

Union Calendar No. 195

112TH CONGRESS
1ST SESSION

H. R. 3010

[Report No. 112-294]

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

NOVEMBER 22, 2011

Additional sponsors: Mr. GOODLATTE, Mr. GOWDY, Mr. FRANKS of Arizona, Mr. GALLEGLY, Mr. ROSS of Florida, Mr. QUAYLE, Mr. PENCE, Mr. MICA, Mr. KLINE, Mr. SHUSTER, Mr. CHAFFETZ, Mr. GRIFFIN of Arkansas, Mrs. ADAMS, Mr. GOHMERT, Mr. AUSTRIA, Mr. DAVIS of Kentucky, Mr. JOHNSON of Ohio, Mr. COSTA, Mr. CALVERT, Mr. CARDOZA, Mr. CARTER, Mr. MATHESON, Mr. CONAWAY, Mr. ISSA, Mr. DONNELLY of Indiana, Mr. WHITFIELD, Mr. JONES, Mr. KING of Iowa, Mrs. LUMMIS, Mr. WILSON of South Carolina, Mr. AUSTIN SCOTT of Georgia, Mr. FLAKE, Ms. JENKINS, and Mr. SHULER

NOVEMBER 22, 2011

Deleted sponsor: Mr. BACA (added November 2, 2011; deleted November 16, 2011)

NOVEMBER 22, 2011

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italie*]

[For text of introduced bill, see copy of bill as introduced on September 22, 2011]

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;*

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

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

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

17 *“(A) an annual cost on the economy of*
18 *\$100,000,000 or more, adjusted annually for in-*
19 *flation;*

20 *“(B) a major increase in costs or prices for*
21 *consumers, individual industries, Federal, State,*
22 *local, or tribal government agencies, or geo-*
23 *graphic regions;*

24 *“(C) significant adverse effects on competi-*
25 *tion, employment, investment, productivity, in-*

1 *novation, or on the ability of United States-*
2 *based enterprises to compete with foreign-based*
3 *enterprises in domestic and export markets; or*

4 *“(D) significant impacts on multiple sectors*
5 *of the economy;*

6 *“(16) ‘high-impact rule’ means any rule that the*
7 *Administrator of the Office of Information and Regu-*
8 *latory Affairs determines is likely to impose an an-*
9 *annual cost on the economy of \$1,000,000,000 or more,*
10 *adjusted annually for inflation;*

11 *“(17) ‘guidance’ means an agency statement of*
12 *general applicability and future effect, other than a*
13 *regulatory action, that sets forth a policy on a statu-*
14 *tory, regulatory or technical issue or an interpreta-*
15 *tion of a statutory or regulatory issue;*

16 *“(18) ‘major guidance’ means guidance that the*
17 *Administrator of the Office of Information and Regu-*
18 *latory Affairs finds is likely to lead to—*

19 *“(A) an annual cost on the economy of*
20 *\$100,000,000 or more, adjusted annually for in-*
21 *flation;*

22 *“(B) a major increase in costs or prices for*
23 *consumers, individual industries, Federal, State,*
24 *local or tribal government agencies, or geo-*
25 *graphic regions;*

1 “(C) *significant adverse effects on competi-*
2 *tion, employment, investment, productivity, in-*
3 *novation, or on the ability of United States-*
4 *based enterprises to compete with foreign-based*
5 *enterprises in domestic and export markets; or*

6 “(D) *significant impacts on multiple sectors*
7 *of the economy;*

8 “(19) *the ‘Information Quality Act’ means sec-*
9 *tion 515 of Public Law 106–554, the Treasury and*
10 *General Government Appropriations Act for Fiscal*
11 *Year 2001, and guidelines issued by the Adminis-*
12 *trator of the Office of Information and Regulatory Af-*
13 *airs or other agencies pursuant to the Act; and*

14 “(20) *the ‘Office of Information and Regulatory*
15 *Affairs’ means the office established under section*
16 *3503 of chapter 35 of title 44 and any successor to*
17 *that office.’”.*

18 **SEC. 3. RULE MAKING.**

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

22 (b) *Section 553 of title 5, United States Code, is*
23 *amended by striking subsections (b) through (e) and insert-*
24 *ing the following:*

1 “(b) *RULE MAKING CONSIDERATIONS.—In a rule*
2 *making, an agency shall make all preliminary and final*
3 *factual determinations based on evidence and consider, in*
4 *addition to other applicable considerations, the following:*

5 “(1) *The legal authority under which a rule may*
6 *be proposed, including whether a rule making is re-*
7 *quired by statute, and if so, whether by a specific*
8 *date, or whether the agency has discretion to com-*
9 *mence a rule making.*

10 “(2) *Other statutory considerations applicable to*
11 *whether the agency can or should propose a rule or*
12 *undertake other agency action.*

13 “(3) *The specific nature and significance of the*
14 *problem the agency may address with a rule (includ-*
15 *ing the degree and nature of risks the problem poses*
16 *and the priority of addressing those risks compared to*
17 *other matters or activities within the agency’s juris-*
18 *isdiction), whether the problem warrants new agency*
19 *action, and the countervailing risks that may be*
20 *posed by alternatives for new agency action.*

21 “(4) *Whether existing rules have created or con-*
22 *tributed to the problem the agency may address with*
23 *a rule and whether those rules could be amended or*
24 *rescinded to address the problem in whole or part.*

1 “(5) *Any reasonable alternatives for a new rule*
2 *or other response identified by the agency or inter-*
3 *ested persons, including not only responses that man-*
4 *date particular conduct or manners of compliance,*
5 *but also—*

6 “(A) *the alternative of no Federal response;*

7 “(B) *amending or rescinding existing rules;*

8 “(C) *potential regional, State, local, or trib-*
9 *al regulatory action or other responses that could*
10 *be taken in lieu of agency action; and*

11 “(D) *potential responses that—*

12 “(i) *specify performance objectives*
13 *rather than conduct or manners of compli-*
14 *ance;*

15 “(ii) *establish economic incentives to*
16 *encourage desired behavior;*

17 “(iii) *provide information upon which*
18 *choices can be made by the public; or*

19 “(iv) *incorporate other innovative al-*
20 *ternatives rather than agency actions that*
21 *specify conduct or manners of compliance.*

22 “(6) *Notwithstanding any other provision of*
23 *law—*

24 “(A) *the potential costs and benefits associ-*
25 *ated with potential alternative rules and other*

1 *responses considered under section 553(b)(5), in-*
2 *cluding direct, indirect, and cumulative costs*
3 *and benefits and estimated impacts on jobs, eco-*
4 *nomi c growth, innovation, and economic com-*
5 *petitiveness;*

6 “(B) means to increase the cost-effectiveness
7 of any Federal response; and

8 “(C) incentives for innovation, consistency,
9 predictability, lower costs of enforcement and
10 compliance (to government entities, regulated en-
11 tities, and the public), and flexibility.

12 “(c) *ADVANCE NOTICE OF PROPOSED RULE MAKING*
13 *FOR MAJOR RULES, HIGH-IMPACT RULES, AND RULES IN-*
14 *VOLVING NOVEL LEGAL OR POLICY ISSUES.—In the case*
15 *of a rule making for a major rule or high-impact rule or*
16 *a rule that involves a novel legal or policy issue arising*
17 *out of statutory mandates, not later than 90 days before*
18 *a notice of proposed rule making is published in the Federal*
19 *Register, an agency shall publish advance notice of proposed*
20 *rule making in the Federal Register. In publishing such ad-*
21 *vance notice, the agency shall—*

22 “(1) include a written statement identifying, at
23 a minimum—

24 “(A) the nature and significance of the
25 problem the agency may address with a rule, in-

1 *cluding data and other evidence and information*
2 *on which the agency expects to rely for the pro-*
3 *posed rule;*

4 “(B) *the legal authority under which a rule*
5 *may be proposed, including whether a rule mak-*
6 *ing is required by statute, and if so, whether by*
7 *a specific date, or whether the agency has discre-*
8 *tion to commence a rule making;*

9 “(C) *preliminary information available to*
10 *the agency concerning the other considerations*
11 *specified in subsection (b); and*

12 “(D) *in the case of a rule that involves a*
13 *novel legal or policy issue arising out of statu-*
14 *tory mandates, the nature of and potential rea-*
15 *sons to adopt the novel legal or policy position*
16 *upon which the agency may base a proposed*
17 *rule;*

18 “(2) *solicit written data, views or argument*
19 *from interested persons concerning the information*
20 *and issues addressed in the advance notice; and*

21 “(3) *provide for a period of not fewer than 60*
22 *days for interested persons to submit such written*
23 *data, views, or argument to the agency.*

24 “(d) *NOTICES OF PROPOSED RULE MAKING; DETER-*
25 *MINATIONS OF OTHER AGENCY COURSE.—(1) Before it de-*

1 *termines to propose a rule, and following completion of pro-*
2 *cedures under subsection (c), if applicable, the agency shall*
3 *consult with the Administrator of the Office of Information*
4 *and Regulatory Affairs. If the agency thereafter determines*
5 *to propose a rule, the agency shall publish a notice of pro-*
6 *posed rule making, which shall include—*

7 “(A) *a statement of the time, place, and nature*
8 *of public rule making proceedings;*

9 “(B) *reference to the legal authority under which*
10 *the rule is proposed;*

11 “(C) *the terms of the proposed rule;*

12 “(D) *a description of information known to the*
13 *agency on the subject and issues of the proposed rule,*
14 *including but not limited to—*

15 “(i) *a summary of information known to*
16 *the agency concerning the considerations speci-*
17 *fied in subsection (b);*

18 “(ii) *a summary of additional information*
19 *the agency provided to and obtained from inter-*
20 *ested persons under subsection (c);*

21 “(iii) *a summary of any preliminary risk*
22 *assessment or regulatory impact analysis per-*
23 *formed by the agency; and*

24 “(iv) *information specifically identifying*
25 *all data, studies, models, and other evidence or*

1 *information considered or used by the agency in*
2 *connection with its determination to propose the*
3 *rule;*

4 “(E)(i) *a reasoned preliminary determination of*
5 *need for the rule based on the information described*
6 *under subparagraph (D); and*

7 “(ii) *an additional statement of whether a rule*
8 *is required by statute;*

9 “(F) *a reasoned preliminary determination that*
10 *the benefits of the proposed rule meet the relevant*
11 *statutory objectives and justify the costs of the pro-*
12 *posed rule (including all costs to be considered under*
13 *subsection (b)(6)), based on the information described*
14 *under subparagraph (D);*

15 “(G) *a discussion of—*

16 “(i) *the alternatives to the proposed rule,*
17 *and other alternative responses, considered by the*
18 *agency under subsection (b);*

19 “(ii) *the costs and benefits of those alter-*
20 *natives (including all costs to be considered*
21 *under subsection (b)(6));*

22 “(iii) *whether those alternatives meet rel-*
23 *evant statutory objectives; and*

24 “(iv) *why the agency did not propose any*
25 *of those alternatives; and*

1 “(H)(i) a statement of whether existing rules
2 have created or contributed to the problem the agency
3 seeks to address with the proposed rule; and

4 “(ii) if so, whether or not the agency proposes to
5 amend or rescind any such rules, and why.

6 All information provided to or considered by the
7 agency, and steps to obtain information by the agen-
8 cy, in connection with its determination to propose
9 the rule, including any preliminary risk assessment
10 or regulatory impact analysis prepared by the agency
11 and all other information prepared or described by
12 the agency under subparagraph (D) and, at the dis-
13 cretion of the President or the Administrator of the
14 Office of Information and Regulatory Affairs, infor-
15 mation provided by that Office in consultations with
16 the agency, shall be placed in the docket for the pro-
17 posed rule and made accessible to the public by elec-
18 tronic means and otherwise for the public’s use when
19 the notice of proposed rule making is published.

20 “(2)(A) If the agency undertakes procedures under sub-
21 section (c) and determines thereafter not to propose a rule,
22 the agency shall, following consultation with the Office of
23 Information and Regulatory Affairs, publish a notice of de-
24 termination of other agency course. A notice of determina-
25 tion of other agency course shall include information re-

1 *quired by paragraph (1)(D) to be included in a notice of*
2 *proposed rule making and a description of the alternative*
3 *response the agency determined to adopt.*

4 *“(B) If in its determination of other agency course the*
5 *agency makes a determination to amend or rescind an ex-*
6 *isting rule, the agency need not undertake additional pro-*
7 *ceedings under subsection (c) before it publishes a notice*
8 *of proposed rule making to amend or rescind the existing*
9 *rule.*

10 *All information provided to or considered by the agency,*
11 *and steps to obtain information by the agency, in connec-*
12 *tion with its determination of other agency course, includ-*
13 *ing but not limited to any preliminary risk assessment or*
14 *regulatory impact analysis prepared by the agency and all*
15 *other information that would be required to be prepared*
16 *or described by the agency under paragraph (1)(D) if the*
17 *agency had determined to publish a notice of proposed rule*
18 *making and, at the discretion of the President or the Ad-*
19 *ministrator of the Office of Information and Regulatory Af-*
20 *fairs, information provided by that Office in consultations*
21 *with the agency, shall be placed in the docket for the deter-*
22 *mination and made accessible to the public by electronic*
23 *means and otherwise for the public’s use when the notice*
24 *of determination is published.*

1 “(3) After notice of proposed rule making required by
2 this section, the agency shall provide interested persons an
3 opportunity to participate in the rule making through sub-
4 mission of written data, views, or arguments with or with-
5 out opportunity for oral presentation, except that—

6 “(A) if a hearing is required under paragraph
7 (4)(B) or subsection (e), opportunity for oral presen-
8 tation shall be provided pursuant to that requirement;
9 or

10 “(B) when other than under subsection (e) of this
11 section rules are required by statute or at the discre-
12 tion of the agency to be made on the record after op-
13 portunity for an agency hearing, sections 556 and
14 557 shall apply, and paragraph (4), the requirements
15 of subsection (e) to receive comment outside of the
16 procedures of sections 556 and 557, and the petition
17 procedures of subsection (e)(6) shall not apply.

18 The agency shall provide not fewer than 60 days for inter-
19 ested persons to submit written data, views, or argument
20 (or 120 days in the case of a proposed major or high-impact
21 rule).

22 “(4)(A) Within 30 days of publication of notice of pro-
23 posed rule making, a member of the public may petition
24 for a hearing in accordance with section 556 to determine
25 whether any evidence or other information upon which the

1 *agency bases the proposed rule fails to comply with the In-*
2 *formation Quality Act.*

3 “(B)(i) *The agency may, upon review of the petition,*
4 *determine without further process to exclude from the rule*
5 *making the evidence or other information that is the subject*
6 *of the petition and, if appropriate, withdraw the proposed*
7 *rule. The agency shall promptly publish any such deter-*
8 *mination.*

9 “(ii) *If the agency does not resolve the petition under*
10 *the procedures of clause (i), it shall grant any such petition*
11 *that presents a prima facie case that evidence or other infor-*
12 *mation upon which the agency bases the proposed rule fails*
13 *to comply with the Information Quality Act, hold the re-*
14 *quested hearing not later than 30 days after receipt of the*
15 *petition, provide a reasonable opportunity for cross-exam-*
16 *ination at the hearing, and decide the issues presented by*
17 *the petition not later than 60 days after receipt of the peti-*
18 *tion. The agency may deny any petition that it determines*
19 *does not present such a prima facie case.*

20 “(C) *There shall be no judicial review of the agency’s*
21 *disposition of issues considered and decided or determined*
22 *under subparagraph (B)(ii) until judicial review of the*
23 *agency’s final action. There shall be no judicial review of*
24 *an agency’s determination to withdraw a proposed rule*
25 *under subparagraph (B)(i) on the basis of the petition.*

1 “(D) *Failure to petition for a hearing under this para-*
2 *graph shall not preclude judicial review of any claim based*
3 *on the Information Quality Act under chapter 7 of this title.*

4 “(e) *HEARINGS FOR HIGH-IMPACT RULES.—Following*
5 *notice of a proposed rule making, receipt of comments on*
6 *the proposed rule, and any hearing held under subsection*
7 *(d)(4), and before adoption of any high-impact rule, the*
8 *agency shall hold a hearing in accordance with sections 556*
9 *and 557, unless such hearing is waived by all participants*
10 *in the rule making other than the agency. The agency shall*
11 *provide a reasonable opportunity for cross-examination at*
12 *such hearing. The hearing shall be limited to the following*
13 *issues of fact, except that participants at the hearing other*
14 *than the agency may waive determination of any such*
15 *issue:*

16 “(1) *Whether the agency’s asserted factual predi-*
17 *cate for the rule is supported by the evidence.*

18 “(2) *Whether there is an alternative to the pro-*
19 *posed rule that would achieve the relevant statutory*
20 *objectives at a lower cost (including all costs to be*
21 *considered under subsection (b)(6)) than the proposed*
22 *rule.*

23 “(3) *If there is more than one alternative to the*
24 *proposed rule that would achieve the relevant statu-*
25 *tory objectives at a lower cost than the proposed rule,*

1 *which alternative would achieve the relevant statutory*
2 *objectives at the lowest cost.*

3 “(4) *Whether, if the agency proposes to adopt a*
4 *rule that is more costly than the least costly alter-*
5 *native that would achieve the relevant statutory objec-*
6 *tives (including all costs to be considered under sub-*
7 *section (b)(6)), the additional benefits of the more*
8 *costly rule exceed the additional costs of the more cost-*
9 *ly rule.*

10 “(5) *Whether the evidence and other information*
11 *upon which the agency bases the proposed rule meets*
12 *the requirements of the Information Quality Act.*

13 “(6) *Upon petition by an interested person who*
14 *has participated in the rule making, other issues rel-*
15 *evant to the rule making, unless the agency deter-*
16 *mines that consideration of the issues at the hearing*
17 *would not advance consideration of the rule or would,*
18 *in light of the nature of the need for agency action,*
19 *unreasonably delay completion of the rule making. An*
20 *agency shall grant or deny a petition under this*
21 *paragraph within 30 days of its receipt of the peti-*
22 *tion.*

23 *No later than 45 days before any hearing held under this*
24 *subsection or sections 556 and 557, the agency shall publish*
25 *in the Federal Register a notice specifying the proposed rule*

1 *to be considered at such hearing, the issues to be considered*
2 *at the hearing, and the time and place for such hearing,*
3 *except that such notice may be issued not later than 15 days*
4 *before a hearing held under subsection (d)(4)(B).*

5 “(f) *FINAL RULES.—(1) The agency shall adopt a rule*
6 *only following consultation with the Administrator of the*
7 *Office of Information and Regulatory Affairs to facilitate*
8 *compliance with applicable rule making requirements.*

9 “(2) *The agency shall adopt a rule only on the basis*
10 *of the best reasonably obtainable scientific, technical, eco-*
11 *nomie, and other evidence and information concerning the*
12 *need for, consequences of, and alternatives to the rule.*

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

17 “(B) *The agency may adopt a rule that is more costly*
18 *than the least costly alternative that would achieve the rel-*
19 *evant statutory objectives only if the additional benefits of*
20 *the more costly rule justify its additional costs and only*
21 *if the agency explains its reason for doing so based on inter-*
22 *ests of public health, safety or welfare that are clearly with-*
23 *in the scope of the statutory provision authorizing the rule.*

1 “(4) When it adopts a final rule, the agency shall pub-
2 lish a notice of final rule making. The notice shall in-
3 clude—

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

6 “(B) the agency’s reasoned final determination
7 of need for a rule to address the problem the agency
8 seeks to address with the rule, including a statement
9 of whether a rule is required by statute and a sum-
10 mary of any final risk assessment or regulatory im-
11 pact analysis prepared by the agency;

12 “(C) the agency’s reasoned final determination
13 that the benefits of the rule meet the relevant statutory
14 objectives and justify the rule’s costs (including all
15 costs to be considered under subsection (b)(6));

16 “(D) the agency’s reasoned final determination
17 not to adopt any of the alternatives to the proposed
18 rule considered by the agency during the rule making,
19 including—

20 “(i) the agency’s reasoned final determina-
21 tion that no alternative considered achieved the
22 relevant statutory objectives with lower costs (in-
23 cluding all costs to be considered under sub-
24 section (b)(6)) than the rule; or

1 “(i) the agency’s reasoned determination
2 that its adoption of a more costly rule complies
3 with subsection (f)(3)(B);

4 “(E) the agency’s reasoned final determination—

5 “(i) that existing rules have not created or
6 contributed to the problem the agency seeks to
7 address with the rule; or

8 “(ii) that existing rules have created or con-
9 tributed to the problem the agency seeks to ad-
10 dress with the rule, and, if so—

11 “(I) why amendment or rescission of
12 such existing rules is not alone sufficient to
13 respond to the problem; and

14 “(II) whether and how the agency in-
15 tends to amend or rescind the existing rule
16 separate from adoption of the rule;

17 “(F) the agency’s reasoned final determination
18 that the evidence and other information upon which
19 the agency bases the rule complies with the Informa-
20 tion Quality Act; and

21 “(G)(i) for any major rule or high-impact rule,
22 the agency’s plan for review of the rule no less than
23 every ten years to determine whether, based upon evi-
24 dence, there remains a need for the rule, whether the
25 rule is in fact achieving statutory objectives, whether

1 *the rule’s benefits continue to justify its costs, and*
2 *whether the rule can be modified or rescinded to re-*
3 *duce costs while continuing to achieve statutory objec-*
4 *tives.*

5 *“(ii) review of a rule under a plan required by*
6 *clause (i) of this subparagraph shall take into account*
7 *the factors and criteria set forth in subsections (b)*
8 *through (f) of section 553 of this title.*

9 *All information considered by the agency in connection*
10 *with its adoption of the rule, and, at the discretion of the*
11 *President or the Administrator of the Office of Information*
12 *and Regulatory Affairs, information provided by that Office*
13 *in consultations with the agency, shall be placed in the*
14 *docket for the rule and made accessible to the public for*
15 *the public’s use no later than when the rule is adopted.*

16 *“(g) EXCEPTIONS FROM NOTICE AND HEARING RE-*
17 *QUIREMENTS.—(1) Except when notice or hearing is re-*
18 *quired by statute, the following do not apply to interpretive*
19 *rules, general statements of policy, or rules of agency orga-*
20 *nization, procedure, or practice:*

21 *“(A) Subsections (c) through (e).*

22 *“(B) Paragraphs (1) through (3) of subsection*
23 *(f).*

24 *“(C) Subparagraphs (B) through (H) of sub-*
25 *section (f)(4).*

1 “(2)(A) When the agency for good cause, based upon
2 evidence, finds (and incorporates the finding and a brief
3 statement of reasons therefor in the rules issued) that com-
4 pliance with subsection (c), (d), or (e) or requirements to
5 render final determinations under subsection (f) of this sec-
6 tion before the issuance of an interim rule is impracticable
7 or contrary to the public interest, including interests of na-
8 tional security, such subsections or requirements to render
9 final determinations shall not apply to the agency’s adop-
10 tion of an interim rule.

11 “(B) If, following compliance with subparagraph (A)
12 of this paragraph, the agency adopts an interim rule, it
13 shall commence proceedings that comply fully with sub-
14 sections (d) through (f) of this section immediately upon
15 publication of the interim rule, shall treat the publication
16 of the interim rule as publication of a notice of proposed
17 rule making and shall not be required to issue supplemental
18 notice other than to complete full compliance with sub-
19 section (d). No less than 270 days from publication of the
20 interim rule (or 18 months in the case of a major rule or
21 high-impact rule), the agency shall complete rule making
22 under subsections (d) through (f) of this subsection and take
23 final action to adopt a final rule or rescind the interim
24 rule. If the agency fails to take timely final action, the in-
25 terim rule will cease to have the effect of law.

1 “(C) Other than in cases involving interests of na-
2 tional security, upon the agency’s publication of an interim
3 rule without compliance with subsections (c), (d), or (e) or
4 requirements to render final determinations under sub-
5 section (f) of this section, an interested party may seek im-
6 mediate judicial review under chapter 7 of this title of the
7 agency’s determination to adopt such interim rule. The
8 record on such review shall include all documents and infor-
9 mation considered by the agency and any additional infor-
10 mation presented by a party that the court determines nec-
11 essary to consider to assure justice.

12 “(3) When the agency for good cause finds (and incor-
13 porates the finding and a brief statement of reasons therefor
14 in the rules issued) that notice and public procedure thereon
15 are unnecessary, including because agency rule making is
16 undertaken only to correct a de minimis technical or cler-
17 ical error in a previously issued rule or for other non-
18 controversial purposes, the agency may publish a rule with-
19 out compliance with subsections (c), (d), (e), or (f)(1)-(3)
20 and (f)(4)(B)-(F). If the agency receives significant adverse
21 comment within 60 days after publication of the rule, it
22 shall treat the notice of the rule as a notice of proposed
23 rule making and complete rule making in compliance with
24 subsections (d) and (f).

1 “(h) *ADDITIONAL REQUIREMENTS FOR HEARINGS.*—
2 *When a hearing is required under subsection (e) or is other-*
3 *wise required by statute or at the agency’s discretion before*
4 *adoption of a rule, the agency shall comply with the re-*
5 *quirements of sections 556 and 557 in addition to the re-*
6 *quirements of subsection (f) in adopting the rule and in*
7 *providing notice of the rule’s adoption.*

8 “(i) *DATE OF PUBLICATION OF RULE.*—*The required*
9 *publication or service of a substantive final or interim rule*
10 *shall be made not less than 30 days before the effective date*
11 *of the rule, except—*

12 “(1) *a substantive rule which grants or recog-*
13 *nizes an exemption or relieves a restriction;*

14 “(2) *interpretive rules and statements of policy;*
15 *or*

16 “(3) *as otherwise provided by the agency for*
17 *good cause found and published with the rule.*

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

21 “(k) *RULE MAKING GUIDELINES.*—(1)(A) *The Admin-*
22 *istrator of the Office of Information and Regulatory Affairs*
23 *shall establish guidelines for the assessment, including*
24 *quantitative and qualitative assessment, of the costs and*
25 *benefits of proposed and final rules and other economic*

1 *issues or issues related to risk that are relevant to rule mak-*
2 *ing under this title. The rigor of cost-benefit analysis re-*
3 *quired by such guidelines shall be commensurate, in the Ad-*
4 *ministrator’s determination, with the economic impact of*
5 *the rule.*

6 “(B) *To ensure that agencies use the best available*
7 *techniques to quantify and evaluate anticipated present and*
8 *future benefits, costs, other economic issues, and risks as ac-*
9 *curately as possible, the Administrator of the Office of In-*
10 *formation and Regulatory Affairs shall regularly update*
11 *guidelines established under paragraph (1)(A) of this sub-*
12 *section.*

13 “(2) *The Administrator of the Office of Information*
14 *and Regulatory Affairs shall also issue guidelines to pro-*
15 *mote coordination, simplification and harmonization of*
16 *agency rules during the rule making process and otherwise.*
17 *Such guidelines shall assure that each agency avoids regula-*
18 *tions that are inconsistent or incompatible with, or duplica-*
19 *tive of, its other regulations and those of other Federal agen-*
20 *cies and drafts its regulations to be simple and easy to un-*
21 *derstand, with the goal of minimizing the potential for un-*
22 *certainty and litigation arising from such uncertainty.*

23 “(3) *To ensure consistency in Federal rule making, the*
24 *Administrator of the Office of Information and Regulatory*
25 *Affairs shall—*

1 “(A) issue guidelines and otherwise take action
2 to ensure that rule makings conducted in whole or in
3 part under procedures specified in provisions of law
4 other than those of subchapter II of this title conform
5 to the fullest extent allowed by law with the proce-
6 dures set forth in section 553 of this title; and

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

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

20 “(l) INCLUSION IN THE RECORD OF CERTAIN DOCU-
21 MENTS AND INFORMATION.—The agency shall include in the
22 record for a rule making, and shall make available by elec-
23 tronic means and otherwise, all documents and information
24 prepared or considered by the agency during the proceeding,
25 including, at the discretion of the President or the Adminis-

1 *trator of the Office of Information and Regulatory Affairs,*
 2 *documents and information communicated by that Office*
 3 *during consultation with the Agency.*

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

11 **SEC. 4. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR**
 12 **GUIDANCE; PRESIDENTIAL AUTHORITY TO**
 13 **ISSUE GUIDELINES FOR ISSUANCE OF GUID-**
 14 **ANCE.**

15 (a) *IN GENERAL.—Chapter 5 of title 5, United States*
 16 *Code, is amended by inserting after section 553 the fol-*
 17 *lowing new section:*

18 **“§553a. Agency guidance; procedures to issue major**
 19 **guidance; authority to issue guidelines for**
 20 **issuance of guidance**

21 “(a) *Before issuing any major guidance, or guidance*
 22 *that involves a novel legal or policy issue arising out of*
 23 *statutory mandates, an agency shall—*

24 “(1) *make and document a reasoned determina-*
 25 *tion that—*

1 “(A) assures that such guidance is under-
2 standable and complies with relevant statutory
3 objectives and regulatory provisions (including
4 any statutory deadlines for agency action);

5 “(B) summarizes the evidence and data on
6 which the agency will base the guidance;

7 “(C) identifies the costs and benefits (in-
8 cluding all costs to be considered during a rule
9 making under section 553(b) of this title) of con-
10 duct conforming to such guidance and assures
11 that such benefits justify such costs; and

12 “(D) describes alternatives to such guidance
13 and their costs and benefits (including all costs
14 to be considered during a rule making under sec-
15 tion 553(b) of this title) and explains why the
16 agency rejected those alternatives; and

17 “(2) confer with the Administrator of the Office
18 of Information and Regulatory Affairs on the
19 issuance of such guidance to assure that the guidance
20 is reasonable, understandable, consistent with relevant
21 statutory and regulatory provisions and requirements
22 or practices of other agencies, does not produce costs
23 that are unjustified by the guidance’s benefits, and is
24 otherwise appropriate.

1 *Upon issuing major guidance, or guidance that involves a*
2 *novel legal or policy issue arising out of statutory man-*
3 *dates, the agency shall publish the documentation required*
4 *by subparagraph (1) by electronic means and otherwise.*

5 *“(b) Agency guidance—*

6 *“(1) is not legally binding and may not be relied*
7 *upon by an agency as legal grounds for agency ac-*
8 *tion;*

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

11 *“(3) shall, at the time it is issued or upon re-*
12 *quest, be made available by the issuing agency to in-*
13 *terested persons and the public by electronic means*
14 *and otherwise.*

15 *Agencies shall avoid the issuance of guidance that is incon-*
16 *sistent or incompatible with, or duplicative of, the agency’s*
17 *governing statutes or regulations, with the goal of mini-*
18 *mizing the potential for uncertainty and litigation arising*
19 *from such uncertainty.*

20 *“(c) The Administrator of the Office of Information*
21 *and Regulatory Affairs shall have authority to issue guide-*
22 *lines for use by the agencies in the issuance of major guid-*
23 *ance and other guidance. Such guidelines shall assure that*
24 *each agency avoids issuing guidance documents that are in-*
25 *consistent or incompatible with, or duplicative of, the law,*

1 *its other regulations, or the regulations of other Federal*
 2 *agencies and drafts its guidance documents to be simple and*
 3 *easy to understand, with the goal of minimizing the poten-*
 4 *tial for uncertainty and litigation arising from such uncer-*
 5 *tainty.”.*

6 (b) *CLERICAL AMENDMENT.—The table of sections for*
 7 *chapter 5 of title 5, United States Code, is amended by in-*
 8 *serting after the item relating to section 553 the following*
 9 *new item:*

“553a. Agency guidance; procedures to issue major guidance; authority to issue
guidelines for issuance of guidance.’”.

10 **SEC. 5. HEARINGS; PRESIDING EMPLOYEES; POWERS AND**
 11 **DUTIES; BURDEN OF PROOF; EVIDENCE;**
 12 **RECORD AS BASIS OF DECISION.**

13 *Section 556 of title 5, United States Code, is amended*
 14 *by striking subsection (e) and inserting the following:*

15 *“(e)(1) The transcript of testimony and exhibits, to-*
 16 *gether with all papers and requests filed in the proceeding,*
 17 *constitutes the exclusive record for decision in accordance*
 18 *with section 557 and shall be made available to the parties*
 19 *and the public by electronic means and, upon payment of*
 20 *lawfully prescribed costs, otherwise. When an agency deci-*
 21 *sion rests on official notice of a material fact not appearing*
 22 *in the evidence in the record, a party is entitled, on timely*
 23 *request, to an opportunity to show the contrary.*

1 “(2) Notwithstanding paragraph (1) of this subsection,
2 in a proceeding held under this section pursuant to section
3 553(d)(4) or 553(e), the record for decision shall also in-
4 clude any information that is part of the record of pro-
5 ceedings under section 553.

6 “(f) When an agency conducts rule making under this
7 section and section 557 directly after concluding pro-
8 ceedings upon an advance notice of proposed rule making
9 under section 553(c), the matters to be considered and deter-
10 minations to be made shall include, among other relevant
11 matters and determinations, the matters and determina-
12 tions described in subsections (b) and (f) of section 553.

13 “(g) Upon receipt of a petition for a hearing under
14 this section, the agency shall grant the petition in the case
15 of any major rule, unless the agency reasonably determines
16 that a hearing would not advance consideration of the rule
17 or would, in light of the need for agency action, unreason-
18 ably delay completion of the rule making. The agency shall
19 publish its decision to grant or deny the petition when it
20 renders the decision, including an explanation of the
21 grounds for decision. The information contained in the peti-
22 tion shall in all cases be included in the administrative
23 record. This subsection shall not apply to rule makings that
24 concern monetary policy proposed or implemented by the

1 *Board of Governors of the Federal Reserve System or the*
2 *Federal Open Market Committee.”.*

3 **SEC. 6. ACTIONS REVIEWABLE.**

4 *Section 704 of title 5, United States Code, is amend-*
5 *ed—*

6 *(1) by striking “Agency action made” and in-*
7 *serting “(a) Agency action made”; and*

8 *(2) by adding at the end the following: “Denial*
9 *by an agency of a correction request or, where admin-*
10 *istrative appeal is provided for, denial of an appeal,*
11 *under an administrative mechanism described in sub-*
12 *section (b)(2)(B) of the Information Quality Act, or*
13 *the failure of an agency within 90 days to grant or*
14 *deny such request or appeal, shall be final action for*
15 *purposes of this section.*

16 *“(b) Other than in cases involving interests of national*
17 *security, notwithstanding subsection (a) of this section,*
18 *upon the agency’s publication of an interim rule without*
19 *compliance with section 553(c), (d), or (e) or requirements*
20 *to render final determinations under subsection (f) of sec-*
21 *tion 553, an interested party may seek immediate judicial*
22 *review under this chapter of the agency’s determination to*
23 *adopt such rule on an interim basis. Review shall be limited*
24 *to whether the agency abused its discretion to adopt the in-*
25 *terim rule without compliance with section 553(c), (d), or*

1 *(e) or without rendering final determinations under sub-*
2 *section (f) of section 553.”.*

3 **SEC. 7. SCOPE OF REVIEW.**

4 *Section 706 of title 5, United States Code is amend-*
5 *ed—*

6 *(1) by striking “To the extent necessary” and in-*
7 *serting “(a) To the extent necessary”;*

8 *(2) in paragraph (2)(A) of subsection (a) (as*
9 *designated by paragraph (1) of this section), by in-*
10 *serting after “in accordance with law” the following:*

11 *“(including the Information Quality Act)”;* and

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

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

14 *“(1) interpretation of an agency rule if the agen-*
15 *cy did not comply with the procedures of section 553*
16 *or sections 556-557 of chapter 5 of this title to issue*
17 *the interpretation;*

18 *“(2) determination of the costs and benefits or*
19 *other economic or risk assessment of the action, if the*
20 *agency failed to conform to guidelines on such deter-*
21 *minations and assessments established by the Admin-*
22 *istrator of the Office of Information and Regulatory*
23 *Affairs under section 553(k);*

24 *“(3) determinations made in the adoption of an*
25 *interim rule; or*

1 “(4) guidance.

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

5 **SEC. 8. ADDED DEFINITION.**

6 *Section 701(b) of title 5, United States Code, is amend-*
7 *ed—*

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

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

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

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

20 **SEC. 9. EFFECTIVE DATE.**

21 *The amendments made by this Act to—*

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

24 (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.*

Union Calendar No. 195

112TH CONGRESS
1ST Session

H. R. 3010

[Report No. 112-294]

A BILL

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

NOVEMBER 22, 2011

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed