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## REGULATORY REFORM IN THE 114<sup>th</sup> AND 115<sup>th</sup> CONGRESSES

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### INTRODUCTION

The election of Donald Trump presents what some see as the potential for a sea change in the American regulatory state, given the emphasis that candidate Trump put on the importance of reducing American businesses' regulatory burdens.<sup>1</sup> Indeed, one of Trump's first actions as president was to issue Executive Order 13771,<sup>2</sup> which created a "one in, two out" requirement for new regulations and imposed caps on the costs new regulations could impose.

At a time when the volume of federal regulations has reached a historic high, proposals to reduce the scope of regulatory burdens are welcome. However, sole reliance on executive orders is unlikely to produce lasting deregulatory change. In our system of separated powers, creating a durable and sustainable deregulatory movement ultimately requires congressional buy-in. Furthermore, congressional involvement

1. Chris Kaufman, "Republican Trump says 70 percent of federal regulations 'can go,'" *Reuters*, Oct. 7, 2016. <http://www.reuters.com/article/us-usa-election-trump-regulations-idUSKCN12629R>.

2. Exec. Order No. 13,771.

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in regulatory-reform efforts can help enhance democratic accountability and good-governance principles.

To better understand what types of regulatory-reform legislation might be helpful in such an effort, it is worthwhile to examine proposals that have been considered in recent congressional sessions. Sorting through these ideas can help to identify the best templates to restore faith in our system of democratic governance and enact durable regulatory change that will last beyond the current administration.

### CONGRESSIONAL INVOLVEMENT TO ENSURE DEMOCRATIC LEGITIMACY

Much ink has been spilled detailing the explosive growth of the modern administrative state. Various studies have estimated the total cumulative cost of federal regulations to be just shy of \$2 trillion.<sup>3</sup> The *Code of Federal Regulations* now totals more than 175,000 pages spread over 236 volumes. It has essentially doubled in size over the past 40 years (in 1975, it sat at just over 71,000 pages and 133 volumes).<sup>4</sup>

This expansion of executive agency activity did not happen by accident. Rather, it was largely the result of Congress' decision to delegate greater and greater swaths of power to federal agencies. Today's executive agencies *legislate* as much as they *execute* the law. Even the U.S. Supreme Court has recognized this reality:

Although modern administrative agencies fit most comfortably within the Executive Branch, as a

3. W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," National Association of Manufacturers, Sep. 10, 2014. <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>; see also Clyde Wayne Crews Jr., "Ten Thousand Commandments," Competitive Enterprise Institute, 2016. <https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202016%20-%20Wayne%20Crews%20-%20May%204%202016.pdf>.

4. Jeff Rosen, "Putting Regulators on a Budget," *National Affairs*, No. 27, Spring 2016. <http://www.nationalaffairs.com/publications/detail/putting-regulators-on-a-budget>.

practical matter they exercise legislative power, by promulgating regulations with the force of law.<sup>5</sup>

But this reality stands in stark contrast with the direct text of the U.S. Constitution. In the very first sentence of the first section of Article I of the Constitution (right after the preamble), the framers declared that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” While the tension between the text and the modern reality raises many far-reaching legal and policy questions, it perhaps most prominently raises concerns about democratic accountability. As the R Street Institute’s Kevin Kosar has noted:

The shift of power to the executive branch has eroded popular sovereignty and accountability, as lawmaking power has moved away from elected officials to anonymous, tenured-for-life bureaucrats. A diminished Congress has led predictably to an executive branch increasingly emboldened to do whatever it pleases.<sup>6</sup>

As a result, frustrated citizens who are upset about a particular agency regulation often lack readily available mechanisms to hold government officials accountable. A lifetime civil servant sitting in an Environmental Protection Agency office may yield enormous influence over environmental regulations, but does not stand for re-election like a congressman.

Thus, even active citizens who are engaged on a particular issue often find themselves powerless to change bad policy decisions. This lack of accountability, in turn, fuels resentment toward government, as evidenced by recent polling showing that only 1-in-5 Americans trusts the federal government.<sup>7</sup> Philip Wallach of the Brookings Institution has summarized the problem as follows:

Where Americans hope to find clear lines of legal authorization and responsibility in the bureaucracy, they instead confront a tangled expanse of agencies and independent commissions with overlapping responsibilities, obscure funding sources, and large portions of government business contracted out in difficult-to-understand ways. The discovery of the divergence between their ideal of lean, clean government and the messy reality leads many Americans to tune out. The few citizens who dutifully dig into the details often end up equally flummoxed by

the confusing lines of responsibility in [the] modern administrative state.<sup>8</sup>

Congress’ delegation of power to federal agencies also lets congressmen themselves off the hook, since they rarely are forced to vote on controversial regulations. A senator can write legislation that dispenses broad agency powers to promulgate regulations, but turn around and publicly decry every action the agency ultimately takes.

Congress is uniquely suited to address democratic legitimacy, given its role as the most democratically accountable branch of government. Greater congressional involvement in the regulatory process would go a long way toward restoring trust in our system of governance.

## CONGRESSIONAL INVOLVEMENT TO SUSTAIN DEREGULATION

Congressional involvement in regulatory reform also is important for more pragmatic reasons. Given the immense growth of the executive branch, it is unsurprising that successive presidential administrations have made attempts to restrain the regulatory state via executive order. In particular, two presidential deregulatory efforts—those by Presidents Ronald Reagan and Barack Obama—demonstrate how executive orders focused on deregulation can prove both transient and ineffective at delivering significant deregulation.

In 1981, as part of his “four pillars” for economic recovery, Reagan issued Executive Order 12291,<sup>9</sup> which established the framework for the Office of Information and Regulatory Affairs to review the substance of all federal agency rules. For “major rules” that had an annual effect on the economy of \$100 million or more, agencies were required to submit Regulatory Impact Analyses to OIRA, describing and identifying the potential costs and benefits of the rule. The order required agencies to demonstrate the benefits of new regulations would outweigh their costs to society, as well as to choose regulatory alternatives that would impose the least net cost to society.

Some scholars have credited EO 12291 with reducing the number of regulations promulgated by federal agencies, at least temporarily.<sup>10</sup> The deregulatory effect of Reagan’s order was particularly salient in certain agencies—for example, more than 40 percent of the rules proposed by the U.S. Labor

5. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013).

6. Kevin R. Kosar, “How to Strengthen Congress,” *National Affairs*, No. 25, Fall 2015. <http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>.

7. “Beyond Distrust: How Americans View Their Government,” Pew Research Center, Nov. 23, 2015. <http://www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/>.

8. Philip Wallach, “The administrative state’s legitimacy crisis,” Brookings Institution, April 2016. [https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis\\_FINAL.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf).

9. Exec. Order 12,291.

10. Clyde Wayne Crews Jr., “Channeling Reagan by Executive Order,” Competitive Enterprise Institute, p. 2, July 14, 2016. <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Channeling%20Reagan%20by%20Executive%20Order.pdf>.

Department from 1981 to 1989 failed to garner OIRA approval on their first try.<sup>11</sup>

But the deregulatory momentum did not last. In 1993, President Bill Clinton replaced EO 12291 with EO 12866.<sup>12</sup> This new order created myriad changes, limiting OIRA's review role to only those rules deemed "significant" (i.e., had an impact on the economy of \$100 million or more) and requiring that any benefits created by new regulations merely "justify" (rather than "outweigh") the costs. These changes led to a decrease in the number of rules OIRA reviewed—from a yearly average of 2,000 to 3,000 to an average of 500 to 700.<sup>13</sup> Partly as a reflection of this policy reversal, issuance of new federal regulations has been on an uninterrupted rise since the 1990s.<sup>14</sup>

The experience of the Reagan years shows that executive orders alone are not sufficient to ensure durable regulatory change.<sup>15</sup> As the Competitive Enterprise Institute's Clyde Wayne Crews put it, "executive actions cannot suffice and more permanent, legislatively instituted reforms are needed."<sup>16</sup> Without congressional action, progress can be reversed at the stroke of a new president's pen.

Changes in presidential leadership aren't the only reason congressional buy-in is crucial to deregulatory efforts. In early 2011, President Obama issued EO 13563,<sup>17</sup> seeking to reduce "redundant, inconsistent, or overlapping" regulations. The order, which built on Clinton's EO 12866, was most noteworthy for requiring agencies to initiate retrospective reviews of their rules and identify the "least costly ways to achieve a regulation's goals."<sup>18</sup> Specifically, agencies were to develop and submit to OIRA preliminary plans to review existing significant regulations periodically and determine whether they should be modified, streamlined, expanded or repealed. The order debuted to much fanfare, with various observ-

ers describing it as "revolutionary" and "unprecedented."<sup>19</sup> Despite these plaudits, its ultimate impact was disappointingly narrow. As Sam Batkins has chronicled, reductions in paperwork hours and costs achieved by the order's retrospective-review requirement frequently have been overwhelmed by concomitant increases in paperwork and costs enacted under the guise of retrospective review.<sup>20</sup> In other words, agencies that engaged in retrospective reviews often used those reviews to *add* regulatory costs, rather than reduce them.

Further, despite an additional executive order<sup>21</sup> that attempted to extend EO 13563's requirements to independent agencies, such agencies mostly failed to submit retrospective-review plans.<sup>22</sup> The general failure of Obama's executive orders to jump-start regulatory reform once again shows the importance of congressional involvement in such efforts. Congressional legislation can help articulate the goals of regulatory reform, as well as to clarify the legal obligations of entities like independent agencies.

President Trump's actions in the regulatory arena have received as much or more fanfare than Reagan's and Obama's, including being dubbed "the most aggressive campaign against government regulation in a generation."<sup>23</sup> Like its predecessors, however, the Trump administration's first deregulatory moves have come by way of executive order, without any apparent attempts to garner congressional buy-in or support. In addition, Trump's two-for-one executive order was rife with uncertainties, ambiguities and questions as to its implementation and possible effect. As drafted, it failed to clarify what type of regulations it would encompass, the agencies to which it would apply or a delineation of how it would define costs.<sup>24</sup> Although many of these initial questions were answered in subsequent guidance,<sup>25</sup> there

11. Murray Weidenbaum, "Regulatory Process Reform from Ford to Clinton," Cato Institute, 1991. <https://object.cato.org/sites/cato.org/files/serials/files/regulation/1991/1/req20n1a.html>.

12. Exec Order 12866.

13. Maeve P. Carey, "The Federal Rulemaking Process: An Overview," Congressional Research Service, RL32240, p. 26, June 17, 2013. <https://fas.org/sgp/crs/misc/RL32240.pdf>.

14. Omar Ahmad Al-Ubaydli and Patrick McLaughlin, "A Numerical Database on Industry-specific Regulations for All U.S. Industries and Federal Regulations, 1997-2012," Mercatus Center, Nov. 12, 2014. <https://www.mercatus.org/publication/regdata-numerical-database-industry-specific-regulations>.

15. Rosen, 2016, p.48.

16. Clyde Wayne Crews Jr., "How President-Elect Donald Trump Can Fast-Track Deregulation and Wealth Creation," *Forbes*, Nov. 9, 2016. <http://www.forbes.com/sites/waynecrews/2016/11/09/how-president-elect-donald-trump-can-fast-track-deregulation-and-wealth-creation/#2d169e4e8a81>.

17. Exec. Order 13563.

18. Michael Greenstone, "The Obama Administration's Regulatory Reform Proposals Will Spur Private Sector Job Growth," Brookings Institution, June 23, 2011. <https://www.brookings.edu/opinions/the-obama-administrations-regulatory-reform-proposals-will-spur-private-sector-job-growth/>; see also Maeve P. Carey, 2013, p. 29.

19. Ibid; see also Cary Coglianese, "Moving Forward with Regulatory Lookback," *Yale Journal on Regulation*, May 9, 2013. <http://valeireg.com/moving-forward-with-regulatory-lookback/>.

20. Sam Batkins, "Three Years of Regulatory Reform: Did the President's Executive Orders Work?" American Action Forum, Jan. 21, 2014. <https://www.americanactionforum.org/insight/three-years-of-regulatory-reform-did-the-presidents-executive-orders-work>.

21. Exec. Order 13579.

22. Ike Brannon and Sam Batkins, "First-Year Grades on Obama Regulatory Reform," *Regulation*, Spring 2012. <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2012/4/v35n1-7.pdf#page=2>.

23. Juliet Eilperin, "Trump undertakes most ambitious regulatory rollback since Reagan," *Washington Post*, Feb. 12, 2017. [https://www.washingtonpost.com/politics/trump-undertakes-most-ambitious-regulatory-rollback-since-reagan/2017/02/12/0337b1f0-efb4-11e6-9662-6eedf1627882\\_story.html?utm\\_term=.c18a046360f9](https://www.washingtonpost.com/politics/trump-undertakes-most-ambitious-regulatory-rollback-since-reagan/2017/02/12/0337b1f0-efb4-11e6-9662-6eedf1627882_story.html?utm_term=.c18a046360f9).

24. Kevin R. Kosar and C. Jarrett Dieterle, "Five big questions about Trump's executive order on regulation," *Politico*, Jan. 31, 2017. <http://www.politico.com/agenda/story/2017/01/five-big-questions-about-trumps-executive-order-on-regulation-000292>.

25. White House, "Reducing Regulation and Controlling Regulatory Costs," Feb. 2, 2017. <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017>.

TABLE I: 114TH CONGRESS REGULATORY-REFORM BILLS.

BILL	COMPANION	STATUS	CO-SPONSORS
U.S. House			
Truth in Regulations Act of 2016 (H.R.6283)	N/A	Introduced	5
Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2016 (H.R.712)	S. 378	Passed House	22
Regulatory Accountability Act of 2015 (H.R.185)	N/A	Passed House	21*
REVIEW Act of 2016 (H.R.3438)	S.1927	Passed House	32
REINS Act of 2015 (H.R.427)	S.226	Passed House	171
SCRUB Act of 2016 (H.R.1155)	S.1683	Passed House	9
Separation of Powers Restoration Act of 2016 (H.R. 4768)	S.2724	Passed House	113
U.S. Senate			
Principled Rulemaking Act of 2015 (S.1818)	N/A	Introduced	3*
RED Tape Act of 2015 (S.1944)	N/A	Introduced	24
Independent Agency Regulatory Analysis Act of 2015 (S.1607)	N/A	Introduced	6*
Article I Regulatory Budget Act of 2016 (S.2982)	H.R.5319	Introduced	2
Smarter Regs Act of 2015 (S.1817)	H.R.5513	Introduced	4*
Regulatory Improvement Act of 2015 (S.708)	H.R. 1407	Introduced	5*

\* Denotes bipartisan co-sponsorship for bill or companion.

remain questions as to the legality of portions of the order, the scale of its potential impact and how legislators view its possible effects.

Even if one were to assume the order ultimately will have significant deregulatory impact, it remains subject to immediate reversal once a new administration takes office. Because of this reality, scholars and commentators long have emphasized the importance of congressional involvement as a prerequisite to enact durable and lasting deregulatory change.<sup>26</sup>

## REGULATORY REFORM IN THE 114<sup>TH</sup> CONGRESS

Having addressed why congressional involvement in regulatory-reform efforts is essential, we turn now to recent regulatory-reform proposals introduced in Congress. The regulatory-reform bills proposed during the 114th Congress, from January 2015 to January 2017, roughly fall into one of two broad categories: those that focused on the process for how new regulations were promulgated and those that proposed mechanisms to review and eliminate existing rules. Many of these bills passed the U.S. House, but as Table 1 shows, none passed the Senate or made it into law.<sup>27</sup>

26. Crews, 2016, “Channeling Reagan by Executive Order,” p.1; Rosen, 2016, p.55. In Canada, which successfully enacted a regulatory-budgeting system as a means to pursue regulatory reform, codification was seen as a key element to ensure deregulatory progress endured even after the election of a new government. See Sean Speer, “Regulatory Budgeting: Lessons from Canada,” R Street Institute, March 2016. <https://www.rstreet.org/wp-content/uploads/2016/03/RSTREET54.pdf>.

27. This paper does not intend to represent an exhaustive list of regulatory-reform proposals considered in the 114<sup>th</sup> and 115<sup>th</sup> Congresses, but rather to analyze the most salient ones. As such, we offer only a selection of the bills under consideration in this area.

## Process-oriented reforms

Among the 114th Congress bills intended to reform the process by which regulations are formulated and enacted was the Truth in Regulations Act,<sup>28</sup> which focused on the issue of guidance documents – informal and putatively nonbinding agency documents that offer interpretations of existing law or clarify legal norms. As the White House Office of Management and Budget has described them, “[g]uidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.”<sup>29</sup>

There have been concerns about potential agency abuse of guidance documents, which often appear to be mandatory and binding legal documents that regulate parties. As legal scholars have noted:

[A] policy or guidance will, in practice, prompt a regulated entity to change its behavior. The document ‘still establishes the law for all those unwilling to pay the expense, or suffer the ill-will of challenging the agency in court.’<sup>30</sup>

28. H.R. 6283, Truth in Regulations Act of 2016. <https://www.congress.gov/bills/114/congress/house-bill/6283>.

29. Office of Management and Budget, Bulletin on Agency Good Guidance Practices, Jan. 25, 2007. [https://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/OMB\\_Bulletin.pdf](https://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/OMB_Bulletin.pdf).

30. Nina A. Mendelson, “Regulatory Beneficiaries and Informal Agency Policymaking,” 92 *Cornell Law Review* p. 397, p. 400, 2007.

Because guidance documents do not go through the ordinary notice-and-comment procedures spelled out by the Administrative Procedure Act, they deprive regulated entities of the opportunity to submit input. This issue has garnered growing bipartisan attention on Capitol Hill.<sup>31</sup>

The Truth in Regulations Act sought to require agencies to develop procedures and standards for issuing “significant” guidance documents, defined as those that have an annual economic effect of at least \$100 million, create a “serious inconsistency” with another agency’s action, materially alter the budget or raise a novel legal or policy issue. The bill would prohibit agencies from using mandatory language in any guidance document—including words such as “shall,” “must” and “required”—and would mandate that agencies provide the public a means to submit comments about such documents.

The Sunshine for Regulations and Regulatory Decrees and Settlements Act<sup>32</sup> tackled similar issues surrounding so-called “sue and settle” procedures. “Sue and settle” occurs when outside groups sue federal agencies—for example, for failing to meet a statutory deadline—and the agencies immediately enter into settlement negotiations with the litigants. Private organizations can use this tactic to steer and control agency policymaking, often with the agency’s encouragement. Agencies may do this in search of a court order that would bind the agency to a predetermined course of action in ways that circumvent the ordinary rulemaking process.<sup>33</sup>

In an effort to discourage this type of backdoor rulemaking, the bill would have required agencies to publish online the notice of the outside group’s intent to sue, as well as the complaint filed in the case. All potentially affected parties would then be afforded the opportunity to intervene in the case. Before any settlement could be finalized, the agreement also would have to be published online and the agency would need to allow public comments. Additionally, agencies would be required to submit annual reports to Congress detailing the number of consent decrees and settlement agreements into which they have entered.

A number of 114<sup>th</sup> Congress bills sought to require more advanced notice and enhanced procedures for the

formulation of major and high-impact rules.<sup>34</sup> For example, the Regulatory Accountability Act<sup>35</sup> would have revised the Administrative Procedure Act to require agencies to consider the legal authority for a proposed rule; the specific nature of the problem to be addressed; whether existing rules have created or contributed to the problem and whether they can be amended or rescinded; any alternatives to the rule; and the costs and benefits of those alternatives. For major and high-impact rules, the bill also would require an “advance” notice of proposed rulemaking<sup>36</sup> to be published 90 days before the traditional notice of proposed rulemaking, and would mandate agency hearings for high-impact rules prior to their adoption.<sup>37</sup>

A more assertive iteration, the REVIEW Act,<sup>38</sup> would have required agencies to postpone the effective date of high-impact rules until all judicial reviews of the regulation were concluded. This would mean that any high-impact rule that sparks a judicial challenge would be prevented from taking effect until all lawsuits had been fully resolved. If no judicial review was sought during the 60-day period provided for initial challenges, the rule would be allowed to take effect.<sup>39</sup>

Another proposal, the Principled Rulemaking Act,<sup>40</sup> sought to require agencies to promulgate only those rules either mandated by law, necessary to interpret a law or necessary to address a public need, such as health and safety. Furthermore, agencies would have been required to assess the significance of the problem they are attempting to address, consider the legal authority for a planned rule, assess regulatory alternatives, design the rule to impose the least possible burden on society and seek to avoid duplicative and inconsistent rules. Notably, the bill would not have applied to guidance documents or policy statements.

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34. For these purposes, “major” is defined as any rule likely to impose an annual economic cost of \$100 million or more; a major increase in costs or prices; significant adverse effects on competition, employment, investment, productivity or innovation; or significant impacts on multiple sectors of the economy. A “high-impact” rule is one likely to have an annual economic cost of \$1 billion or more.

35. H.R. 185, Regulatory Accountability Act of 2015. <https://www.congress.gov/bill/114th-congress/house-bill/185>.

36. Advance notice of proposed rulemaking requires agencies to notify the public the agency may initiate rulemaking in a certain area, as well as requiring them to solicit comments and information about the issues addressed in the advanced notice. See Maeve P. Carey, 2013, p.6 n.18.

37. The Senate considered its own version of the Regulatory Accountability Act, S. 2006, The Early Participation in Regulations Act of 2015. S.1820 also included advanced notice requirements for major rules.

38. H.R. 3438, REVIEW Act of 2016. <https://www.congress.gov/bill/114th-congress/house-bill/3438>

39. S. 1927 was the Senate’s version of the REVIEW Act.

40. S. 1818, Principled Rulemaking Act of 2015. <https://www.congress.gov/bill/114th-congress/senate-bill/1818/text>.

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31. Hearing before the Subcommittee on Regulatory Affairs and Federal Management, U.S. Senate Committee on Homeland Security & Governmental Affairs, “Examining the Use of Agency Regulatory Guidance, Part II,” June 30, 2016. <https://www.hsgac.senate.gov/hearings/examining-the-use-of-agency-regulatory-guidance-part-ii>.

32. H.R. 712, Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2016. <https://www.congress.gov/bill/114th-congress/house-bill/712>.

33. William L. Kovacs, et al., “Sue and Settle: Regulating Behind Closed Doors,” U.S. Chamber of Commerce, p. 11, May 2013. <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.



The RED Tape Act<sup>41</sup> was more aggressive in its efforts to slow the pace of new regulations. It would have allowed agencies to promulgate a “covered rule” (one that creates a new financial or administrative burden on individuals or businesses) only if the agency also repealed one or more existing rules. The cost of the repealed rule would have to be greater than or equal to the cost of the new rule. The bill would have exempted rules that relate to an agency’s internal policies or rules that were revised to become less burdensome, but it would have encompassed guidance documents and policy statements.<sup>42</sup> If this proposal sounds familiar, it’s because President Trump’s EO 13771 instituted a similar “one in, two out” requirement.

The regulatory-reform bill that received perhaps the most attention was the Regulations from the Executive in Need of Scrutiny Act, better known as the REINS Act.<sup>43</sup> The REINS Act would have required both houses of Congress—via a joint resolution of approval—to sign off on any new major rules promulgated by agencies. A major rule was defined to include those with an annual economic effect of \$100 million or more, as well as those that would cause a major price increase for consumers or industries; create significant adverse effects on competition, employment, investment, productivity or innovation; or any rules made under the Patient Protection and Affordable Care Act. The bill would have allowed temporary exemptions for rules the president deemed necessary to address an imminent public safety or health issue, allowing such emergency rules to take effect for 90 days without congressional approval.

Some scholars have claimed the REINS Act conflicts with the Constitution’s separation-of-powers structure, although the most in-depth legal scholarship on the issue suggests it would pass constitutional muster.<sup>44</sup> Both the propriety and potential impact of the REINS Act have sparked debates among policy wonks.<sup>45</sup> Some left-leaning observers have argued the bill would unduly insert Congress and lobbyists into complex issues concerning the environment and public health,<sup>46</sup> while

certain right-leaning observers have argued the bill was under-inclusive, in that it only applied to major rules.<sup>47</sup>

A final process-oriented reform proposal, the Independent Agency Regulatory Analysis Act,<sup>48</sup> sought reforms to independent agencies and regulatory commissions, such as the Securities Exchange Commission or the Consumer Financial Protection Board. Because these agencies operate outside the direct control of the president, some legal scholars have raised constitutional separation-of-powers concerns about their structure.<sup>49</sup> Regardless of their legal merit, independent agencies often lack democratic accountability since their commission members are not at-will appointees and therefore not easily removable by the president. Furthermore, independent agencies have not traditionally been required to comply with the regulatory-analysis requirements that apply to other agencies.

The bill would have allowed the president to require via executive order that independent agencies engage in regulatory analysis and submit—along with a cost-benefit assessment—any economically significant rules (those with an annual economic effect of \$100 million or more) to OIRA for review. This would have meant that, among other things, independent agencies would need to identify the problem their proposed rule sought to address; examine whether existing rules created or contributed to that problem; assess available regulatory alternatives; and design the rule in the most cost-effective manner possible and in a way that would impose the least burden on society.

## Retrospective review and rule reduction

The other grouping of significant regulatory-reform bills in the 114th Congress focused on methods to review, evaluate, curtail or eliminate unnecessary and burdensome regulations, though often through quite different proposed means.

Sen. Mike Lee, R-Utah, garnered headlines for introducing the Article I Regulatory Budget Act,<sup>50</sup> which would have imposed a “regulatory budget” on federal agencies. The budget would set limits on the regulatory costs that agencies could impose on individuals and businesses each year, similar to a scheme successfully implemented in Canada.<sup>51</sup>

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41. S. 1944, RED Tape Act of 2015. <https://www.congress.gov/bill/114th-congress/senate-bill/1944/all-info>.

42. Clyde Wayne Crews, “Regulations Endanger Democracy,” Competitive Enterprise Institute, Aug. 11, 2015. <https://cei.org/blog/regulations-endanger-democracy>.

43. H.R. 427, Regulations from the Executive in Need of Scrutiny Act of 2015. <https://www.congress.gov/bill/114th-congress/house-bill/427>. The Senate version of the REINS Act is S. 226.

44. Jonathan H. Adler, “Placing ‘REINS’ on Regulations: Assessing the Proposed REINS Act,” 16 *N.Y.U. Journal of Legislation & Public Policy*, 1, 2013.

45. Kevin R. Kosar and Andrew Rudalevige, “Should Congress have to approve every federal regulation? A debate,” Washington Post, Feb. 2, 2017. [https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/02/should-congress-have-to-approve-every-federal-regulation-a-debate/?utm\\_term=.afef40ffbae6](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/02/should-congress-have-to-approve-every-federal-regulation-a-debate/?utm_term=.afef40ffbae6).

46. Alison Cassady, “The REINS Act: Handing the reins of public health and safety over to big corporations,” Center for American Progress, Jan. 4, 2017. <https://www.americanprogress.org/issues/ext/2017/01/04/295890/the-reins-act-handing-the-reins-of-public-health-and-safety-over-to-big-corporations/>.

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47. Dave Boyer, “Senate moves to rein in regulations, looks to give Congress vote,” *Washington Times*, Nov. 15, 2016. <http://www.washingtontimes.com/news/2016/nov/15/senate-moves-to-rein-in-regulations/>.

48. S. 1607, Independent Agency Regulatory Analysis Act of 2015. <https://www.congress.gov/bill/114th-congress/senate-bill/1607/all-info>.

49. Joseph Postell, “From Administrative State to Constitutional Government,” Heritage Foundation, Dec. 14, 2012. <http://www.heritage.org/political-process/report/administrative-state-constitutional-government>.

50. S. 2982, Article I Regulatory Budget Act of 2016. <https://www.congress.gov/bill/114th-congress/senate-bill/2982>. H.R. 5319 was the companion House bill.

51. Speer, 2016.

Among the benefits of a regulatory budget is that it creates transparency about the costs of regulations and fosters greater appreciation of the trade-offs and unintended consequences caused by regulatory action.<sup>52</sup>

Early U.S. prototypes of regulatory-budgeting regimes appeared as early as the Carter administration, but the idea has gained particular traction since President Trump's EO 13771, which mandates a type of regulatory budget for agencies going forward. Like other regulatory-reform efforts initiated by the executive branch, congressional buy-in likely would prove vital to sustain a long-term regulatory-budgeting regime. Furthermore, as the most democratically accountable branch of government—and the one responsible for setting the fiscal budget—it would be best to task Congress with responsibility to set the regulatory cost caps for each agency.<sup>53</sup>

The Regulatory Budget Act would have accomplished these goals by amending the Congressional Budget Act of 1974 to require Congress to vote on the total regulatory costs each federal agency could impose on business and individuals. The bill also would have created enforcement mechanisms to ensure that agencies adhered to their budget limits, including allowing points of order to be raised against legislation that ran afoul of the budget caps; creating private rights of action in federal court against agencies that violate their limits; and establishing requirements that appropriations legislation contain enforcement mechanisms.

Notably, the bill also would have prohibited agencies from issuing “significant guidance documents” unless they had gone through notice-and-comment procedures. “Significant” guidance documents would be defined as those with an economic effect of more than \$100 million; those that raise a serious inconsistency with the action of another agency; those that materially alter the budgetary impact of entitlements; or those that raise novel policy and legal issues.

Other attempts to reduce regulatory burdens used different means, such as retrospective reviews of already-entrenched regulations. The Smarter Regs Act,<sup>54</sup> for example, would have required agencies promulgating a major rule (annual economic effect of \$100 million) to set out the objectives of the rule and a plan to review the rule within 10 years to assess whether it had accomplished its objectives and at what cost. Specifically, the bill would have required a clear statement of the rule's objectives (including an estimate of cost-benefits);

the methodology and metrics by which the agency would analyze the rule; a plan for gathering data on such metrics; and a time frame to conduct an assessment of the rule. In conducting its review, the agency would need to compare how actual costs and benefits compared to initial estimates, determine whether the regulation accomplishes its objective and whether there are similarly effective but less costly alternatives. While these reviews would be conducted by individual agencies, OIRA would have been tasked with overseeing the process.

A more comprehensive approach, applied to more than just newly issued major rules, was proposed by the Searching for and Cutting Regulations that are Unnecessarily Burdensome Act, better known as the SCRUB Act.<sup>55</sup> The SCRUB Act would have established a regulatory review commission to survey the *Federal Code of Regulations* for rules that should be eliminated. Rules that were 15 years and older would receive priority, with a goal to reduce the cumulative cost of regulation by more than 15 percent, without sacrificing effectiveness. The commission's recommendations would have to be approved by Congress to take effect. Further, if an agency proposed a new rule, it would be required to repeal rules targeted by the commission for elimination to offset any costs of the new rule.

The Regulatory Improvement Act<sup>56</sup> also proposed a commission that would make recommendations to modify or repeal regulations finalized more than 10 years ago. Priority would be given to review regulations that disproportionately affected smaller entities, created substantial paperwork costs or that could reduce costs without sacrificing effectiveness.

The use of commissions to review and suggest regulations for repeal are similar in character to the Base Realignment and Closure (BRAC) commission employed in the late 1980s and 1990s to close excess military bases.<sup>57</sup> Other legislative reforms have been floated that, instead of using commissions, would have tasked agencies themselves with reviewing certain rules in order to modify or eliminate them.<sup>58</sup>

Finally, the Separation of Powers Restoration Act<sup>59</sup> sought to address another issue: the level of deference the federal judiciary is required to give agency interpretations of statutes. Under current judicial doctrine, federal judges must grant

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52. Rosen, 2016.

53. C. Jarrett Dieterle, “Lessons from the godfather of regulatory budgeting,” *The Hill*, Feb. 23, 2017. <http://thehill.com/blogs/pundits-blog/economy-budget/320800-lessons-from-the-godfather-of-regulatory-budgeting>.

54. S. 1817, Smarter Regs Act of 2015. <https://www.congress.gov/bill/114th-congress/senate-bill/1817>.

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55. H.R. 1155, SCRUB Act of 2016. <https://www.congress.gov/bill/114th-congress/house-bill/1155>.

56. S. 708, Regulatory Improvement Act of 2015. <https://www.congress.gov/bill/114th-congress/senate-bill/708>.

57. Kevin R. Kosar, “Mr. Smith takes on the regulatory state,” R Street Institute, Jan. 8, 2016. <http://www.rstreet.org/2016/01/08/mr-smith-takes-on-the-regulatory-state/>.

58. For example, the Regulatory Review and Sunset Act of 2015, H.R. 2010 and S. 1067.

59. H.R. 4768, Separation of Powers Restoration Act of 2016. <https://www.congress.gov/bill/114th-congress/house-bill/4768>.

broad latitude to agency interpretations of statutes under their jurisdiction. In effect, this means that, unless an agency’s interpretation of a statute is unreasonable, courts must adhere to it. Unsurprisingly, this allows agencies significant leeway to exercise their regulatory powers.

This level of deference to agency interpretations—known in the legal community as *Chevron* deference, after the landmark Supreme Court case—has become contentious. There continues to be an ongoing debate among judges, legal scholars and practitioners about the propriety of according federal agencies such broad deference.<sup>60</sup> Partially in response to this debate, Congress has begun to consider legislation like the Separation of Powers Restoration Act, which would modify the scope of judicial review of agency actions and allow courts to review agency actions *de novo* (“from the beginning”) and without *Chevron* deference. This change would empower courts to overturn existing agency decisions and interpretations more readily.

## REGULATORY REFORM IN THE 115<sup>TH</sup> CONGRESS

None of the 114<sup>th</sup> Congress’ regulatory-reform proposals ultimately made it to the president’s desk to become law. However, numerous regulatory-reform proposals from the 114<sup>th</sup> Congress already have been re-introduced in the 115<sup>th</sup> Congress, with some already passed by the U.S. House. These include new versions of the REINS Act,<sup>61</sup> SCRUB Act<sup>62</sup> and the Regulatory Accountability Act. The new version of the Regulatory Accountability Act also incorporates the text from several other reform bills, including the previously mentioned Separation of Powers Act and the REVIEW Act.<sup>63</sup> The House also has passed a new regulatory-reform bill that would codify OIRA’s review process, currently conducted

pursuant to EO 12668, thereby providing a durable statutory grounding for centralized review.<sup>64</sup>

Other bills from the 114<sup>th</sup> Congress that have been reintro-

60. Jonathan Adler, “Should Chevron be reconsidered? A federal judge thinks so,” *Washington Post*, Aug. 24, 2016. [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/24/should-chevron-be-reconsidered-a-federal-judge-thinks-so/?utm\\_term=.5a2a2bca006b](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/24/should-chevron-be-reconsidered-a-federal-judge-thinks-so/?utm_term=.5a2a2bca006b); see also Adam J. White, “Reforming Administrative Law to Reflect Administrative Reality,” *National Affairs: Unleashing Opportunity*, pp.76-79, Jan. 11, 2017. [http://www.nationalaffairs.com/docLib/20170111\\_Booklet2\\_WebBook.pdf](http://www.nationalaffairs.com/docLib/20170111_Booklet2_WebBook.pdf); and Philip Hamburger, “Chevron Bias,” 84 *Geo. Wash. L. Rev.* 1187, 2016. [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2477641](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2477641).

61. H.R. 26, Regulations from the Executive in Need of Scrutiny Act of 2017. <https://www.congress.gov/bill/115th-congress/house-bill/26>.

62. H.R. 998, SCRUB Act. <https://www.congress.gov/bill/115th-congress/house-bill/998>.

63. H.R. 5, Regulatory Accountability Act of 2017. <https://www.congress.gov/bill/115th-congress/house-bill/5>; see also Ryan Young, “Regulatory Reform in 2017: REINS and the Regulatory Accountability Act,” *Competitive Enterprise Institute*, Jan. 6, 2017. <https://cei.org/blog/regulatory-reform-2017-reins-and-regulatory-accountability-act>.

64. H.R. 1009, OIRA Insight, Reform, and Accountability Act. <https://www.congress.gov/bill/115th-congress/house-bill/1009>.

duced in the House or Senate but, as of this writing, not been passed by either chamber include the Truth in Regulations Act<sup>65</sup> and RED Tape Act<sup>66</sup> in the Senate, and the Sunshine for Regulations and Regulatory Decrees and Settlements Act<sup>67</sup> and Regulatory Improvement Act<sup>68</sup> in the House.

TABLE 2: 115<sup>TH</sup> CONGRESS REGULATORY-REFORM BILLS

Bills	Companion	Status (as of 4/3/17)	Co-sponsors
U.S. House			
Regulatory Accountability Act of 2017 (H.R.5) <sup>†</sup>	S.577, S.584	Passed House	25*
REINS Act of 2017 (H.R.26)	S.21	Passed House	160
SCRUB Act (H.R.998)	N/A	Passed House	3
OIRA Insight, Reform, and Accountability Act (H.R.1009)	N/A	Passed House	4
Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017 (H.R.469)	S.119	Introduced	18
Regulatory Improvement Act of 2017 (H.R. 978)	N/A	Introduced	8*
U.S. Senate			
Truth in Regulations Act of 2017 (S.580)	N/A	Introduced	0
RED Tape Act of 2017 (S.56)	N/A	Introduced	17

\* Denotes bipartisan co-sponsorship for bill or companion bill.

<sup>†</sup> The 115<sup>th</sup> Congress’ version of the Regulatory Accountability Act is an aggregation of regulatory reform bills that includes versions of the Separation of Powers Act and the REVIEW Act.

EO 13771—establishing the “one-in, two-out” system, in addition to imposing a regulatory budget—also could spur congressional action. Sen. Mike Lee, R-Utah, introduced legislation in the 114<sup>th</sup> Congress to create a regulatory-budgeting regime and could do so again. Notably, both the Senate and House have held hearings and published white papers on regulatory budgeting, and language supporting a regulatory budget was included in House Republicans’ “A Better Way”

65. S. 580, Truth in Regulations Act of 2017. <https://www.congress.gov/bill/115th-congress/senate-bill/580/text>.

66. S. 56, RED Tape Act of 2017. <https://www.congress.gov/bill/115th-congress/senate-bill/56/cosponsors>.

67. H.R. 469, Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017. <https://www.congress.gov/bill/115th-congress/house-bill/469>.

68. H.R. 978, Regulatory Improvement Act of 2017. <https://www.congress.gov/bill/115th-congress/house-bill/978>.



task-force recommendations.<sup>69</sup> Although many observers are pessimistic about Congress enacting such a budget, one regulatory-budgeting expert predicted that successful implementation of regulatory budgeting by the current administration would be a catalyst for Congress to get involved.<sup>70</sup>

It's ultimately unclear which, if any, of these regulatory-reform bills might pass the 115th Congress. As yet, none have been considered by the Senate, although the upper house is expected to take up the subject of regulatory reform at some point in the session. Because such legislation would need 60 votes to clear a Senate filibuster, any regulatory-reform proposal would need bipartisan support to be enacted.

There has been some bipartisan engagement on several of the regulatory-reform bills discussed in this paper, as can be seen in Tables 1 and 2. Perhaps most prominently, Sens. James Lankford, R-Okla., and Heidi Heitkamp, D-N.D.—both members of the Senate Homeland Security and Governmental Affairs Committee—co-sponsored several reform proposals in the 114th Congress, including the Principled Rule-making Act and the Smarter Regs Act.<sup>71</sup> Both also plan to re-introduce these bills in the 115th Congress.<sup>72</sup> Such cooperation could potentially provide a path for regulatory-reform legislation to clear the Senate.

Finally, it's worth noting that the 115th Congress has been proactive in its early days in targeting regulations promulgated over the final six months of the Obama administration by using the Congressional Review Act.<sup>73</sup> While the CRA is not a comprehensive regulatory-reform tool, its increased use shows its potential to roll back a limited set of regulations. There has also been recent legal scholarship suggesting the CRA's potential to reach back much further in time to repeal

previously enacted regulations—a potential development that could be worth watching.<sup>74</sup>

## CONCLUSION

There remains considerable uncertainty as to whether Congress will pass significant regulatory-reform legislation this session. Many of the reform proposals reviewed in this paper have their adherents and several are uniquely suited to address the dual issues of democratic accountability and deregulatory sustainability.

In restoring democratic accountability to our system of government, the REINS Act could be particularly valuable. Because the REINS Act would force Congress to vote up or down on the largest regulatory actions, congressmen would be answerable to voters who either favored a regulation that Congress failed to approve or disfavored a regulation that Congress did approve.<sup>75</sup> The SCRUB Act could play a similar role for already-enacted regulations, forcing Congress to vote on whether to approve a commission's recommendations about regulations that should be repealed.

In locking in sustainable deregulatory change, all of the legislative proposals discussed here could be helpful. Sen. Lee's Article I Regulation Budget Act would be particularly useful to cement a regulatory-budgeting process into law. This would prevent future presidents from simply undoing EO 13371 with a new executive order.

Finally, it bears noting that, while many of the bills discussed in this paper would be a welcome down payment on comprehensive reform, none by themselves will be sufficient to curb the growth of the regulatory state. One concern with the regulatory-reform proposals discussed here is that they all focus on outputs. They target already-existing rules or the process by which new regulations are enacted. In other words, they mostly seek to address regulations at the end of the process, rather than at the input phase.

Input-focused reforms would need to address the organic statutes that created agencies and authorized them to take certain kinds of actions. Such statutes have delegated broad powers to agencies and essentially abdicated Congress' role in rulemaking. To truly cut back on regulatory growth, Congress should consider revisiting the inputs as well as the outputs. To be sure, doing so likely would be even more

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69. Sen. Mike Lee, et al., "Leashing Leviathan: The Case for a Congressional Regulatory Budget," Article I Project Policy Brief, No. 3, May 25, 2016. <https://www.scribd.com/doc/313787922/AIP-Issue-No-3-Leashing-Leviathan-The-Case-for-a-Congressional-Regulatory-Budget>; see also U.S. House of Representatives Committee on the Budget, "Congressional Budgeting: Introduction to a Regulatory Budget", Working Paper, Sept. 8, 2016. <http://budget.house.gov/uploadedfiles/06-bpr-regulatorybudgeting-090816.pdf>; and "A Better Way: Our Vision for a Confident America," June 14, 2016. [http://abetterway.speaker.gov/\\_assets/pdf/ABetterWay-Economy-PolicyPaper.pdf](http://abetterway.speaker.gov/_assets/pdf/ABetterWay-Economy-PolicyPaper.pdf).

70. C. Jarrett Dieterle, "Lessons from the godfather of regulatory budgeting," *The Hill*, Feb. 23, 2017. <http://thehill.com/blogs/pundits-blog/economy-budget/320800-lessons-from-the-godfather-of-regulatory-budgeting>.

71. Press release, "Senators Heitkamp, Lankford Bipartisan Regulatory Improvement Bills Pass Committee," Office of Sen. Heitkamp, Oct. 7, 2015. <https://www.heitkamp.senate.gov/public/index.cfm/2015/10/senators-heitkamp-lankford-bipartisan-regulatory-improvement-bills-pass-committee>. Sens. Lankford and Heitkamp also co-sponsored the Early Participation in Regulations Act (S. 1820).

72. Tim Devaney, "Trump puts Obama regulations on the chopping block," *The Hill*, Jan. 31, 2017. <http://thehill.com/regulation/316980-trump-puts-obama-regulations-on-the-chopping-block>. Sen. Lankford recently introduced a package of "regulatory improvement bills" that included the Early Participation in Regulations Act of 2017 (S.579), which was again co-sponsored by Sen. Heitkamp.

73. C. Jarrett Dieterle, "Republicans Could Have a Regulatory 'Game Changer' on Their Hands," *Weekly Standard*, Feb. 7, 2017. <http://www.weeklystandard.com/republicans-could-have-a-regulatory-game-changer-on-their-hands/article/2006716>.

74. Paul J. Larkin, "The Reach of the Congressional Review Act," Heritage Foundation, Legal Memorandum No. 201, Feb. 8, 2017. [http://www.heritage.org/sites/default/files/2017-02/LM-201\\_1.pdf](http://www.heritage.org/sites/default/files/2017-02/LM-201_1.pdf); see also RedTapeRollback.com, a Project of the Pacific Legal Foundation.

75. Kevin R. Kosar, "5 reasons to support the REINS Act," R Street Institute, July 28, 2015. <http://www.rstreet.org/2015/07/28/5-reasons-to-support-the-reins-act/>; see also Cameron Smith, "The REINS Act: Increasing the accountability of our elected officials," *Forbes*, Jan. 12, 2015. <https://www.forbes.com/sites/realspin/2015/01/12/the-reins-act-increasing-the-accountability-of-our-elected-officials/#8e3d57a63f93>.

politically contentious than the output-focused reforms discussed in this paper.

For the first time in several years, our government is facing what might be described as a potential “deregulatory moment.” In order to create enduring change, it is important for Congress to become involved and codify durable reforms that supplement and extend executive actions. Doing so would also help enhance trust in government by restoring more democratic accountability to the process. While congressional action may seem unlikely in today’s politicized and polarized environment, the current Congress has many templates and ideas upon which it can draw.

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