

CONGRESSIONAL TESTIMONY

**“REINS Act of 2013”:
Promoting Jobs, Growth, and
Competitiveness**

Testimony before

**The Subcommittee on Regulatory Reform,
Commercial and Antitrust Law**

Committee on the Judiciary

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Mr. Chairman, Ranking member Cohen, members of the subcommittee: My name is James Gattuso. I am Senior Research Fellow in Regulatory Policy at The Heritage Foundation. Thank you for inviting me to be here today to discuss H.R. 367, the Regulations from the Executive in Need of Scrutiny, or REINS, Act. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Over the past few weeks, all eyes have been focused on federal spending and efforts to limit an out-of-control budget. Obscure policy terms such as “sequestration” have become household words as Congress struggles with the issue. However, federal spending is only one part of the burden imposed on Americans by the federal government. Regulations impose hundreds of billions, or even trillions, of dollars in additional costs. These burdens not only increase the prices for consumers, but keep enterprises from growing and jobs from being created.

During the past four years, the regulatory burdens placed on the American people and economy have grown at a breathtaking rate. During President Obama’s first four years in office, over 130 major rules increasing regulatory burdens (roughly defined as those costing \$100 million or more each year) were adopted by agencies, imposing some \$70 billion in new annual costs according to preliminary calculations based on agency estimates. By comparison, about 50 such rules, with about \$15 billion in new annual costs, were imposed during George W. Bush’s first term.¹

¹ Includes “major” rules reported in the Government Accountability Offices’ Federal Rule Database, excluding rules with only a budgetary effect or that otherwise do not restrict or impose a mandate on

These new rules have covered a wide range of activity. Financial regulations adopted under the Dodd–Frank law constituted close to a third of the rulemakings. The largest share of estimated costs, however, has come from the Environmental Protection Agency. New energy efficiency mandates on everything from microwave ovens to clothes dryers also upped the total.

And more regulation is on the way. According to the latest Unified Agenda of Federal Regulations, 131 new major regulations are already in the pipeline. That compares to 90 in process when President Obama took office and only 56 in the spring of 2011.²

However, while regulatory growth has accelerated under President Obama, it did not start with his administration. Each year for the past 30 years, according to the Office of Management and Budget, the burden of regulation imposed on Americans and the U.S.

private-sector activity. For a fuller explanation, see James L. Gattuso and Diane Katz, “Red Tape Rising: Obama-Era Regulation at the Three-Year Mark, Heritage Foundation *Backgrounder* No. 2663, March 13, 2012, <http://www.heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-the-three-year-mark>.

² Office of Management and Budget, Office of Information and Regulatory Affairs, “Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, <http://www.reginfo.gov/public/do/eAgendaMain>. Notably, although OMB is required by executive order to release two such “Unified Agendas” each year, no report was released in the spring of 2012, and the fall 2012 agenda was not released until December. See Diane Katz, “Obama’s Regulatory Agenda Goes Undercover,” Heritage Foundation Foundry blog, August 31, 2012, <http://blog.heritage.org/2012/08/31/obamas-regulatory-agenda-goes-undercover/>. Similarly, OMB has failed to produce its statutorily required annual report on the costs and benefits of regulation since 2011, releasing only a draft report in early 2012. These failures have impeded the ability of policymakers and the public to evaluate regulatory trends and performance.

economy has grown. Not since 1982 have total regulatory costs declined.³ Regulatory growth is not a short-term phenomenon confined to an outlier presidency. It is a long-term, persistent trend.

Not all regulations are unwarranted, of course. Many rules are well-justified. No one is talking about eliminating airline safety rules or allowing contaminated meat to be freely sold. But there are volumes of rules not so well justified, ranging from the trivial (do we really need to require railroads to paint an “F” on locomotives to indicate the front?) to the potentially catastrophic (should the Federal Communications Commission regulate the Internet?). And the constant increase in regulatory burdens is taking its toll on the economy at a time when the nation can ill afford it.

Firm action by Congress to rein in this growing red tape is needed. This should include requiring explicit approval of all new major rules by Congress, as provided by the REINS Act, ensuring that burdens are not placed on Americans without the approval of their elected representatives.

Congress, of course, has always had the constitutional authority to control regulatory growth. All of the thousands of rules and regulations adopted each year are based on powers delegated to agencies by Congress itself. These rules can always be revoked or modified by legislation passed by Congress. In addition, recognizing that institutional inertia can make it difficult to move legislation forward, the 1996

³ Office of Management and Budget, Office of Information and Regulatory Affairs, “2009 Report to Congress on the Benefits and Costs of Federal Regulations a Unfunded Mandates on State, Local, and Tribal Entities,” p.32.

Congressional Review Act (CRA) established “fast track” procedures for blocking proposed rules, ensuring an up-or-down vote in the House and the Senate on “resolutions of disapproval.”

The CRA, however, has been successfully used only once to stop a rule, and that was over a decade ago, when a Labor Department rule promulgated by the Clinton Administration was rejected shortly after George Bush was inaugurated as President. One problem is that a CRA resolution—like all other legislation—cannot be adopted unless agreed to by the President. But few Presidents are keen on rejecting the work of their own appointees. As a result, the CRA and congressional review of rulemaking have been toothless tigers.

The REINS Act would finally give a real bite to regulatory review by, in effect, reversing the burden of proof. Specifically, promulgation of major rules would be conditioned on approval by Congress. They would not be formally adopted until and unless a “resolution of approval” is adopted by Congress. As with the CRA’s “resolution of *disapproval*,” this resolution would be subject to fast-track consideration.

This is undeniably a significant change in the way rules are adopted. The effect, however, is to reinforce, not to upset, the constitutional balance of powers. As a first matter, the change merely restores Congress’s constitutional role of legislating, much of which has been delegated to regulators. As important, the change constrains Congress as much as it empowers it by making legislators more accountable for their actions.

Under present practice, Congress gets to take credit for enacting popular but vague legislation but then can plausibly deny responsibility for the costly regulations that result. Thus, for example, the FCC is charged with furthering the “public interest,” the EPA with regulating “pollutants,” and the new Consumer Financial Protection Agency with limiting “abusive” financial practices without a clear indication of what those terms mean. This allows Congress to stand on the sidelines, ready to take credit or to denounce the agencies’ actions, rather than take responsibility itself.

The result is power without accountability—a useful formula politically but an abysmal one for policymaking. The REINS Act would end this shell game. Congress would no longer be able to pass vague legislation and disclaim responsibility for agency rulemaking.

Despite the claims by opponents—and some supporters—of REINS, the legislation is not inherently anti-regulatory. Instead, it simply ensures scrutiny by Congress of proposed rules. It would apply just as much to agency decisions that reduce regulatory burdens as it would to those that increase such burdens.

This is not to say that equal numbers of pro-regulatory and deregulatory actions would be subject to scrutiny under the REINS Act. That is not because of any bias in the legislation, but rather is simply because agencies act to increase regulation far more often than they act to reduce it. In Republican as well as Democratic presidencies, decreases in

regulation have been far outnumbered by increases.⁴ Under President Obama, they have almost disappeared entirely (at least among major rules). The unavoidable fact is that we are facing a flood of new regulation, not a flood of deregulation. Reviews under the REINS Act would only reflect that fact.

Some critics say that the task of reviewing so many rules would be too burdensome for Congress and would simply “gum up” the regulatory works.⁵ But, while costly, the number of major regulations issued each year is in the low dozens—hardly an unmanageable number. Of these, about half are budgetary in nature, such as those setting Medicare reimbursement rates, and perhaps could be exempted from REINS review. In any case, it hardly makes sense to excuse Congress from the task of reviewing new rules because too many are being produced. If anything, that would indicate a greater need to monitor regulatory activity.

Critics also argue that the REINS Act would displace regulators’ “expert” judgment with political decision-making. For example, Steven Shapiro of the Center for Progressive Reform writes that Congressional action “is likely to be nakedly political, reflecting the raw political power of special interests,” while agency actions “are backed up with reasonable policy determinations.”⁶

⁴ See, i.e., James L. Gattuso, “Reining in the Regulators: How Does President Bush Measure Up?” Heritage Foundation Backgrounder No. 1801, September 28, 2004, <http://www.heritage.org/research/reports/2004/09/reining-in-the-regulators-how-does-president-bush-measure-up>.

⁵ Sidney Shapiro, “The REINS Act: The Latest Conservative Effort to Gum Up the Regulatory Works,” Center for Progressive Reform blog, January 14, 2011, <http://www.cprblog.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F>.

⁶ Ibid.

But, outside of political science textbooks, that's not how government works. Regulators have their own interested agendas. And political considerations, shockingly, do influence the process. Spend an hour in front of most any agency and watch the lobbyists flow in and out if you doubt that.

Moreover, most regulatory decision-making requires more than scientific expertise. It involves value judgments as to what burdens will be placed on the American people for what benefit. Such decisions properly involve Congress.

Congress and agency "experts" will not always agree. Since Members of Congress must regularly face the voters, they will have a different perspective from appointed regulators. But that's not a bug in the system; it's a feature. Simply put, no rule should be adopted if the American people, as represented by Congress, don't agree it is necessary.⁷

While the REINS Act would provide an important start toward taming excessive regulation, it is no silver bullet. Other reforms that complement the changes made by REINS are also needed. Among them:

⁷ Importantly, congressional review under the REINS Act would be in addition to, not instead of, review by the executive branch and by the courts. In fact, the legislation explicitly provides that "[t]he enactment of a resolution of approval does not serve as a grant or modification of statutory authority by Congress for the promulgation of a rule, does 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" Sec. 805(c). In other words, approval of a rule by Congress under the REINS Act does not provide a free pass for regulators.

1. Imposing sunset dates for federal regulations. The REINS Act is a forward-looking reform, ensuring scrutiny of newly proposed rules. Action is also needed to address the existing stock of regulations already on the books. To ensure that these existing rules are justified and effective, they should automatically expire after a set period—perhaps 10 years—if not explicitly reaffirmed by regulators through a notice and comment rulemaking. As with any such regulatory decision, this reaffirmation would be subject to congressional review under the REINS Act.
2. Developing a congressional regulatory analysis capability. In order to exercise its duties under the REINS Act responsibly, Congress needs the capability to analyze proposed and existing rules independently without reliance on OMB or the regulatory agencies. This could be done through a new Congressional Office of Regulatory Analysis modeled on the Congressional Budget Office or, alternatively, through existing Congressional institutions such as CBO or the Government Accountability Office. Such a capability would also help Congress better evaluate the regulatory consequences of the legislation it enacts.

Congressional approval of proposed new rules as provided in the proposed REINS Act would be an important step toward holding both regulators and Congress accountable for the regulations imposed on the private sector. While it is no panacea for the increasing flood of new regulations, it would be a powerful first step toward reform.

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