

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 1269 Regulation Freedom Amendment

SPONSOR(S): Raulerson and others

TIED BILLS: None **IDEN./SIM. BILLS:** None

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--------------------------------------|-----------|---------|--|
| 1) Local & Federal Affairs Committee | 10 Y, 5 N | Renner | Kiner |
| 2) Judiciary Committee | 13 Y, 4 N | Patton | Havlicak |

SUMMARY ANALYSIS

Article V of the U.S. Constitution prescribes two methods for amending the Constitution. One method is for both houses of Congress, by two-thirds vote, to propose an amendment that becomes effective when ratified by three-fourths of the states (38 states). All 27 amendments to the Constitution were adopted through this procedure.

The other method, which has never been used, requires Congress to call a constitutional convention (Article V convention) to propose amendments when two-thirds of the states (34 states) apply for such a convention. These proposed amendments would require approval of three-fourths of the states in order to be ratified.

HM 1269 petitions the U.S. Congress to propose to the states an amendment to the U.S. Constitution entitled the "Regulation Freedom Amendment." The amendment would require the House and Senate to adopt proposed federal regulations by majority vote, whenever one quarter of either body objects to the proposed regulation.

Legislative memorials are not subject to the Governor's veto power and are not presented to the Governor for review. Memorials have no force of law—they are mechanisms for formally petitioning the U.S. Congress to act on a particular subject.

This memorial does not have a fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Methods of Amending the U.S. Constitution

Article V of the U.S. Constitution prescribes two methods for amending the Constitution. One method is for Congress to propose an amendment that is ratified by the states. All 27 amendments to the Constitution were adopted through this procedure. The other method, which has never been used, is for states to apply for a constitutional convention that proposes amendments.¹

Congressional Amendments

Congress, by a two-thirds vote in both houses, may propose a constitutional amendment in the form of a joint resolution. After Congress proposes an amendment, the Archivist of the U.S. is responsible for administering the ratification process.² Since the President does not have a constitutional role in the amendment process, the joint resolution does not go to the White House for signature or approval. The Office of the Federal Register (OFR) assembles an information package for the states which includes copies of the joint resolution and the statutory procedure for ratification under 1 U.S.C. 106b.³ The Archivist submits the proposed amendment to the states for their consideration by sending a letter of notification and the OFR informational material to each governor. The governors then formally submit the amendment to their state legislatures.⁴

When a state ratifies a proposed amendment, it sends a certified copy of the state action to the Archivist. A proposed amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states (38 states). The OFR verifies the ratification documents and drafts a formal proclamation for the Archivist to certify that the amendment is valid and has become part of the U.S. Constitution. This certification is published in the Federal Register and U.S. Statutes at Large and serves as official notice that the amendment process has been completed.⁵

Since 1789, Congress has proposed 33 amendments by this method, 27 of which have been adopted.⁶

Constitutional Convention Amendments

A constitutional amendment may also be proposed by a constitutional convention (Article V convention) applied for by two-thirds of the state legislatures (34 states). This method has never been used. If 34 states apply, Congress must call an Article V convention to consider and propose amendments. These proposed amendments must be ratified by three-fourths of the states (38 states). Records of the Philadelphia Convention of 1787 indicate that the founders intended to balance Congress's amendatory power by providing the Article V convention method to empower the people to propose amendments. Article V identifies these methods as equal and requires the same ratification for all proposed amendments.⁷

Though the specific procedures for an Article V convention are not specified in the Constitution, Congress has historically taken on broad responsibilities in connection with a convention by administering state applications, establishing procedures to summon a convention, setting the amount

¹ Erwin Chemerinsky, *Constitutional Law*, pg. 6 (3rd ed. 2006).

² 1 U.S.C. 106b.

³ *The Constitutional Amendment Process*, U.S. National Archives and Records Administration, <http://www.archives.gov/federal-register/constitution/> (last visited March 27, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2.

of time allotted to its deliberations, determining the number and selection process of its delegates, setting internal convention procedures, and providing arrangement for the formal transmission of any proposed amendments to the states.⁸

Although never used in full, this method has been a useful tool to provoke congressional action. The most successful incidence of using the threat of a constitutional convention to induce change was the movement for the direct election of Senators, which prodded Congress to propose the 17th Amendment.⁹

Federal Administrative Law

The scope of the federal administrative state expanded greatly during the 20th century. In the 1930's, President Franklin Delano Roosevelt's New Deal programs designed to combat the Great Depression led to the creation of a wave of new administrative agencies such as the National Labor Relations Board, the Securities and Exchange Commission, the Social Security Administration, the Federal Communications Commission, and the Tennessee Valley Authority. Critics of this expansion of federal administrative authority charged that it jeopardized the separation of powers in the U.S. Constitution and created a "fourth branch" of government. In response to the criticisms of the expansion of administrative power in the 1930's, Congress passed the Administrative Procedures Act (APA) in 1946. The APA has been described as a "bill of rights" for the regulatory state. Administrative agencies must follow procedures established by the APA when exercising their rulemaking and adjudicatory powers.

Since the 1930's, the scope of the federal administrative state continued to expand. In the 1970's for instance, a wave of quality of life oriented regulations lead to the creation of the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Product Safety Commission (CPSC).

Federal administrative agencies of the federal government of the United States of America are controlled by the executive branch. The legislative branch has the power to create, abolish or modify the powers and structure of administrative agencies. Laws passed by the legislative branch and actions taken by the executive branch are subject to review by the judicial branch. Federal administrative agencies have quasi-legislative (rulemaking) and quasi-judicial (adjudicatory) powers to assist them in carrying out their executive functions. The rule-making and adjudicatory powers of federal agencies are regulated by the APA.

Administrative agencies adopt rules through the rulemaking procedures set forth in the APA. When adopting a new rule an agency must publish the proposed rule in the Federal Register, allow interested parties an opportunity to submit comments on the proposal, and incorporate in the final rule a concise general statement of the basis and purpose of the rule.¹⁰

Presently, the executive branch of the federal government is comprised of 15 cabinet level executive departments which oversee 137 dependent agencies, in addition to 70 independent agencies and government corporations which are listed below.

Cabinet Level Departments and Related Agencies

- Department of Agriculture (USDA)
 - Agricultural Marketing Service
 - Agricultural Research Service
 - Animal and Plant Health Inspection Service
 - Center for Nutrition Policy and Promotion (CNPP)
 - Economic Research Service
 - Farm Service Agency

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ Koch, C., et al. *Administrative Law: Cases and Material*, 6th ed., Ch. 1, part B.

- Food and Nutrition Service
- Food Safety and Inspection Service
- Forest Service
- Grain Inspection, Packers and Stockyards Administration
- Marketing and Regulatory Programs (Agriculture Department)
- National Agricultural Statistics Service
- National Institute of Food and Agriculture
- Natural Resources Conservation Service
- Risk Management Agency (Agriculture Department)
- Rural Development
- Department of Commerce (DOC)
 - Bureau of Economic Analysis (BEA)
 - Bureau of Industry and Security
 - Committee for the Implementation of Textile Agreements
 - Economics and Statistics Administration
 - Economic Development Administration (EDA)
 - International Trade Administration (ITA)
 - Minority Business Development Agency
 - National Institute of Standards and Technology (NIST)
 - National Oceanic and Atmospheric Administration (NOAA)
 - National Technical Information Service
 - National Telecommunications and Information Administration
 - Bureau of the Census
 - U.S. Patent and Trademark Office
- Department of Defense (DOD)
 - Department of Defense Inspector General
 - National Defense University
 - National Geospatial-Intelligence Agency
 - National Security Agency (NSA)
 - U.S. Navy
 - Pentagon Force Protection Agency
 - Prisoner of War/Missing Personnel Office
 - TRICARE Management
 - U.S. Air Force
 - U.S. Army
 - U.S. Fleet Forces Command
 - U.S. Military Academy, West Point
 - Unified Combatant Commands (Defense Department)
 - Uniformed Services University of the Health Sciences
 - Washington Headquarters Services
 - Federal Voting Assistance Program
- Department of Education (ED)
 - The Education Publications Center (EDPUBS)
 - Office for Civil Rights, Department of Education
 - Office of Elementary and Secondary Education (OESE)
 - Office of Postsecondary Education (OPE)
 - Office of Special Education and Rehabilitative Services (OSERS)
 - Office of Vocational and Adult Education (OVAE)
 - White House Commission on Presidential Scholars
- Department of Energy (DOE)
 - Energy Efficiency and Renewable Energy (EERE)
 - Fossil Energy
 - National Laboratories (Energy Department)

- National Nuclear Security Administration
- Nuclear Energy, Science and Technology
- Power Administrations
- Public Affairs
- Science Office (Energy Department)
- Department of Health and Human Services (HHS)
 - Administration for Children and Families (ACF)
 - Administration for Community Living
 - Centers for Disease Control and Prevention (CDC)
 - Centers for Medicare and Medicaid Services (CMS)
 - Food and Drug Administration (FDA)
 - National Institutes of Health (NIH)
 - Substance Abuse and Mental Health Services Administration
 - Agency for Healthcare Research and Quality (AHRQ)
 - Agency for Toxic Substances and Disease Registry
 - Health Resources and Services Administration
 - Indian Health Service
- Department of Homeland Security (DHS)
 - Computer Emergency Readiness Team (US CERT)
 - Federal Emergency Management Agency (FEMA)
 - FEMA Disaster Assistance
 - Federal Law Enforcement Training Center
 - Secret Service
 - Transportation Security Administration (TSA)
 - U.S. Citizenship and Immigration Services
 - U.S. Coast Guard
 - U.S. Customs and Border Protection
 - U.S. Immigration and Customs Enforcement
- Department of Housing and Urban Development (HUD)
 - Federal Housing Administration (FHA)
 - Multifamily Housing Office
 - Office of Community Planning and Development
 - Office of Fair Housing and Equal Opportunity
 - Policy Development and Research (HUD)
 - Public and Indian Housing
- Department of Justice (DOJ)
 - Antitrust Division
 - Bureau of Alcohol, Tobacco, Firearms, and Explosives
 - Bureau of Justice Statistics
 - Bureau of Prisons
 - Community Oriented Policing Services (COPS)
 - Drug Enforcement Administration
 - Executive Office for Immigration Review
 - Federal Bureau of Investigation (FBI)
 - Marshals Service
 - Office of Justice Programs
 - Office of the Pardon Attorney
 - Parole Commission
 - U.S. National Central Bureau - Interpol
 - U.S. Trustee Program
- Department of Labor (DOL)
 - Employee Benefits Security Administration (EBSA)

- Job Corps
 - Mine Safety and Health Administration
 - National Contact Center
 - Occupational Safety and Health Administration (OSHA)
 - Office of Disability Employment Policy
 - Veterans' Employment and Training Service
 - Women's Bureau (Labor Department)
- Department of State (DOS)
 - U.S. Mission to the United Nations
- Department of the Interior (DOI)
 - Bureau of Indian Affairs (BIA)
 - Bureau of Land Management (BLM)
 - Bureau of Reclamation
 - Fish and Wildlife Service
 - National Park Service (NPS)
 - Surface Mining, Reclamation and Enforcement
 - U.S. Geological Survey (USGS)
 - Bureau of Ocean Energy Management
 - Bureau of Safety and Environmental Enforcement
 - National Park Service
- Department of the Treasury
 - Alcohol and Tobacco Tax and Trade Bureau
 - Bureau of the Public Debt
 - Internal Revenue Service (IRS)
 - Office of the Comptroller of the Currency (OCC)
 - Taxpayer Advocacy Panel
 - United States Mint
 - Financial Management Service
- Department of Transportation (DOT)
 - Federal Aviation Administration (FAA)
 - Maritime Administration
 - National Highway Traffic Safety Administration
 - Pipeline and Hazardous Materials Safety Administration
 - Research and Innovative Technology Administration
 - Saint Lawrence Seaway Development Corporation
 - Surface Transportation Board
- Department of Veterans Affairs (VA)
 - National Cemetery Administration (NCA)
 - Veterans Benefits Administration
 - Veterans Day National Committee

Independent Agencies and Government Corporations

- Administrative Conference of the United States
- Advisory Council on Historic Preservation
- African Development Foundation
- AMTRAK (National Railroad Passenger Corporation)
- Broadcasting Board of Governors
- Central Intelligence Agency (CIA)
- Commission on Civil Rights
- Commodity Futures Trading Commission
- Consumer Product Safety Commission (CPSC)
- Corporation for National and Community Service
- Court Services and Offender Supervision Agency for the District of Columbia
- Defense Nuclear Facilities Safety Board
- Director of National Intelligence
- Environmental Protection Agency (EPA)
- Equal Employment Opportunity Commission (EEOC)
- Export-Import Bank of the United States
- Farm Credit Administration
- Farm Credit System Insurance Corporation
- Federal Communications Commission (FCC)
- Federal Deposit Insurance Corporation (FDIC)
- Federal Election Commission (FEC)
- Federal Energy Regulatory Commission
- Federal Housing Finance Agency
- Federal Labor Relations Authority
- Federal Maritime Commission
- Federal Mediation and Conciliation Service
- Federal Mine Safety and Health Review Commission
- Federal Reserve System
- Federal Retirement Thrift Investment Board
- Federal Trade Commission (FTC)
- General Services Administration (GSA)
- Institute of Museum and Library Services
- Inter-American Foundation
- Merit Systems Protection Board
- Millennium Challenge Corporation
- National Aeronautics and Space Administration (NASA)
- National Archives and Records Administration (NARA)
- National Capital Planning Commission
- National Council on Disability
- National Credit Union Administration (NCUA)
- National Endowment for the Arts
- National Endowment for the Humanities
- National Labor Relations Board (NLRB)
- National Mediation Board
- National Railroad Passenger Corporation (AMTRAK)
- National Science Foundation (NSF)
- National Transportation Safety Board
- Nuclear Regulatory Commission (NRC)
- Occupational Safety and Health Review Commission
- Office of Compliance
- Office of Government Ethics

- Office of Personnel Management
- Office of Special Counsel
- Office of the Director of National Intelligence
- Office of the National Counterintelligence Executive
- Overseas Private Investment Corporation
- Panama Canal Commission
- Peace Corps
- Pension Benefit Guaranty Corporation
- Postal Regulatory Commission
- Railroad Retirement Board
- Securities and Exchange Commission (SEC)
- Selective Service System
- Small Business Administration (SBA)
- Social Security Administration (SSA)
- Tennessee Valley Authority
- U.S. Trade and Development Agency
- United States Agency for International Development (USAID)
- United States International Trade Commission
- United States Postal Service (USPS) ¹¹

Regulations from the Executive in Need of Scrutiny (REINS) Act

Congress has made attempts to curb executive agency powers by introducing the REINS Act in 2013.¹² The purpose of the REINS Act is to increase accountability and transparency in the federal regulatory process by requiring Congress to approve all new major regulations. The Act sets forth procedures federal agencies must follow, including preparing a report to Congress which classifies rules as major or non-major, list agency actions designed to implement a statutory provision or objective, list the aggregate economic impact of those actions, and include a complete copy of any cost-benefit analysis of a rule.

On August 2, 2013, the Act passed the House of Representatives but was never heard by the Senate. The Act was introduced again in 2015.¹³ The Act has been referred to committees in both the House of Representatives and the Senate; however, neither bill has yet to be heard in those committees.¹⁴

Effect of Proposed Changes

HM 1269 petitions the United States Congress to propose to the states an amendment to the U.S. Constitution entitled the “Regulation Freedom Amendment.” Under the amendment, whenever one quarter of either the House of Representatives or the Senate objects to a proposed regulation, and transmits their written declaration of opposition to the President, a majority vote of the House and Senate would be required to adopt the proposed federal regulation.

Legislative memorials are not subject to the Governor’s veto power and are not presented to the Governor for review. Memorials have no force of law—they are mechanisms for formally petitioning the U.S. Congress to act on a particular subject. This memorial does not have a fiscal impact.

B. SECTION DIRECTORY:

Not applicable.

¹¹ *Federal Executive Branch*, available at <http://www.usa.gov/Agencies/Federal/Executive.shtml> (last visited March, 27, 2015).

¹² H.R. 367, 113th Cong. (2013).

¹³ H.R. 427 and S 226, 114th Cong. (2015).

¹⁴ See GovTrack.us, available at <https://www.govtrack.us/events/track-something?feed=billsearch:text=Executive%20in%20Need%20of%20Scrutiny%20Act>, (last visited March 27, 2015).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.