## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HM 439 Regulation Freedom Amendment
**SPONSOR(S):** Raulerson
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Local, Federal & Veterans Affairs Subcommittee | 8 Y, 5 N | Darden | Miller |
| 2) Government Accountability Committee | | | |

## 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 439 petitions the U.S. Congress to propose to the states an amendment to the U.S. Constitution which would require 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. s. 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, commonly referred to an "Article V convention," applied for by two-thirds of the state legislatures. While this method has never been used, organized groups promoted a convention to encourage Congress to submit amendments for ratification.[7] If 34 states apply, Congress must call a 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

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[1] *See Constitutional Amendment Process*, U.S. National Archives and Records Administration, https://www.archives.gov/federal-register/constitution (last visited Feb. 17, 2017).
[2] 1 U.S.C. s. 106b.
[3] *Constitutional Amendment Process*, *supra* note 1.
[4] *Id*.
[5] *Id*.
[6] *6 Constitutional Amendments That Just Missed the Cut*, The Week, http://theweek.com/articles/446233/6-constitutional-amendments-that-just-missed-cut (last visited Feb. 17, 2017).
[7] Thomas H. Neale, Cong. Research Serv., R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (Oct. 22, 2012).

propose amendments. Article V identifies these methods as equal and requires the same ratification for all proposed amendments.[8]

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 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.[9]

Federal Administrative Law[10]

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,[11] the Securities and Exchange Commission,[12] the Social Security Administration,[13] the Federal Communications Commission,[14] and the Tennessee Valley Authority.[15] In the 1970's, a wave of quality of life oriented regulations lead to the creation of the Environmental Protection Agency (EPA),[16] the Occupational Safety and Health Administration (OSHA),[17] and the Consumer Product Safety Commission (CPSC).[18]

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.[19] 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.

Federal administrative agencies are controlled by the executive branch. The legislative branch has the power to create, abolish or modify the powers and structure of administrative agencies.[20] 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.[21]

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.[22]

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[8] *Id.*
[9] *Id.*
[10] *See generally* Koch, C., et al. *Administrative Law: Cases and Material,* 7th ed., Ch. 1, part B.
[11] 29 U.S.C. s. 153.
[12] 15 U.S.C. s. 78d.
[13] 42 U.S.C. s. 901.
[14] 47 U.S.C. s. 151.
[15] 16 U.S.C. s. 831.
[16] Reorganization Plan No. 3 of 1970, 84 Stat. 2086-2089 (1970).
[17] 29 U.S.C. s. 656.
[18] 15 U.S.C. s. 2053.
[19] 5 U.S.C. ss. 551-559.
[20] *See* art. I, s. 8, U.S. Const.
[21] 5 U.S.C. ss. 553-554.
[22] 5 U.S.C. s. 553.

Presently, the executive branch of the federal government is comprised of 15 cabinet departments,[23] listed below, in addition to independent agencies and government corporations.

Cabinet Departments

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Housing and Urban Development
- Department of the Interior
- Department of Justice
- Department of Labor
- Department of State
- Department of Transportation
- Department of the Treasury
- Department of Veterans Affairs

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

Congress has made several attempts to curb executive agency powers in years. The Regulations from the Executive in Need of Scrutiny (REINS) Act was first introduced in 2015.[24] The REINS Act would require any federal agency promulgating a rule to classify the rule as a "major rule" or "non-major rule" when published. A rule is classified as a "major rule" if:

- The rule was made under the Patient Protection and Affordable Care Act; or
- The rule was determined by the Office of Management and Budget (OMB) to have:
    - An annual economic effect of $100 million or more;
    - A major increase in costs or prices for consumers, business, or governments; or
    - Significant adverse effects on the ability of domestic businesses to compete with foreign firms in domestic and export markets.[25]

If a rule is classified as a "major rule," it may not take effect unless approved by a joint resolution passed within 70 legislative days after the agency proposing the rule submits its report to Congress.

All other rules are classified as "non-major rules." A non-major rule may be repealed under the terms of the REINS Act if a joint resolution is passed within 60 legislative days.

The House of Representatives passed the REINS Act on July 28, 2015, but the bill was not passed by the Senate.[26] The bill was reintroduced during the 115th Congress and approved by the House on January 5, 2017.[27] A companion measure is pending in the Senate.[28]

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[23] *See* 3 U,S,C, s. 19(d)(1) (list of Cabinet departments which may act as President if the President pro tempore of the Senate may not act as president).
[24] H.R. 427 and S 226, 114th Cong. (2015).
[25] This determination by OMB would parallel Florida's current requirement that agency rules exceeding a certain minimum financial or economic impact must first be ratified by the Legislature before such rules may take effect. *See* s. 120.541(3), F.S.
[26] *See Actions Overview H.R. 427 – 114th Congress (2015-2016)*, Congress.gov, https://www.congress.gov/bill/114th-congress/house-bill/427/actions (last visited Feb. 20, 2017).
[27] *Actions Overview H.R. 26 – 115th Congress (2017-2018)*, Congress.gov, https://www.congress.gov/bill/115th-congress/house-bill/26/actions (last visited Feb. 20, 2017).

**Effect of Proposed Changes**

HM 439 petitions the United States Congress to propose to the states an amendment to the U.S. Constitution. 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.

## 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. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

[28] *Actions Overview S. 21 – 115th Congress (2017-2018),* Congress.gov, https://www.congress.gov/bill/115th-congress/senate-bill/21/actions (last visited Feb. 20, 2017).

2. Other:

None.

B. RULE-MAKING AUTHORITY:

A memorial neither requires nor authorizes administrative rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES