

112TH CONGRESS
1ST SESSION

H. R. 3010

To reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2011

Mr. SMITH of Texas (for himself, Mr. COBLE, and Mr. PETERSON) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Regulatory Account-
5 ability Act of 2011”.

6 **SEC. 2. DEFINITIONS.**

7 Section 551 of title 5, United States Code, is amend-
8 ed—

9 (1) in paragraph (13), by striking “and” at the
10 end;

1 (2) in paragraph (14), by striking the period at
2 the end and inserting a semicolon; and

3 (3) by adding at the end the following:

4 “(15) ‘major rule’ means any rule that the Ad-
5 ministrator of the Office of Information and Regu-
6 latory Affairs determines is likely to impose—

7 “(A) an annual cost on the economy of
8 \$100,000,000 or more, adjusted annually for
9 inflation;

10 “(B) a major increase in costs or prices for
11 consumers, individual industries, Federal,
12 State, local, or tribal government agencies, or
13 geographic regions;

14 “(C) significant adverse effects on competi-
15 tion, employment, investment, productivity, in-
16 novation, or on the ability of United States-
17 based enterprises to compete with foreign-based
18 enterprises in domestic and export markets; or

19 “(D) significant costs on multiple sectors
20 of the economy;

21 “(16) ‘high-impact rule’ means any rule that
22 the Administrator of the Office of Information and
23 Regulatory Affairs determines is likely to impose an
24 annual cost on the economy of \$1,000,000,000 or
25 more, adjusted annually for inflation;

1 “(17) ‘guidance’ means an agency statement of
2 general applicability and future effect, other than a
3 regulatory action, that sets forth a policy on a statu-
4 tory, regulatory or technical issue or an interpreta-
5 tion of a statutory or regulatory issue;

6 “(18) ‘major guidance’ means guidance that the
7 Administrator of the Office of Information and Reg-
8 ulatory Affairs finds is likely to lead to—

9 “(A) an annual cost on the economy of
10 \$100,000,000 or more, adjusted annually for
11 inflation;

12 “(B) a major increase in costs or prices for
13 consumers, individual industries, Federal,
14 State, local or tribal government agencies, or
15 geographic regions;

16 “(C) significant adverse effects on competi-
17 tion, employment, investment, productivity, in-
18 novation, or on the ability of United States-
19 based enterprises to compete with foreign-based
20 enterprises in domestic and export markets; or

21 “(D) significant costs for multiple sectors
22 of the economy;

23 “(19) the ‘Information Quality Act’ means sec-
24 tion 515 of Public Law 106–554, the Treasury and
25 General Government Appropriations Act for Fiscal

1 Year 2001, and guidelines issued by the Adminis-
2 trator of the Office of Information and Regulatory
3 Affairs or other agencies pursuant to the Act; and

4 “(20) the ‘Office of Information and Regulatory
5 Affairs’ means the office established under section
6 3503 of chapter 35 of title 44 and any successor to
7 that office.”.

8 **SEC. 3. RULEMAKING.**

9 (a) Section 553(a) of title 5, United States Code, is
10 amended by striking “(a) This section applies” and insert-
11 ing “(a) APPLICABILITY.—This section applies”.

12 (b) Section 553 of title 5, United States Code, is
13 amended by striking subsections (b) through (e) and in-
14 serting the following:

15 “(b) RULE MAKING CONSIDERATIONS.—In a rule
16 making, an agency shall make all preliminary and final
17 determinations based on evidence and consider, in addition
18 to other applicable considerations, the following:

19 “(1) The legal authority under which a rule
20 may be proposed, including whether a rule making
21 is required by statute, and if so, whether by a spe-
22 cific date, or whether the agency has discretion to
23 commence a rule making.

1 “(2) Other statutory considerations applicable
2 to whether the agency can or should propose a rule
3 or undertake other agency action.

4 “(3) The specific nature and significance of the
5 problem the agency may address with a rule (includ-
6 ing the degree and nature of risks the problem poses
7 and the priority of addressing those risks compared
8 to other matters or activities within the agency’s ju-
9 risdiction), whether the problem warrants new agen-
10 cy action, and the countervailing risks that may be
11 posed by alternatives for new agency action.

12 “(4) Whether existing rules have created or
13 contributed to the problem the agency may address
14 with a rule and whether those rules could be amend-
15 ed or rescinded to address the problem in whole or
16 part.

17 “(5) Any reasonable alternatives for a new rule
18 or other response identified by the agency or inter-
19 ested persons, including not only responses that
20 mandate particular conduct or manners of compli-
21 ance, but also—

22 “(A) the alternative of no Federal re-
23 sponse;

24 “(B) amending or rescinding existing
25 rules;

1 “(C) potential regional, State, local, or
2 tribal regulatory action or other responses that
3 could be taken in lieu of agency action; and

4 “(D) potential responses that—

5 “(i) specify performance objectives
6 rather than conduct or manners of compli-
7 ance;

8 “(ii) establish economic incentives to
9 encourage desired behavior;

10 “(iii) provide information upon which
11 choices can be made by the public; or

12 “(iv) incorporate other innovative al-
13 ternatives rather than agency actions that
14 specify conduct or manners of compliance.

15 “(6) Notwithstanding any other provision of
16 law—

17 “(A) the potential costs and benefits asso-
18 ciated with potential alternative rules and other
19 responses considered under section 553(b)(5),
20 including direct, indirect, and cumulative costs
21 and benefits and estimated impacts on jobs,
22 economic growth, innovation, and economic
23 competitiveness;

24 “(B) means to increase the cost-effective-
25 ness of any Federal response; and

1 “(C) incentives for innovation, consistency,
2 predictability, lower costs of enforcement and
3 compliance (to government entities, regulated
4 entities, and the public), and flexibility.

5 “(c) ADVANCE NOTICE OF PROPOSED RULE MAKING
6 FOR MAJOR RULES AND HIGH-IMPACT RULES.—

7 “(1) In the case of a rule making for a major
8 rule or high-impact rule, not later than 90 days be-
9 fore a notice of proposed rule making is published
10 in the Federal Register, an agency shall publish ad-
11 vance notice of proposed rule making in the Federal
12 Register. In publishing such advance notice, the
13 agency shall—

14 “(A) include a written statement identi-
15 fying, at a minimum—

16 “(i) the nature and significance of the
17 problem the agency may address with a
18 rule, including data and other evidence and
19 information on which the agency expects to
20 rely for the proposed rule;

21 “(ii) the legal authority under which a
22 rule may be proposed, including whether a
23 rule making is required by statute, and if
24 so, whether by a specific date, or whether

1 the agency has discretion to commence a
2 rule making; and

3 “(iii) preliminary information avail-
4 able to the agency concerning the other
5 considerations specified in subsection (b);

6 “(B) solicit written data, views or argu-
7 ment from interested persons concerning the in-
8 formation and issues addressed in the advance
9 notice; and

10 “(C) provide for a period of not fewer than
11 60 days for interested persons to submit such
12 written data, views, or argument to the agency.

13 “(d) NOTICES OF PROPOSED RULE MAKING; DETER-
14 MINATIONS OF OTHER AGENCY COURSE.—Following com-
15 pletion of procedures under subsection (c), if applicable,
16 and consultation with the Administrator of the Office of
17 Information and Regulatory Affairs, the agency shall pub-
18 lish either a notice of proposed rule making or a deter-
19 mination of other agency course, in accordance with the
20 following:

21 “(1) A notice of proposed rule making shall in-
22 clude—

23 “(A) a statement of the time, place, and
24 nature of public rule making proceedings;

1 “(B) reference to the legal authority under
2 which the rule is proposed;

3 “(C) the terms of the proposed rule;

4 “(D) a description of information known to
5 the agency on the subject and issues of the pro-
6 posed rule, including but not limited to—

7 “(i) a summary of information known
8 to the agency concerning the consider-
9 ations specified in subsection (b);

10 “(ii) a summary of additional infor-
11 mation the agency provided to and ob-
12 tained from interested persons under sub-
13 section (c); and

14 “(iii) information specifically identi-
15 fying all data, studies, models, and other
16 evidence or information considered or used
17 by the agency in connection with its deter-
18 mination to propose the rule;

19 “(E)(i) a reasoned preliminary determina-
20 tion of need for the rule based on the informa-
21 tion described under subparagraph (D); and

22 “(ii) an additional statement of whether a
23 rule is required by statute;

24 “(F) a reasoned preliminary determination
25 that the benefits of the proposed rule meet the

1 relevant statutory objectives and justify the
2 costs of the proposed rule (including all costs to
3 be considered under subsection (b)(6)), based
4 on the information described under subpara-
5 graph (D);

6 “(G) a discussion of—

7 “(i) the alternatives to the proposed
8 rule, and other alternative responses, con-
9 sidered by the agency under subsection (b);

10 “(ii) the costs and benefits of those
11 alternatives (including all costs to be con-
12 sidered under subsection (b)(6));

13 “(iii) whether those alternatives meet
14 relevant statutory objectives; and

15 “(iv) why the agency did not propose
16 any of those alternatives; and

17 “(H)(i) a statement of whether existing
18 rules have created or contributed to the prob-
19 lem the agency seeks to address with the pro-
20 posed rule; and

21 “(ii) if so, whether or not the agency pro-
22 poses to amend or rescind any such rules, and
23 why.

24 All information considered by the agency, and
25 steps to obtain information by the agency, in

1 connection with its determination to propose
2 the rule, including all information described by
3 the agency under subparagraph (D) and, at the
4 discretion of the President or the Administrator
5 of the Office of Information and Regulatory Af-
6 fairs, information provided by that Office in
7 consultations with the agency, shall be placed in
8 the docket for the proposed rule and made ac-
9 cessible to the public for the public's use when
10 the notice of proposed rule making is published.

11 “(2)(A) A notice of determination of other
12 agency course shall include a description of the al-
13 ternative response the agency determined to adopt.

14 “(B) If in its determination of other agency
15 course the agency makes a determination to amend
16 or rescind an existing rule, the agency need not un-
17 dertake additional proceedings under subsection (c)
18 before it publishes a notice of proposed rule making
19 to amend or rescind the existing rule.

20 All information considered by the agency, and steps
21 to obtain information by the agency, in connection
22 with its determination of other agency course, in-
23 cluding but not limited to all information that would
24 be required to be described by the agency under
25 paragraph (1)(D) if the agency had determined to

1 publish a notice of proposed rule making and, at the
2 discretion of the President or the Administrator of
3 the Office of Information and Regulatory Affairs, in-
4 formation provided by that Office in consultations
5 with the agency, shall be placed in the docket for the
6 determination and made accessible to the public for
7 the public's use when the notice of determination is
8 published.

9 “(3) After notice of proposed rule making re-
10 quired by this section, the agency shall provide inter-
11 ested persons an opportunity to participate in the
12 rule making through submission of written data,
13 views, or arguments with or without opportunity for
14 oral presentation, except that—

15 “(A) if a hearing is required under para-
16 graph (4)(B) or subsection (e), opportunity for
17 oral presentation shall be provided pursuant to
18 that requirement; or

19 “(B) when other than under subsection (e)
20 of this section rules are required by statute or
21 at the discretion of the agency to be made on
22 the record after opportunity for an agency hear-
23 ing, sections 556 and 557 shall apply, and
24 paragraph (4), requirements of subsection (e)
25 to receive comment outside of the procedures of

1 sections 556 and 557, and the petition proce-
2 dures of subsection (e)(6) shall not apply.

3 The agency shall provide not fewer than 90 days for
4 interested persons to submit written data, views, or
5 argument (or 120 days in the case of a proposed
6 major or high-impact rule).

7 “(4)(A) Within 30 days of publication of notice
8 of proposed rulemaking, a member of the public may
9 petition for a hearing in accordance with section 556
10 to determine whether any evidence or other informa-
11 tion upon which the agency bases the proposed rule
12 fails to comply with of the Information Quality Act.

13 “(B)(i) The agency may, upon review of the pe-
14 tition, determine without further process to exclude
15 from the rule making the evidence or other informa-
16 tion that is the subject of the petition and, if appro-
17 priate, withdraw the proposed rule. The agency shall
18 promptly publish any such determination.

19 “(ii) If the agency does not resolve the petition
20 under the procedures of clause (i), it shall grant any
21 such petition that presents a prima facie case that
22 evidence or other information upon which the agency
23 bases the proposed rule fails to comply with the In-
24 formation Quality Act, hold the requested hearing
25 not later than 30 days after receipt of the petition,

1 provide a reasonable opportunity for cross-examina-
2 tion at the hearing, and decide the issues presented
3 by the petition not later than 60 days after receipt
4 of the petition. The agency may deny any petition
5 that it determines does not present such a prima
6 facie case.

7 “(C) There shall be no judicial review of the
8 agency’s disposition of issues considered and decided
9 or determined under subparagraph (B)(ii) until judi-
10 cial review of the agency’s final action. There shall
11 be no judicial review of an agency’s determination to
12 withdraw a proposed rule under subparagraph
13 (B)(i).

14 “(D) Failure to petition for a hearing under
15 this paragraph shall not preclude judicial review of
16 any claim based on the Information Quality Act
17 under chapter 7 of this title.

18 “(e) HEARINGS FOR HIGH-IMPACT RULES.—Fol-
19 lowing notice of a proposed rule making, receipt of com-
20 ments on the proposed rule, and any hearing held under
21 subsection (d)(4), and before adoption of any high-impact
22 rule, the agency shall hold a hearing in accordance with
23 sections 556 and 557, unless such hearing is waived by
24 all participants in the rulemaking other than the agency.
25 The agency shall provide a reasonable opportunity for

1 cross-examination at such hearing. The hearing shall be
2 limited to the following issues of fact, except that partici-
3 pants at the hearing other than the agency may waive de-
4 termination of any such issue:

5 “(1) Whether the agency’s asserted factual
6 predicate for the rule is supported by the evidence.

7 “(2) Whether there is an alternative to the pro-
8 posed rule that would achieve the relevant statutory
9 objectives at a lower cost (including all costs to be
10 considered under subsection (b)(6)) than the pro-
11 posed rule.

12 “(3) If there is more than one alternative to the
13 proposed rule that would achieve the relevant statu-
14 tory objectives at a lower cost than the proposed
15 rule, which alternative would achieve the relevant
16 statutory objectives at the lowest cost.

17 “(4) Whether, if the agency proposes to adopt
18 a rule that is more costly than the least costly alter-
19 native that would achieve the relevant statutory ob-
20 jectives (including all costs to be considered under
21 subsection (b)(6)), the additional benefits of the
22 more costly rule exceed the additional costs of the
23 more costly rule.

24 “(5) Whether the evidence and other informa-
25 tion upon which the agency bases the proposed rule

1 meets the requirements of the Information Quality
2 Act.

3 “(6) Upon petition by an interested person who
4 has participated in the rulemaking, other issues rel-
5 evant to the rule making, unless the agency deter-
6 mines that consideration of the issues at the hearing
7 would not advance consideration of the rule or
8 would, in light of the nature of the need for agency
9 action, unreasonably delay completion of the rule
10 making. An agency shall grant or deny a petition
11 under this paragraph within 30 days of its receipt
12 of the petition.

13 No later than 45 days before any hearing held under this
14 subsection or sections 556 and 557, the agency shall pub-
15 lish in the Federal Register a notice specifying the pro-
16 posed rule to be considered at such hearing, the issues
17 to be considered at the hearing, and the time and place
18 for such hearing, except that such notice may be issued
19 not later than 15 days before a hearing held under sub-
20 section (d)(4)(B).

21 “(f) FINAL RULES.—(1) The agency shall adopt a
22 rule only following consultation with the Administrator of
23 the Office of Information and Regulatory Affairs to facili-
24 tate compliance with applicable rule making requirements.

1 “(2) The agency shall adopt a rule only on the basis
2 of the best reasonably obtainable scientific, technical, eco-
3 nomic, and other evidence and information concerning the
4 need for, consequences of, and alternatives to the rule.

5 “(3)(A) Except as provided in subparagraph (B), the
6 agency shall adopt the least costly rule considered during
7 the rule making (including all costs to be considered under
8 subsection (b)(6)) that meets relevant statutory objectives.

9 “(B) The agency may adopt a rule that is more costly
10 than the least costly alternative that would achieve the rel-
11 evant statutory objectives only if the additional benefits
12 of the more costly rule justify its additional costs and only
13 if the agency explains its reason for doing so based on
14 interests of public health, safety or welfare that are clearly
15 within the scope of the statutory provision authorizing the
16 rule.

17 “(4) When it adopts a final rule, the agency shall
18 publish a notice of final rule making. The notice shall in-
19 clude—

20 “(A) a concise, general statement of the rule’s
21 basis and purpose;

22 “(B) the agency’s reasoned final determination
23 of need for a rule to address the problem the agency
24 seeks to address with the rule, including a statement
25 of whether a rule is required by statute;

1 “(C) the agency’s reasoned final determination
2 that the benefits of the rule meet the relevant statu-
3 tory objectives and justify the rule’s costs (including
4 all costs to be considered under subsection (b)(6));

5 “(D) the agency’s reasoned final determination
6 not to adopt any of the alternatives to the proposed
7 rule considered by the agency during the rule mak-
8 ing, including—

9 “(i) the agency’s reasoned final determina-
10 tion that no alternative considered achieved the
11 relevant statutory objectives with lower costs
12 (including all costs to be considered under sub-
13 section (b)(6)) than the rule; or

14 “(ii) the agency’s reasoned determination
15 that its adoption of a more costly rule complies
16 with subsection (f)(3)(B);

17 “(E) the agency’s reasoned final determina-
18 tion—

19 “(i) that existing rules have not created or
20 contributed to the problem the agency seeks to
21 address with the rule; or

22 “(ii) that existing rules have created or
23 contributed to the problem the agency seeks to
24 address with the rule, and, if so—

1 “(I) why amendment or rescission of
2 such existing rules is not alone sufficient
3 to respond to the problem; and

4 “(II) whether and how the agency in-
5 tends to amend or rescind the existing rule
6 separate from adoption of the rule;

7 “(F) the agency’s reasoned final determination
8 that the evidence and other information upon which
9 the agency bases the rule complies with the Informa-
10 tion Quality Act; and

11 “(G)(i) for any major rule or high-impact rule,
12 the agency’s plan for review of the rule no less than
13 every ten years to determine whether, based upon
14 evidence, there remains a need for the rule, whether
15 the rule is in fact achieving statutory objectives,
16 whether the rule’s benefits continue to justify its
17 costs, and whether the rule can be modified or re-
18 scinded to reduce costs while continuing to achieve
19 statutory objectives;

20 “(ii) review of a rule under a plan required by
21 clause (i) of this subparagraph shall take into ac-
22 count the factors and criteria set forth in sub-
23 sections (b) through (f) of section 553 of this title.
24 All information considered by the agency in connec-
25 tion with its adoption of the rule, and, at the discre-

1 tion of the President or the Administrator of the Of-
2 fice of Information and Regulatory Affairs, informa-
3 tion provided by that Office in consultations with the
4 agency, shall be placed in the docket for the rule and
5 made accessible to the public for the public's use no
6 later than when the rule is adopted.

7 “(g) EXCEPTIONS FROM NOTICE AND HEARING RE-
8 QUIREMENTS.—(1) Except when notice or hearing is re-
9 quired by statute, subsections (c) through (e) of this sec-
10 tion do not apply to interpretive rules, general statements
11 of policy, or rules of agency organization, procedure, or
12 practice.

13 “(2)(A) When the agency for good cause, based upon
14 evidence, finds (and incorporates the finding and a brief
15 statement of reasons therefor in the rules issued) that
16 compliance with subsection (c), (d), or (e) or requirements
17 to render final determinations under subsection (f) of this
18 section before the issuance of an interim rule is impracti-
19 cable or contrary to the public interest, including interests
20 of national security, such subsections or requirements to
21 render final determinations shall not apply to the agency's
22 adoption of an interim rule.

23 “(B) If, following compliance with subparagraph (A)
24 of this paragraph, the agency adopts an interim rule, it
25 shall commence proceedings that comply fully with sub-

1 sections (e) through (f) of this section immediately upon
2 publication of the interim rule. No less than 270 days
3 from publication of the interim rule (or 18 months in the
4 case of a major rule or high-impact rule), the agency shall
5 complete rule making under subsections (e) through (f)
6 of this subsection and take final action to adopt a final
7 rule or rescind the interim rule. If the agency fails to take
8 timely final action, the interim rule will cease to have the
9 effect of law.

10 “(C) Other than in cases involving interests of na-
11 tional security, upon the agency’s publication of an interim
12 rule without compliance with subsections (e), (d), or (e)
13 or requirements to render final determinations under sub-
14 section (f) of this section, an interested party may seek
15 immediate judicial review under chapter 7 of this title of
16 the agency’s determination to adopt such interim rule. The
17 record on such review shall include all documents and in-
18 formation considered by the agency and any additional in-
19 formation presented by a party that the court determines
20 necessary to consider to assure justice.

21 “(h) ADDITIONAL REQUIREMENTS FOR HEARINGS.—
22 When a hearing is required under subsection (e) or is oth-
23 erwise required by statute or at the agency’s discretion
24 before adoption of a rule, the agency shall comply with
25 the requirements of sections 556 and 557 in addition to

1 the requirements of subsection (f) in adopting the rule and
2 in providing notice of the rule's adoption.

3 “(i) DATE OF PUBLICATION OF RULE.—The required
4 publication or service of a substantive final or interim rule
5 shall be made not less than 30 days before the effective
6 date of the rule, except—

7 “(1) a substantive rule which grants or recog-
8 nizes an exemption or relieves a restriction;

9 “(2) interpretive rules and statements of policy;
10 or

11 “(3) as otherwise provided by the agency for
12 good cause found and published with the rule.

13 “(j) RIGHT TO PETITION.—Each agency shall give
14 an interested person the right to petition for the issuance,
15 amendment, or repeal of a rule.

16 “(k) RULE MAKING GUIDELINES.—(1)(A) The Ad-
17 ministrator of the Office of Information and Regulatory
18 Affairs shall have authority to establish guidelines for the
19 assessment, including quantitative and qualitative assess-
20 ment, of the costs and benefits of potential, proposed, and
21 final rules and other economic issues or issues related to
22 risk that are relevant to rule making under this section
23 and other sections of this title. The rigor of cost-benefit
24 analysis required by such guidelines shall be commensu-

1 rate, in the Administrator’s determination, with the eco-
2 nomic impact of the rule.

3 “(B) To ensure that agencies use the best available
4 techniques to quantify and evaluate anticipated present
5 and future benefits, costs, other economic issues, and risks
6 as accurately as possible, the Administrator of the Office
7 of Information and Regulatory Affairs shall regularly up-
8 date guidelines established under paragraph (1)(A) of this
9 subsection.

10 “(2) The Administrator of the Office of Information
11 and Regulatory Affairs shall also have authority to issue
12 guidelines to promote coordination, simplification and har-
13 monization of agency rules during the rule making process
14 and otherwise. Such guidelines shall assure that each
15 agency avoids regulations that are inconsistent or incom-
16 patible with, or duplicative of, its other regulations and
17 those of other Federal agencies and drafts its regulations
18 to be simple and easy to understand, with the goal of mini-
19 mizing the potential for uncertainty and litigation arising
20 from such uncertainty.

21 “(3) To ensure consistency in Federal rule making,
22 the Administrator of the Office of Information and Regu-
23 latory Affairs shall—

24 “(A) issue guidelines and otherwise take action
25 to ensure that rule makings conducted in whole or

1 in part under procedures specified in provisions of
2 law other than those of subchapter II of this title
3 conform to the fullest extent allowed by law with the
4 procedures set forth in section 553 of this title; and

5 “(B) issue guidelines for the conduct of hear-
6 ings under subsections 553(d)(4) and 553(e) of this
7 section, including to assure a reasonable opportunity
8 for cross-examination. Each agency shall adopt regu-
9 lations for the conduct of hearings consistent with
10 the guidelines issued under this subparagraph.

11 “(4) The Administrator of the Office of Information
12 and Regulatory Affairs shall issue guidelines pursuant to
13 the Information Quality Act to apply in rule making pro-
14 ceedings under sections 553, 556 and 557 of this title.
15 In all cases, such guidelines, and the Administrator’s spe-
16 cific determinations regarding agency compliance with
17 such guidelines, shall be entitled to judicial deference.

18 “(l) INCLUSION IN THE RECORD OF CERTAIN DOCU-
19 MENTS AND INFORMATION.—The agency shall include in
20 the record for a rule making all documents and informa-
21 tion considered by the agency during the proceeding, in-
22 cluding, at the discretion of the President or the Adminis-
23 trator of the Office of Information and Regulatory Affairs,
24 documents and information communicated by that Office
25 during consultation with the Agency.

1 “(m) MONETARY POLICY EXEMPTION.—Nothing in
2 subsection (b)(6), subparagraphs (F) and (G) of sub-
3 section (d)(1), subsection (e), subsection (f)(3), and sub-
4 paragraphs (C) and (D) of subsection (f)(5) shall apply
5 to rule makings that concern monetary policy proposed or
6 implemented by the Board of Governors of the Federal
7 Reserve System or the Federal Open Market Committee.”.

8 **SEC. 4. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR**
9 **GUIDANCE; PRESIDENTIAL AUTHORITY TO**
10 **ISSUE GUIDELINES FOR ISSUANCE OF GUID-**
11 **ANCE.**

12 (a) IN GENERAL.—Chapter 5 of title 5, United
13 States Code, is amended by inserting after section 553 the
14 following new section:

15 **“§ 553a. Agency guidance; procedures to issue major**
16 **guidance; authority to issue guidelines**
17 **for issuance of guidance**

18 “(a) Before issuing any major guidance, an agency
19 shall—

20 “(1) make and document a reasoned determina-
21 tion that—

22 “(A) assures that such guidance is under-
23 standable and complies with relevant statutory
24 objectives and regulatory provisions;

1 “(B) identifies the costs and benefits (in-
2 cluding all costs to be considered during the
3 rule making under section 553(b) of this title)
4 of conduct conforming to such guidance and
5 assures that such benefits justify such costs;
6 and

7 “(C) describes alternatives to such guid-
8 ance and their costs and benefits (including all
9 costs to be considered during rule making
10 under section 553(b) of this title) and explains
11 why the agency rejected those alternatives; and

12 “(2) confer with the Administrator of the Office
13 of Information and Regulatory Affairs on the
14 issuance of such guidance to assure that the guid-
15 ance is reasonable, understandable, consistent with
16 relevant statutory and regulatory provisions and re-
17 quirements or practices of other agencies, does not
18 produce costs that are unjustified by the guidance’s
19 benefits, and is otherwise appropriate.

20 “(b) Agency guidance—

21 “(1) is not legally binding and may not be re-
22 lied upon by an agency as legal grounds for agency
23 action;

24 “(2) shall state in a plain, prominent and per-
25 manent manner that it is not legally binding; and

1 “(3) shall, at the time it is issued or upon re-
2 quest, be made available by the issuing agency to in-
3 terested persons and the public.

4 “(c) The Administrator of the Office of Information
5 and Regulatory Affairs shall have authority to issue guide-
6 lines for use by the agencies in the issuance of major guid-
7 ance and other guidance. Such guidelines shall assure that
8 each agency avoids issuing guidance documents that are
9 inconsistent or incompatible with, or duplicative of, with
10 its other regulations and those of other Federal agencies
11 and drafts its guidance documents to be simple and easy
12 to understand, with the goal of minimizing the potential
13 for uncertainty and litigation arising from such uncer-
14 tainty.”.

15 (b) CLERICAL AMENDMENT.—The table of sections
16 for chapter 5 of title 5, United States Code, is amended
17 by inserting after the item relating to section 553 the fol-
18 lowing new item:

 “553a. Agency guidance; procedures to issue major guidance; presidential au-
 thority to issue guidelines for issuance of guidance.”.

19 **SEC. 5. HEARINGS; PRESIDING EMPLOYEES; POWERS AND**
20 **DUTIES; BURDEN OF PROOF; EVIDENCE;**
21 **RECORD AS BASIS OF DECISION.**

22 Section 556 of title 5, United States Code, is amend-
23 ed by striking subsection (e) and inserting the following:

1 “(e)(1) The transcript of testimony and exhibits, to-
2 gether with all papers and requests filed in the proceeding,
3 constitutes the exclusive record for decision in accordance
4 with section 557 and, on payment of lawfully prescribed
5 costs, shall be made available to the parties. When an
6 agency decision rests on official notice of a material fact
7 not appearing in the evidence in the record, a party is
8 entitled, on timely request, to an opportunity to show the
9 contrary.

10 “(2) Notwithstanding paragraph (1) of this sub-
11 section, in a proceeding held under this section pursuant
12 to section 553(d)(4) or 553(e), the record for decision
13 shall include any information that is part of the record
14 of proceedings under section 553.

15 “(f) When an agency conducts rule making under this
16 section and section 557 directly after concluding pro-
17 ceedings upon an advance notice of proposed rulemaking
18 under section 553(c), the matters to be considered and
19 determinations to be made shall include, among other rel-
20 evant matters and determinations, the matters and deter-
21 minations described in subsections (b) and (f) of section
22 553.

23 “(g) Upon receipt of a petition for a hearing under
24 this section, the agency shall grant the petition in the case
25 of any major rule, unless the agency reasonably deter-

1 mines that a hearing would not advance consideration of
2 the rule or would, in light of the need for agency action,
3 unreasonably delay completion of the rule making. The
4 agency shall publish its decision to grant or deny the peti-
5 tion when it renders the decision, including an explanation
6 of the grounds for decision. The information contained in
7 the petition shall in all cases be included in the adminis-
8 trative record. This subsection shall not apply to rule mak-
9 ings that concern monetary policy proposed or imple-
10 mented by the Board of Governors of the Federal Reserve
11 System or the Federal Open Market Committee.”.

12 **SEC. 6. ACTIONS REVIEWABLE.**

13 Section 704 of title 5, United States Code, is amend-
14 ed—

15 (1) by striking “Agency action made” and in-
16 serting “(a) Agency action made”; and

17 (2) by adding at the end the following:

18 “(b) Other than in cases involving interests of na-
19 tional security, notwithstanding subsection (a) of this sec-
20 tion, upon the agency’s publication of an interim rule with-
21 out compliance with section 553 (c), (d), or (e) or require-
22 ments to render final determinations under subsection (f)
23 of section 553, an interested party may seek immediate
24 judicial review under this chapter of the agency’s deter-
25 mination to adopt such rule on an interim basis. Review

1 shall be limited to whether the agency abused its discre-
2 tion to adopt the interim rule without compliance with sec-
3 tion 553 (c), (d), or (e) or without rendering final deter-
4 minations under subsection (f) of section 553.”.

5 **SEC. 7. SCOPE OF REVIEW.**

6 Section 706 of title 5, United States Code is amend-
7 ed—

8 (1) by striking “To the extent necessary” and
9 inserting “(a) To the extent necessary”;

10 (2) in paragraph (2)(A) of subsection (a) (as
11 redesignated by paragraph (1) of this section), by in-
12 serting after “in accordance with law” the following:
13 “(including the Information Quality Act)”;

14 (3) by adding at the end the following:

15 “(b) The court shall not defer to the agency’s—

16 “(1) interpretation of an agency rule if the
17 agency did not comply with the procedures of section
18 553 or sections 556–557 of chapter 5 of this title to
19 issue the interpretation;

20 “(2) determination of the costs and benefits or
21 other economic or risk assessment of the action, if
22 the agency failed to conform to guidelines on such
23 determinations and assessments established by the
24 Administrator of the Office of Information and Reg-
25 ulatory Affairs under section 553(k); or

1 “(3) determinations under interlocutory review
2 pursuant to sections 553(g)(2)(C) and 704(b).

3 “(c) The court shall review agency denials of petitions
4 under section 553(e)(6) or any other petition for a hearing
5 under sections 556 and 557 for abuse of agency discre-
6 tion.”.

7 **SEC. 8. ADDED DEFINITION.**

8 Section 701(b) of title 5, United States Code, is
9 amended—

10 (1) in paragraph (1), by striking “and”;

11 (2) in paragraph (2), by striking the period at
12 the end, and inserting “; and”; and

13 (3) by adding at the end the following:

14 “(3) ‘substantial evidence’ means such relevant
15 evidence as a reasonable mind might accept as ade-
16 quate to support a conclusion in light of the record
17 considered as a whole, taking into account whatever
18 in the record fairly detracts from the weight of the
19 evidence relied upon by the agency to support its de-
20 cision.”.

21 **SEC. 9. EFFECTIVE DATE.**

22 The amendments made by this Act to—

23 (1) sections 553, 556, and 704 of title 5,
24 United States Code;

25 (2) subsection (b) of section 701 of such title;

1 (3) paragraphs (2) and (3) of section 706(b) of
2 such title; and
3 (4) subsection (c) of section 706 of such title;
4 shall not apply to any rule makings pending or completed
5 on the date of enactment of this Act.

○