Legal Sidebar

Administrative Law Reform Legislation in the 116th Congress

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Congress has broad authority to define and prescribe the powers and responsibilities of federal agencies. Typically, an agency may carry out its congressionally prescribed responsibilities in a number of ways, including through issuing binding regulations and adjudicative orders, and through providing nonbinding oral or written guidance to stakeholders and the public. And Congress may, within constitutional bounds, alter agencies' powers and responsibilities as it deems appropriate.

The 116th Congress has considered numerous legislative proposals to alter the administrative rulemaking process or the way those rules may be reviewed by courts and the legislative branch. Some proposals would modify the rulemaking procedures of the Administrative Procedure Act (APA), including to require, in certain situations, trial-type, evidentiary hearings on specific types of rules. Others would increase congressional involvement in agency rulemaking by, for example, requiring legislative approval of certain rules before they may go into effect. And still other proposals would change the scope of federal courts' review of agency legal interpretations by altering or eliminating judicial deference doctrines. These categories of proposals are discussed in more detail below.

Not every bill in the 116th Congress touching upon administrative law issues is identified in this Sidebar, particularly those that do not seek to alter the agency-rulemaking process government-wide or modify judicial oversight of agency legal interpretations. For example, this Sidebar does not address those bills that would authorize or require White House review of certain actions of independent regulatory agencies; impose requirements only on specific agencies; primarily affect budgetary and appropriations matters; or, with the exception of the Congressional Review Act (CRA), amend more specialized or particular administrative law statutes such as the Freedom of Information Act, Federal Advisory Committee Act, Regulatory Flexibility Act, or Unfunded Mandates Reform Act. These bills may be discussed in other CRS products.

Proposals to Amend the APA's Rulemaking Procedures

Several bills aim to increase transparency and public accountability by altering how agencies promulgate regulations under the APA. The APA prescribes default procedures that an "agency" must follow when developing and issuing rules with the force and effect of law. An agency generally must publish a notice of proposed rulemaking in the *Federal Register* and afford members of the public an opportunity to

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submit comments on the proposal. The "agency must consider and respond to significant comments received during the period for public comment." And an agency must include in its final rule "a concise general statement of [its] basis and purpose." A rule issued under these procedures generally takes effect no earlier than 30 days thereafter. This process is known as *informal* or *notice-and-comment* rulemaking.

Some bills that would amend the APA's rulemaking provisions are relatively modest in scope and directed at discrete aspects of the rulemaking process. For example, S. 395, Providing Accountability Through Transparency Act of 2019, passed by the Senate in June 2019, would amend the APA to require that agencies include in each notice of proposed rulemaking a citation to a page on *regulations.gov* containing a plain-language summary of the proposal in no more than 100 words. (A nearly identical companion bill was introduced in the House in February 2019.)

Another bill, S. 1419, Early Participation in Regulations Act of 2019, which was reported out of the Senate Committee on Homeland Security and Governmental Affairs (HSGAC) in September 2019, would amend the APA to require that, with some exceptions, an agency publish an advance notice of proposed rulemaking (ANPRM) 90 days before publishing in the *Federal Register* a notice of proposed rulemaking for a "major rule." (The bill employs a similar definition of "major rule" as the CRA.) Agencies would have to provide at least a 30-day period for public comment on the ANPRM. The APA currently does not mention ANPRMs, nor does it mandate a minimum comment period for rulemakings.

Other reform proposals in this category focus on broad reform efforts or would impose more extensive changes to the rulemaking process. S. 1420, Setting Manageable Analysis Requirements in Text Act of 2019, for example, which was reported out of HSGAC in July 2019, would amend the APA to require that agencies engage in retrospective review of most "major rules" (i.e., examine such rules after they have been issued) to determine, among other things, whether the rules are achieving their regulatory objectives. And H.R. 3449, introduced in June 2019, would amend the APA to require that an agency's notice of proposed rulemaking for a new rule identify two rules that the agency intends on repealing, unless the agency is engaging in rulemaking for a new rule that is statutorily required.

S. 3208, introduced in January 2020, is more wide-ranging than the bills discussed above. The latest iteration of the Regulatory Review Act (RAA), some form of which has been introduced in Congress since 2011, S. 3208 would amend numerous aspects of the APA's rulemaking (as well as judicial review) provisions. For example, S. 3208 would direct agencies to include "all studies, models, scientific literature, and other information developed or relied upon by the agency" on rulemaking dockets. This requirement would codify a judicially established doctrine that some jurists and commentators have criticized for lacking a sufficient basis in the APA. S. 3208 would also authorize parties to petition an agency to hold trial-type, evidentiary proceedings for proposed "high-impact rules," which it defines as rules that the OIRA Administrator determines will likely have an annual economic impact of at least $500 million. While there has been little commentary on the 2020 RAA, commentators debated the propriety of a number of provisions contained in prior RAAs, including those that, like the current bill, would authorize or require the use of trial-type proceedings for certain proposed rules that would be akin to (or directly incorporate) the APA's *formal rulemaking* procedures.

Proposals to Increase Congressional Oversight of Rules

Several bills in the 116th Congress would alter the congressional role in the rulemaking process. Congress can exert a significant amount of control over the substance of agency rulemakings and other actions. As a general matter, the authority Congress delegates to an agency—including the authority to issue binding regulations—can be modified at any time by Congress via statute. Likewise, Congress can reverse agency regulations through the enactment of ordinary legislation. But Congress can oversee or exert control over agency rulemakings in other ways, too. For example, under the CRA, an agency must submit a rule to Congress before it may go into effect and Congress can use special, fast-track procedures to consider a

joint resolution of disapproval of an agency rule, which, if enacted, would prevent the rule from taking or continuing to have effect. An agency is prohibited from reissuing a rejected rule "in substantially the same form" or issuing "a new rule that is substantially the same" unless "specifically authorized" to do so by a subsequently enacted law.

Several bills would increase congressional oversight of agency rulemakings, including through changes to the CRA. For example, H.R. 3972 and S. 92 are the latest iterations of the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would amend the CRA in critical respects. The bills' most significant changes to the CRA concern their treatment of "major rules." Under the current version of the CRA, any rule—major or not—will not take effect if a joint resolution of disapproval is enacted. But under the REINS Act, a major rule would not take effect unless a joint resolution of *approval* is enacted. This would be a significant change to the current CRA process. If enacted, the REINS Act could potentially incentivize agencies to craft regulations, particularly "major" ones, in accordance with known congressional preferences, as congressional inaction would be sufficient to block a major rule. A joint resolution of disapproval would still be available to block all other, "nonmajor" rules. (Another proposal, H.R. 903, Sunset Act of 2019, would require enactment of a joint resolution of approval before *any* covered rule can become effective. H.R. 903 does not distinguish between major and nonmajor rules.)

Some bills would similarly create specific oversight mechanisms by which Congress could channel its authority over agency rules. H.R. 903, for example, would provide that rules would become ineffective 10 years after congressional approval (or 10 years after their extension by a joint resolution of approval). And H.R. 3617, the latest version of the Article I Restoration Act introduced in recent Congresses, would provide that covered agency rules become ineffective after three years "unless specifically reauthorized by an Act of Congress." H.R. 3617 would allow agencies to seek congressional reauthorization within a specified period of time. By conditioning the long-term existence of covered rules on congressional approval, the bill could lead agencies to give considerable attention to the continued need for certain regulatory initiatives and programs, as well as congressional support for such rules.

Another proposal, H.R. 395, Preventing Overreach Within the Executive Rulemaking System (POWERS) Act of 2019, would require that agencies refrain from issuing a final rule for at least 60 days from the date they publish a notice of proposed rulemaking for the rule, and directs agencies to respond to comments submitted by certain congressional committees during that time period.

Proposals to Alter the Scope of Judicial Review of Agency Legal Interpretations

Some Members introduced bills that would alter deference standards federal courts employ when reviewing certain agency legal interpretations. Federal courts are authorized to review the legality of federal agency actions in a variety of contexts, and the Supreme Court has established several doctrines that guide judicial review in these cases. One of the most well-known of these doctrines is the *Chevron* doctrine—named after the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* *Chevron* generally instructs courts to defer to an agency's reasonable interpretation of an ambiguous statute it administers. The related *Auer* or *Seminole Rock* doctrine, named after the Court's opinions in *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, generally instructs courts to defer to an agency's reasonable interpretation of an ambiguous regulation (as opposed to statute). If neither *Chevron* nor *Auer* deference applies, the High Court's 1944 decision *Skidmore v. Swift & Co.* instructs lower courts to still give an agency's legal interpretation some level of deference consistent with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."

In recent years, many commentators, lower federal court judges, and even some Justices of the Supreme Court have criticized the *Chevron* and *Auer* doctrines on a variety of constitutional and statutory bases.

Some Members of Congress who share similar views frequently have introduced legislation to overturn the deference doctrines by requiring courts to review agency action "de novo"—i.e., "anew, . . . as if no decision [below] previously had been rendered." H.R. 1927 and S. 909, the newest iterations of the oft-introduced Separations of Powers Restoration Act (SOPRA), would amend the APA's judicial review provisions by directing reviewing courts to "decide de novo relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies." Both bills further state that the de novo standard would apply to actions reviewed under any statute—not just the APA. The bills would seem to significantly constrain or perhaps even prohibit courts from according *Chevron* and *Auer* deference to agency statutory and regulatory interpretations, respectively, although some commentators question the effectiveness of such an approach.

SOPRA is not the only attempt by Members of the 116th Congress to limit the breadth of judicial deference to agency legal interpretations. The RAA (discussed above) would amend the APA to provide that courts should give weight to agency interpretations of their own rules according to "the thoroughness evident in the consideration of the rule by the agency, the validity of the reasoning of the agency, and the consistency of the interpretation with earlier and later pronouncements." This provision would seemingly replace *Auer* with *Skidmore* deference, or something akin to it, in judicial review of agency regulatory interpretations. But the proposed amendment does not mirror completely the deferential standard set forth in *Skidmore*, omitting reference to the Court's broader observation that deference may be given to an agency's interpretation based on "all those factors which give it power to persuade." This difference may call into question whether the RAA is intended to limit judicial review of agency regulatory interpretations only to consideration of the thoroughness, validity, and consistency factors, and not any of the other factors identified by courts applying *Skidmore*.

Conclusion

Like the 115th Congress, the 116th Congress has for its consideration many proposals to reform the administrative state, both through modest amendments to procedural requirements and more wide-ranging or substantive changes to the regulatory process and judicial review of agency action. Assuming Congress does not pursue any major legislative efforts in this area prior to the beginning of the 117th Congress next January, many of the same bills or variations thereof may be introduced in the next Congress. Whether the Members of the next Congress will share a similar desire for reform as shown by some Members of the 116th Congress remains to be seen and may hinge on a variety of factors, including how the division of power is shared between the House of Representatives, Senate, and President, and whether new regulatory or other policies pursued by the executive branch prompt questions from Congress about whether administrative agencies are appropriately carrying out their congressionally prescribed powers and responsibilities.

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