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BRIEFLY NOTED

Trump’s Regulatory Legacy Will Be through Congress, Not Regulators

BY SAM BATKINS

Much has been made of former U.S. Environmental Protection Agency administrator Scott Pruitt’s tenure—not only the scandals, but his deregulatory agenda. Based on press reports, one would think that if President Barack Obama’s EPA finalized a regulation, Pruitt’s EPA tried to undo it.

Despite the public perception that Pruitt and President Trump’s other regulators are working to reverse all that Obama’s regulators implemented, it’s arguable that the only lasting regulatory results of Trump’s time in office so far are products of Capitol Hill: 16 Congressional Review Act (CRA) resolutions of disapproval and modest legislation to amend the 2010 Dodd-Frank Act.

There’s no debate that Trump’s deregulatory agenda has resulted in published regulatory savings for the nation. According to the American Action Forum, since 2017, regulators have published nearly 60 final rules that cut costs, including three that would reduce total burdens by more than \$1 billion. However, for those to become *real* savings will require that the changes survive judicial scrutiny, and currently there is a host of lawsuits challenging virtually every major deregulatory action. The EPA alone has lost seven deregulatory attempts in the courts over the last 18 months.

The administration won’t lose every suit, but the president’s deregulatory legacy will be substantially muted by the courts and by Congress if Democrats retake control after this fall’s elections. Obviously, a new occupant in the White House in 2021 will immediately seek to reverse the deregulatory posture of the Trump administration and his policies

could be an afterthought a decade from now. That’s a far cry from President Ronald Reagan’s record of regulatory reform.

CRA’s second act? / Before 2017, the CRA had only been invoked successfully once, to rescind an ergonomics rule in 2001. But in less than two years of the Trump administration, 16 regulations have been axed, including five major rules. With total cost savings from CRA rescissions exceeding \$4 billion, that’s a legacy of achievement in an environment where costs seemingly increase daily.

What is more noteworthy from a philosophical, partisan, and structural perspective, however, is that *both* Democrats and Republicans now look to the CRA to address rules from the executive of which they disapprove. Two years ago, some Democrats and progressives argued the CRA was unconstitutional and special interest groups still push for Congress to tie its own hands by repealing the CRA. But every Democrat in the Senate is now on record as wanting to overturn the Federal Communications Commission’s recent net neutrality repeal.

In CRA debates during the first few months of the Trump administration, some progressives were arguing the CRA was merely a cudgel to destroy important health and safety protections. Now Democrats have realized that it can also be a tool to check an executive they don’t like. Those instances will be rare for Democrats, but frequent enough that they might as well

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keep the CRA in play for regulations they view as overly noxious. Why any party in Congress would want to abdicate a powerful statutory check on the executive is a mystery, even if the CRA does have a perceived anti-regulatory bias.

Arguably more important than the bipartisan embrace of the CRA is its new use to revoke regulatory guidance, not just formal regulations. This spring, the Senate narrowly struck down the Consumer Financial Protection Bureau's (CFPB) 2013 auto-lending guidance, marking the first time the CRA had ever been used to strike

that Congress could strike down guidance, even decades-old guidance, gradually gathered steam, culminating in a Government Accountability Office (GAO) opinion that the CRA could be used to strike down certain past guidance if it had never been submitted to Congress as the statute requires.

With its 51–47 vote on the auto-lending guidance, the Senate established Congress's ability to review years-old administrative actions, rescind them (with presidential approval or a veto override), and ensure that they may never be reissued "in substantially the same form." (See "Should We Fear

now, but the ability to strike down major regulatory guidance, indeed virtually every action of a president, is a notable shift in the balance of power between the executive and legislative branches. President Trump likely won't tout this accomplishment as a regulatory landmark, but he should.

Dodd–Frank's haircut / Finally, although there was intense lobbying in Congress over legislation (S. 2155) to amend Dodd–Frank, more politically salient events in D.C. largely swept this accomplishment under the rug. Although it wasn't complete Dodd–Frank repeal, it was a notable achievement because of the narrow Republican majority in the Senate. Few probably expected the bill to get 67 votes in the Senate or for 33 Democrats to back the bill in the House. Lawmakers did this knowing they were paring back some of Dodd–Frank's most notorious provisions: the Volcker Rule, tighter qualified mortgage standards, "Systematically Important Financial Institution" designations for banks with \$50 billion in assets, and stress tests for most large banks. The bill essentially exempted many small- and medium-sized banks from Dodd–Frank's most onerous regulations.

More importantly, Democrats did so in the wake of a publicity assault by Sen. Elizabeth Warren (D–MA) and other progressive groups. Many on the left pilloried Democrats who voted in favor of the regulatory change, arguing they provided a sop to the largest banks in the world, caved in on important financial safeguards, and bent to the will of Republicans and Trump (the more important political point). Warren even raised money off of Democrats who voted for the changes.

A more comprehensive Dodd–Frank reform bill that libertarians and conservatives truly wanted was never going to garner 60 votes in this political environment, much less 67 in the Senate. Nevertheless, it's a remarkable feat that Democrats like Michael Bennett (D–CO), Jeanne Shaheen (D–NH), and Maggie Hassan (D–NH) voted for the bill when even seemingly noncontroversial under-secretaries struggle to get 52



In a February 2017 Oval Office ceremony, President Trump signed House Joint Resolution 41, removing some Dodd–Frank Act restrictions on oil and gas companies.

down a guidance document. The idea of using the CRA in this way was originally raised in a *Wall Street Journal* op-ed in 2017. This was dismissed by some conservatives out-of-hand because of widespread skepticism that the CRA could apply to guidance beyond the 60-day legislative window, essentially the last six months of most presidential administrations. Supporters of the notion reminded critics that regulators rarely submit guidance to Congress, which means the 60-day clock doesn't start ticking. Thanks to a public lobbying campaign by Sen. Pat Toomey (R–PA) and the Pacific Legal Foundation, the idea

‘Zombie’ Regulations?” Summer 2017.) The implications of Congress striking down this little-known CFPB rule will have to be examined further by scholars, but it is a near certainty that even Democrats will avail themselves of this power if they gain control of both chambers of Congress and the West Wing.

Yes, a Democratic president could have his agencies overturn a Trump guidance document, but using the CRA to prevent conservatives from issuing substantially similar guidance in the future is an incredible power that Congress has only begun to exploit. It may not be the talk of the town

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confirmation votes in the Senate. Consider that Bennet votes with Trump's position just 28% of the time according to *FiveThirtyEight.com*, Shaheen 33%, and Hassan 32%. Yet, despite their opposition to the president and their perceived willingness not to frustrate fellow Democrats, they still voted to reform Dodd-Frank, albeit modestly.

With the passage of the amendment legislation, Congress did more to reform financial regulation than many perceive. Volcker rule relief is now permanent for community banks. That might seem somewhat trivial, even as community banks slowly disappear, but just as it took four regulatory agencies years to give life to the rule, so it would take the coordination of those four to deliver substantial relief. This process would take years and could generate more delays through court challenges. Congress managed to provide relief in a few months and overturning the changes won't be easy for a future Congress. That accomplishment shouldn't be dismissed as small potatoes. Getting 67 votes on any regulatory reform package is rare, especially when it's related to Dodd-Frank. Just ask House and Senate leaders how the sloggling was on Affordable Care Act repeal.

Conclusion / In regulatory policy, success can take years. Those gains can then prove fleeting once the next administration takes the reins. President Obama's regulatory "tsunami" was viewed as one of the largest expansions of the regulatory state since Franklin Delano Roosevelt. Records were broken, entire new agencies were conceived, and—with plenty of progressives on the D.C. Circuit Court of Appeals—many assumed Obama's regulatory achievements would be a legacy, not an ephemeral blip.

As soon as the Trump administration came to power, his underlings immediately attempted to press the "undo" button on every notable regulation from the past eight years. However, with progressive outrage and courts sometimes standing in the way, lasting progress through administrative action will be slow to achieve. That is why President Trump and fans of deregulation

should give Congress a pat on the back for their unheralded work reforming regulation. From striking down 16 rules to ensuring that Congress can scrutinize and rescind old regulatory guidance, there is a new era in congressional regulatory oversight, one Democrats could one day embrace as well. The CRA is now entrenched as a tool both parties can use to check the excesses of the executive and his regulators. Congress also managed to produce a substantive, albeit limited, reform of Dodd-Frank.

These reforms delivered a broader constitutional balance between Congress and the president. Now, whenever new guidance

is penned, the executive will have to think twice about the implications for Congress down the road. Even conservative administrations will have to contemplate Democrats gathering the votes on a CRA resolution to strike down an executive action.

On January 20, 2017, few speculated that these achievements could become a reality. Sure, some regulations would fall, but would Democrats embrace the CRA? Would guidance be up for grabs? Would 67 senators vote to upend parts of Dodd-Frank? One could argue President Trump cemented his regulatory legacy in his first 18 months in office, yet the public took little notice. R

Why Can't Food Be Genetically Engineered and Organic?

BY HENRY I. MILLER AND JOHN J. COHRSEN

The Organic Foods Production Act of 1990 directed the U.S. Department of Agriculture to develop national standards for the production of "organic foods." The legislation came about because of consumer demand for food that was supposedly more healthful and produced with more sustainable farming methods than regular commercial farming.

However, the national standards that were ultimately adopted in 2000 do not improve food safety, quality, or nutrition—nor were they intended to. When the final National Organic Standards were issued in 2000, then-agriculture secretary Dan Glickman said: "Let me be clear about one thing: the organic label is a marketing tool. It is not a statement about food safety, nor is 'organic' a value judgment about nutrition or quality." One of his

successors, John Block, observed in 2014, "Yet USDA's own research shows consumers buy higher-priced organic products because they mistakenly believe them safer and more nutritious."

False labeling / Despite the nonexistent health, safety, or environmental benefits and the higher prices consumers pay for these foods, those consumers often don't even get the products they've been promised.

In a pair of articles last year, the *Washington Post's* Peter Whoriskey reported on the apparent false-labeling of supposedly organic foods. In one article, he tracked a few milk producers to see whether they followed the USDA's strict but weakly enforced guidelines for organic certification. Organic milk can cost twice as much as conventional milk and, as Whoriskey

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key observed, “If organic farms violate organic rules, consumers are being misled and overcharged.”

The *Post* surveilled Aurora Organic Dairy—a major milk supplier for house organic brands sold by retailers such as Walmart and Costco—and found that the company appeared to violate rules about how often their cows are grass-fed, a key differential between conventional and organic milk production. The *Post* had several organic milk samples tested to measure for two fats that are more prevalent in organic milk (although in amounts inconsequential to human health), and most fell short.



Whoriskey reported that the integrity of the organic label rests on “an unusual system of inspections” that the head of the USDA’s organic program calls “fairly unique.” Organic producers pay a private inspector, approved by the USDA, to certify their products as organic; the agency checks in on those inspectors every few years. The USDA has only 82 certified inspection firms to supervise a massive organic supply chain of more than 31,000 farms and businesses worldwide. This leaves plenty of room for error and outright cheating and fosters a pay-to-play climate that benefits producers and inspectors at the expense of unwitting consumers.

The burgeoning organic market has also created a huge demand for agri-

cultural imports. Most alarming is the importation of supposedly organic grains to be used as animal feed, from Ukraine, Turkey, India, and China—countries with dubious food-safety standards and enforcement.

The *Post*’s investigation shed doubts on the authenticity of these imported “organic” grains. Whoriskey reported on how 36 million pounds of soybeans from Ukraine, shipped through Turkey to California in 2016, “underwent a remarkable transformation” from conventional to organic. The fraud increased the value of the beans by \$4 million because organic grains sell for more than non-organic.

Whoriskey found that at least 21 million pounds of the phony organic soybeans had already entered the food supply. And the *Post* reported on two other fraudulent shipments of organic grains in the past year that “were large enough to constitute a meaningful proportion of the U.S. supply of those commodities. All three were presented as organic, despite evidence to the contrary.”

Innovation / The USDA reported that in 2016, U.S. farms and ranches sold \$7.6 billion of (supposedly) organic commodities, up 23% from \$6.2 billion the year before. Of 2016 sales, 56% were for crops (\$4.2 billion) and the remaining 44% were for livestock, poultry, and related products.

The growth of organic foods, however, has not been accompanied by a corresponding bump in innovation to improve safety, quality, or nutrition. In fact, evidence suggests the opposite: a lowering of food safety, quality, and nutrition, and continuing burdens of organic production on the environment, especially its excessive use of water and arable land. Moreover, organic crop yields are typically lower and their retail prices significantly higher.

While progress in organic agriculture has been largely stagnant, innovation based on precise molecular techniques for the genetic improvement of food crops and food processing has been occurring in much of the world. This genetic engineering—primarily of commodity crops but increasingly of some specialty crops—has contributed to more efficient, sustainable food production, and also to the introduction of traits appealing to consumers.

Crop plants have been genetically engineered to be fortified with important vitamins and minerals and to be drought-, flood-, pest-, disease-, and herbicide-resistant, requiring less spraying of insecticides and other inputs, and increasing yields and resilience. Likewise, animals can be genetically engineered to be more nutritious and disease-resistant, and to impose less stress on the natural environment—for example, by producing less-toxic manure. Such plant and animal innovations are critical not only to meet the global need for improved food quality and availability, but also for adaptation to the challenges of increasing population and a changing climate.

The original draft of the National Organic Standards proposed by the USDA did not exclude crops improved with molecular genetic engineering techniques from organic practices as long as they met the specified organic production standards. But ultimately, in response to a deluge of anti-genetic engineering public comments from organizations and individuals (including the organic industry, which sought to prevent market share gains by the nascent plant biotechnology companies), and because of anti-biotechnology sentiment in the USDA’s political

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leadership, the USDA used its discretion to exclude genetically engineered products from the definition of organic food.

Accordingly, by definition the 2000 National Organic Standards prohibit the use of the USDA Organic Label on food varieties derived from organisms created with molecular genetic engineering techniques, even when the foods are otherwise grown with complete fidelity to the requirements of organic production. That exclusion is perhaps the most irrational aspect of the organic standards. Except for wild berries and wild mushrooms, virtually all the fruits, vegetables, and grains in our diet have been genetically improved by one technique or another, including through what are called “wide crosses,” which move genes from one species or genus to another in ways that do not occur in nature. The newer molecular techniques are just more precise and predictable extensions of earlier techniques for genetic modification.

The prohibition of “genetically engineered, organically produced” crops denies consumers nutritionally improved foods, such as rice fortified with the precursor of vitamin A, canola oil with enhanced levels of omega-3 fatty acids, apples that don’t turn brown when cut, and potatoes that are bruise-resistant (and therefore, reduce waste) and have lower levels of the precursor of acrylamide, a carcinogen produced by cooking at high temperatures. Thus, the exclusion from organic agriculture of plants made with molecular genetic engineering forfeits the benefits of higher yields and lower environmental burdens—explicit goals of the Organic Foods Production Act of 1990.

Fear of ‘Frankenfood’/ A major reason for the exclusion of genetically engineered products from the organic definition was to make organic food acceptable to consumers who did not want genetically engineered products at a time when the U.S. government did not require them to be specifically labeled. The U.S. Food and Drug Administration had determined

that the process by which genetically engineered plant foods were improved did not in itself raise nutritional or safety concerns and so labeling was not required unless safety issues were raised by the product. Thus, as far as the U.S. government was concerned, there was no compelling reason to label genetically engineered food products. Nevertheless, responding to pressure from activists and the organic and natural food industries, several states enacted laws requiring genetically engineered food labeling, thus creating disparate labeling requirements that would have created a significant problem for the industry. That led Congress to pass, in 2016, a preemptive disclosure law that required the USDA to establish a national policy for labeling “bioengineered” food.

The disclosure law does not in any way alter the current National Organic Standards, but it does provide an opening for the agriculture secretary to consider modifying the definition of organic to include genetically engineered food as originally proposed almost 30 years ago. Sec. 293 (f) of the law specifically requires the USDA to

consider establishing consistency between – (1) the national bioengineered food disclosure standard established under this section; and (2) the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.) and any rules or regulations implementing that Act.

With the ongoing oversight of regulatory agencies and the disclosure requirements for bioengineered food products, arguably they should now be eligible for the USDA organic seal if they comply with the requirements of both the National Organic Standards and the new bioengineered-food disclosure standards. No longer would consumers be denied the choice of purchasing food that is both organic and genetically engineered. As noted above, many of the latter increasingly boast traits and characteristics with palpable benefits to consumers, including biofortification of plants with

vitamins and minerals, more healthful vegetable oils, leaner meats, and reduced levels of allergens.

The USDA’s proposed rule, the public comment period for which closed on July 29, posed questions relevant to the development of the bioengineered disclosure standard. However, those questions were formulated by the Barack Obama administration and it is unclear whether they represent the policy positions of the Trump administration. Not included in the questions was any consideration of how the disclosure requirements of Sec.293(f) would relate to the National Organic Standards.

If consumers who protested the inclusion of bioengineered food within the “organic” definition three decades ago remain opposed, they could simply refuse to purchase organic products bearing the “bioengineered” label. There is no reason that others should be denied the opportunity to partake of “organic bioengineered” products.

Interestingly, the inclusion of gene-editing techniques such as CRISPR, which does not usually involve the insertion of “foreign” DNA, has been endorsed by a prominent voice in the organic movement. Klaas Martens, a third-generation grain and livestock farmer who has farmed organically for more than a quarter-century, said he would be open to gene editing: “If it could be used in a way that enhanced the natural system, and mimicked it, then I would want to use it.”

The Trump administration should direct the USDA to comply with Section 293(f) by amending the National Organic Standards to permit the inclusion of crops, animals, and microorganisms (for example, to produce yogurt or alcoholic beverages) modified with the most precise and predictable genetic techniques. That would firmly establish the United States as the world’s pacesetter in the creation of a new, welcome category of agricultural products that are both *organic* and *bioengineered*. It would also favor consumer choice and encourage more-sustainable agricultural practices. R

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