. By restricting rulemaking for major rules, the REINS Act threatens public health and safety*

While the REINS Act is clearly unnecessary and unworkable, its most pernicious effect will be putting the health, welfare and safety of Americans at risk. In addition to the monetary benefits of regulations, regulations promote improved air quality, healthier children, reduced discrimination, protection of our public health and safety, protection of human dignity, and other non-quantifiable but fundamental values. The costs of delaying these highly beneficial rules could be substantial.

The meltdown of the nuclear reactors at the Fukushima Daiichi power plant in Japan earlier this year in the aftermath of a devastating earthquake and tsunami illustrate the dangers of ineffective regulation. In response to the disaster, the U.S. Nuclear Regulatory Commission under the Atomic Energy Act<sup>52</sup> promulgated six rules to increase safety of American nuclear reactor facilities. At a minimum, the REINS Act would delay the implementation of these rules. At worst, it could prevent them from ever going into effect.

As Representative Quigley observed at the Committee markup of H.R. 10, stronger, more effective regulations may have prevented various disasters, including the financial fraud committed by Enron; coal mine fires; the tragic commuter airline crash that occurred in Buffalo, New York; the financial crisis in Wall Street that resulted from deregulation of financial products; and contaminated food items such as cantaloupes, turkey, hamburgers and eggs that have caused numerous deaths. As he explained, regulations play a critical role in ensuring the safety of the bridges we drive across, or the water we drink, or the food we consume.<sup>53</sup>

For example, three years ago, traces of the toxic chemical melamine were found in infant formula that was manufactured by an American company. It is likely that the REINS Act would have substantially delayed any corrective regulation issued in response to this contamination event. In response to this concern, Representative Sheila Jackson Lee (D-TX) offered an amendment at the Committee markup of H.R. 10 to exempt any proposed rule relating to infant formula, as defined by the Federal Food, Drug, and Cosmetic Act.<sup>54</sup> Although Representative Jackson Lee emphasized the need to protect the most vulnerable, namely, infants,<sup>55</sup> her amendment failed by a vote of 13 to 22. Similarly, Ranking Member John Conyers, Jr. (D-MI) offered an amendment to exempt from the bill any rule that protects or saves lives.<sup>56</sup> This amendment also failed on party lines by a vote of 13 to 20.

Finally, the REINS Act, if enacted, would consume vast amounts of limited Congressional time and resources, which would necessarily have to be diverted from other critical legislative, oversight, and constituent responsibilities. In calendar year 2010 alone, Federal agencies issued 94 major new rules that would have been

<sup>52</sup>42 U.S.C. §§ 2011 *et seq.* (2011).

<sup>53</sup>Unofficial Tr. of Markup of H.R. 10, the “Regulations of the Executive in Need of Scrutiny Act of 2011,” by the H. Comm. on the Judiciary, 112th Cong., at 74–76 (Oct. 25, 2011).

<sup>54</sup>*Id.* at 104.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 32.

subject to the REINS Act's requirements.<sup>57</sup> Meanwhile, there were only approximately 116 legislative days in the House during that same time period. Under these constraints, there would not have been enough time for Congress to consider and approve even the most worthy rules while also fulfilling its other responsibilities. Even under expedited procedures, Congress would likely be forced to ignore other important duties, doing a further disservice to the American people.

#### IV. THE REINS ACT OFFENDS SEPARATION OF POWERS PRINCIPLES

The REINS Act presents serious Constitutional concerns by offending separation of powers constraints in two respects: (1) by providing for what may be an unconstitutional one-House legislative veto; and (2) by effectively turning Congress into a "super administrative agency."

Under H.R. 10's Congressional approval mechanism, one House of Congress can effectively veto an agency's rule by simply not acting within the 70-legislative-day time frame provided for in the bill. Such a mechanism would be, in effect, indistinguishable from the one-House legislative veto that the Supreme Court held to be unconstitutional in *INS v. Chadha*.<sup>58</sup> The Court held in that decision that a veto of a Federal agency's legislative act was itself a legislative act that required passage by both Houses of Congress and presentment to the President for his signature.<sup>59</sup> Under H.R. 10, one House could effectively veto agency rules without meeting the Constitutional requirements discussed in *Chadha*.

Another possible separation of powers issue presented by the bill is that by making major rules effective only upon Congressional approval, the REINS Act turns major rules issued by Federal agencies into mere advisory rules. Through the REINS Act, Congress seeks to increase its own power over Executive Branch junctions and, in so doing, usurps a constitutional directive to the Executive Branch to "take care that the laws be faithfully executed."<sup>60</sup>

#### CONCLUSION

H.R. 10 does nothing to create jobs or improve the economy. Instead, it throws sand in the gears of government by making it nearly impossible to enact important new regulations. By requiring that each House pass and the President sign each new major regulation, this misguided legislation will require Congress to expend time and expertise that it does not have, while increasing the opportunity for private interests to influence the process. This bill is not the solution for the many problems currently facing the American people.

In fact, H.R. 10 is an unworkable solution to an artificial problem. There is no evidence that regulations stifle job creation. What we do know, however, is that regulations play a critical role in pro-

<sup>57</sup> Office of Information and Regulatory Affairs, Office of Management and Budget, *available at* <http://www.reginfo.gov/public/do/eoHistReviewSearch.jsessionid=9f8e89cb30d62463a3e4b8644060b5c6e60195668b93.e34ObxiKbN0Sci0Lch8Ma3eKa30Re6fznA5Pp7ftolbGmkTy> (last visited November 1, 2011).

<sup>58</sup> 462 U.S. 919 (1983) (holding that a one-House legislative veto violated the Constitution's bicameralism and presentment clauses).

<sup>59</sup> *Id.*

<sup>60</sup> See *Morrison v. Olson*, 487 U.S. 654 (1988) (outlining tests for evaluating statutory schemes under separation of powers doctrine).

protecting the health of all Americans, ensuring the safety of our workers, promoting the integrity of our financial system, and preserving the environment. Delaying or thwarting these critical measures imperils our Nation's well-being. These are tangible benefits of regulations that far outweigh any perceived costs. Indeed, the Administration has expressed nearly identical concerns about similar legislation pending in the Senate. It stated that such legislation would "delay and, in many cases, thwart implementation of statutory mandates and execution of duly enacted laws, increase business uncertainty, undermine much-needed protections of the American public, and create unnecessary confusion. There is no justification for such an unprecedented requirement."<sup>61</sup>

The REINS Act is not necessary because Congress already has myriad tools at its disposal, such as limiting delegations of authority to agencies, controlling agency appropriations, staying the effect of specific rules, and holding oversight hearings. These tools, unlike the REINS Act, do not trample the separation of powers and will not lead to government gridlock.

For all of the foregoing reasons, we strongly oppose H.R. 10 and we urge our colleagues to join us in opposition.

JOHN CONYERS, JR.  
 JERROLD NADLER.  
 ROBERT C. "BOBBY" SCOTT.  
 ZOE LOFGREN.  
 SHEILA JACKSON LEE.  
 MAXINE WATERS.  
 STEVE COHEN.  
 HENRY C. "HANK" JOHNSON, JR.  
 MIKE QUIGLEY.  
 TED DEUTCH.

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<sup>61</sup>Executive Office of the President, Statement of Administration Policy on S. 1786, Long-Term Surface Transportation Extension Act of 2011 (Nov. 3, 2011).