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# Environmental Protection in the Trump Era

Spring 2018



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Environmental Protection in the Trump Era.

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# Creating New Roadblocks for Future Regulation

Several bills pending in Congress would **add major procedural hurdles for federal agencies issuing new regulations**, as well as constrain agencies' use of scientific data. **Pending legislation also would facilitate Congress' authority to invalidate existing regulations.** If enacted, any of these bills would add structural constraints to federal agencies' ability to regulate in the effort to protect the environment, human health and safety, and the public welfare more broadly.



## Process.

Like most federal legislation, the bills discussed in this chapter would require an affirmative vote from each house of Congress. Passage by the Senate may require overcoming a possible minority filibuster, which would require 60 votes to end debate on the legislation. Once passed by both houses, the bill is then presented to the president for signature; if the president vetoes a bill, it would only become a law if both houses of Congress override the veto with a two-thirds supermajority vote.

Several pieces of the legislation described here were introduced in previous sessions of Congress in the same or similar forms. Most passed the House of Representatives but died in the Senate, under the threat of a filibuster or of a veto from President Obama. Once the White House changed hands, these bills' prospects improved. However, there has been little recent action on most of the bills discussed below.



## Opportunities for Public Engagement.

The primary action for members of the public and advocacy groups would be to seek to influence member voting on these bills. The Senate will be key, because to overcome a filibuster there, 60 votes would be necessary.

**Action Areas to Watch.** *Midnight Rules Relief Act of 2017 (H.R. 21, S. 34).* This bill would **facilitate the future invalidation of agency regulations** under the Congressional Review Act ("CRA," [see Chapter 3.](#)) One key CRA limitation is that a separate disapproval resolution is required for each regulation, which requires a substantial amount of Senate floor time. For regulations promulgated toward the end of the last year of a president's term, the **Midnight Rules Relief Act would allow actions on multiple regulations to be bundled into a single disapproval resolution.**

## Areas to Watch

*Regulatory reform legislation*, including: the Midnight Rules Relief Act, and the REINS Act, which would strengthen congressional review of rulemaking; the Regulatory Accountability Act, adding numerous steps to the regulatory process and abolishing *Chevron* deference; the SCRUB Act, identifying rules for repeal and establishing a regulatory cut-go process (REINS contains a similar concept); and the Regulatory Integrity Act and the GOOD Act, adding more transparency into the regulatory process. There has been little recent action on these measures, which were developed in the context of the prior Administration. The exception is the GOOD Act, which was not introduced until early 2018.

*Legislation on the use of science*, including: the EPA Science Advisory Board Reform Act of 2017, changing board membership and processes; and the Honest and Open New EPA Science Treatment Act of 2017, requiring publication of scientific information on which EPA action is based. The BEST Act imposes similar requirements on administrative agencies more generally.

## Areas to Watch

*New membership on EPA advisory committees, due to a new policy barring any direct recipient of an active agency grant from serving.*

Specifically, any regulations promulgated during the last 60 session days of the Senate or the last 60 legislative days of the House of Representatives during the last year of a presidential term **could be bundled and disapproved** during a window of time at the beginning of the next session of Congress. This change would relax the current constraint imposed by the current CRA, which allows for each resolution requiring up to 10 hours of Senate floor, and **would greatly speed the CRA disapproval process**.

This bill was passed by the House of Representatives on January 4, 2017. It is now pending before the Senate.

*Regulations from the Executive in Need of Scrutiny Act of 2017 (H.R. 26, S. 21) (“REINS Act”).* The **REINS Act encompasses radical changes to the regulatory process** that would make it much more difficult to regulate generally. The following are the primary provisions of the REINS Act.

**First**, for all new regulations, **the bill would implement a “regulatory cut-go requirement.”** Every agency issuing a new rule would be required to “identify a rule or rules that may be amended or repealed to completely offset any annual costs of the new rule to the United States economy.” REINS Act, Sec. 3. The agency would also be required to “make each such repeal or amendment” before the new rule could take effect. *Id.* This requirement resembles—but is not identical to—President Trump’s January 30 Executive Order ([see Chapter 2](#)) that creates a regulatory “budget” and requires two regulations to be repealed for every new regulation. Notably, the provisions of the REINS Act would apply to future administrations, while the new Executive Order could be rescinded by a subsequent president.

**Second**, the REINS Act would create a new process for issuing new “major rules,” defined as those likely to cause:

- an annual cost to the economy of \$100 million or more,
- a major increase in costs or prices, or
- significant “adverse effects on competition, employment, investment, productivity, innovation” or on the ability of American companies to compete with foreign companies.

Under the bill, no major rule could take effect without a congressional resolution explicitly *approving* that rule. This is the inverse of the current CRA process, which permits finalized rules to go into effect unless specifically disapproved by Congress. Moreover, such a resolution could only be passed within the timelines set by the Act; if no resolution were passed within the allowable time frame, the rule could not take effect.

For non-major rules, **the REINS Act retains a slightly modified version of the disapproval process under the CRA**, which currently applies to all rules. Under the Act, there would be a window for Congress to pass disapproval resolutions with respect to individual non-major regulations. Absent congressional disapproval, a non-major regulation would take effect.

**Third**, the **REINS Act establishes a process for congressional review of all rules in effect at the time the legislation is enacted.** This process would occur over 10 years following the Act’s enactment, with one-tenth of existing rules reviewed each year. There is some ambiguity as to

how the legislation's provisions would apply to existing rules. It appears that, **for each set of rules identified each year, Congress can:**

- approve all rules through a single resolution,
- attach conditions to the approval of certain rules, or
- separate certain rules for individual approval or disapproval resolutions.

Notably, any regulation not approved within the 10-year review is deemed not to continue in effect.

The REINS Act was passed by the House of Representatives on January 5, 2017. It is now pending before the Senate.

*Regulatory Accountability Act of 2017 (H.R. 5).* This legislation is an **omnibus bill that would add numerous steps to the regulatory process** across federal agencies. This bill was passed by the House of Representatives on January 11, 2017, and a modified version, S. 951, was introduced in the Senate. Parallel versions of certain titles of this bill also have been introduced in the Senate as stand-alone bills.

- *Title I – Regulatory Accountability Act.* **This title would add numerous obstacles**—by some counts, more than 80—**to the regulatory process.** These include additional analyses and procedures for any “major rule” or “high-impact rule.” In addition, the Act establishes a default requirement to adopt regulations that are “least costly” to the regulated parties, setting aside the rule’s expected benefits. Adopting a rule that is not the “least costly” would require an explicit justification. A stand-alone version of the Regulatory Accountability Act (S. 951) was introduced in the Senate on April 26, 2017. There are significant differences between the Senate bill and Title I of the House omnibus bill: among others, the Senate bill requires agencies to adopt the “most cost-effective” alternative considered rather than the “least costly alternative.”
- *Title II – Separation of Powers Restoration Act.* **This title abolishes Chevron deference,** under which courts are required to defer to agencies’ legal interpretations in certain circumstances. Instead, courts would interpret legal provisions independently, without any deference to agency perspectives. A parallel version of this title was introduced in the Senate (S. 1577) on July 18, 2017, and is now pending.
- *Title III – Small Business Regulatory Flexibility Improvements Act.* **This title strengthens the provisions of the Regulatory Flexibility Act,** which provides protections for small businesses and establishes additional required procedures for rulemaking. Parallel stand-alone versions of this title have been introduced in the Senate (S. 584) and in the House (H.R. 33); both are now pending.
- *Title IV – Require Evaluation Before Implementing Executive Wish Lists Act (or “REVIEW Act”).* **This title postpones the effective date of any “high-impact rule,”** defined as rules that would impose an annual cost of \$1 billion or more, “until the final disposition of all actions seeking judicial review of the rule.” Sec. 402. Given the complexity and pace of litigation for most major regulations, **this could stay a rule’s effectiveness for years.** The legislation could also encourage litigation as a vehicle for postponing the implementation of rules.
- *Title V – All Economic Regulations Are Transparent Act (or “ALERT Act”).* **This title would add multiple additional reporting requirements for each agency** regarding ongoing

rulemakings, including a requirement that the White House's Office of Information and Regulatory Affairs post on the Internet information regarding individual rules. The bill also would impose a six-month delay after the posting of that information before any rule could become effective. A stand-alone version of this title has been introduced in the House (H.R. 75) and is now pending.

- *Title VI – Providing Accountability Through Transparency Act.* **This title requires each agency to include the internet address for a 100-word summary of a proposed rule,** to be posted on regulations.gov, in any notice of proposed rulemaking and in the docket for the proposed rule. (Currently, notices regarding rulemakings are already required to include a brief summary of the rule, see 1 C.F.R. §18.12 (2015)). Parallel standalone versions of this title have been introduced in the Senate (S. 577) and in the House (H.R. 77); both are now pending.

*Searching for and Cutting Regulations That Are Unnecessarily Burdensome Act (H.R. 998) (“SCRUB Act”).* This bill would **create a commission to identify rules for repeal and implement a regulatory cut-go requirement based on the commission’s report.**

- *Title I – Retrospective Regulatory Review Commission.* **This title establishes a commission with a five-year mission to evaluate rules set out in the Code of Federal Regulations against a set of criteria to determine if they should be repealed** to reduce the cost of regulation to the economy, with a 15 percent cost-reduction goal. One criterion is whether and the extent to which repealing a rule would impact public health. The Commission would classify identified rules for either immediate action to repeal, or as eligible for repeal under Title II’s regulatory cut-go procedures. Agencies must repeal those rules identified, upon enactment of a congressional joint resolution. Similar to the CRA, the SCRUB Act prohibits agencies from reissuing a rule that is substantially the same as one repealed unless specifically authorized by law. An agency must also ensure a new rule does not result in the adverse effects that either initiated the recommendation for repeal, or which are of the kind identified in the criteria used to evaluate rules for repeal.
- *Title II – Regulatory Cut-Go.* **This title requires agencies to offset the costs of any new rule by repealing rule(s) classified by the commission in Title I.**
- *Title III – Retrospective Review of New Rules.* **This title requires agencies, when promulgating a new rule, to include a plan for its review within the subsequent 10 years.**
- *Title IV – Judicial Review.* This title subjects to judicial review agency compliance with the bill’s provisions pertaining to repealing rules under the terms of a joint resolution and the reissuance of rules, the cut-go procedures under Title II, and plans for future review of newly promulgated rules under Title III.

This bill was passed by the House of Representatives on March 1, 2017. It is now pending before the Senate.

*Guidance Out of Darkness Act (H.R. 4809, S. 2296) (“GOOD Act”).* This bill would **require agencies to publish in a single online location nearly all agency statements issued outside the notice-and-comment process.**

Guidance documents are policy statements clarifying existing laws or regulations, and are usually excluded from notice-and-comment rulemaking requirements. The GOOD Act defines the term expansively to include nearly all agency statements issued outside of the notice-and-comment process that are not agency orders. Agencies must also publish online, within 60 days, all guidance issued in the 10-year period prior to the bill being enacted. All rescinded guidance documents must be retained online and marked with the date of rescission.

This bill was introduced in the House of Representatives on January 16, 2018, and in the Senate on January 11, 2018.

*Regulatory Integrity Act (H.R. 1004).* This bill would **require agencies to publish online information regarding pending regulatory activity and associated public communications.**

The bill's goal is to increase transparency of regulatory action, which spans rulemaking, adjudications, policy statements, and guidance. Its provisions mandate that executive agencies publish online a list of pending regulatory actions and associated information, including their status and any other, duplicative actions. Agencies must also publish, within 24 hours of issuance, all public communications pertaining to each regulatory action, and maintain their availability at least five years after such regulatory action is finalized. Public communications are limited to impartial requests for comment or dissemination of information; agencies are prohibited from using public communication to advocate in support or opposition of pending action.

This bill was passed by the House of Representatives on March 2, 2017. It is now pending before the Senate.

*Legislation on the Use of Science.* Several bills are now pending regarding the use of science by EPA and by other agencies.

For example, the EPA Science Advisory Board Reform Act of 2017 (H.R. 1431) would change the membership of EPA's Science Advisory Board and the procedures by which it operates. Among other changes, it would require that "the scientific and technical points of view represented on and the functions to be performed by the Board are *fairly balanced* among the members of the Board." H.R. 1431, Sec. 2 (emphasis added). Similarly, the Act would make it easier for experts tied to regulated entities to serve on the Board. It also constrains the Board's ability to set limits on the time for receiving public comments, potentially creating substantial delays for the Board's work. The House passed this bill on March, 30, 2017, and it is now pending before the Senate.

The Honest and Open New EPA Science Treatment Act of 2017 (H.R. 1430) ("**HONEST Act**") would **require that all scientific and technical information on which an EPA action is based be publicly available before that action is taken.** However, the **bill does not adequately account for the privacy concerns** that make it impossible to release certain data publicly; thus, the Act would appear to prevent EPA from issuing regulations in those circumstances. The bill would also require that the information made public allow "substantial reproduction of research results." H.R. 1430, Sec. 2. This requirement seems likely to create another significant obstacle to environmental regulation because many critical environmental and public health studies may not be reproducible—even though they are considered reliable. The House passed this bill on March 29, 2017, and it is now pending before the Senate.

Looking beyond EPA, the Better Evaluation of Science and Technology Act of 2017 (S. 578) (“BEST Act”) would apply similar principles as those embodied in the HONEST Act to administrative agencies across the federal government.

In addition to these legislative efforts regarding science, it is possible that **similar goals may be pursued through administrative action**. For example, on October 31, EPA Administrator Pruitt issued a directive establishing new policy for EPA’s 22 federal advisory committees. This includes barring any direct recipient of an active agency grant from serving and regularly rotating members. Key committees include the Science Advisory Board (SAB), Clean Air Scientific Advisory Committee (CASAC), and the Board of Scientific Counselors (BOSC). Changes in the membership of these and other advisory boards may be used to achieve changes to agency scientific practices—in addition to any changes that may be mandated by legislation.