

REGULATORY ACCOUNTABILITY ACT OF 2011

NOVEMBER 22, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3010]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3010) to reform the process by which Federal agencies analyze and formulate new regulations and guidance documents, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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## The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Regulatory Accountability Act of 2011”.

### SEC. 2. DEFINITIONS.

Section 551 of title 5, United States Code, is amended—

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

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

(3) by adding at the end the following:

“(15) ‘major rule’ means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose—

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

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

“(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

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

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

“(17) ‘guidance’ means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue;

“(18) ‘major guidance’ means guidance that the Administrator of the Office of Information and Regulatory Affairs finds is likely to lead to—

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

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

“(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

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

“(19) the ‘Information Quality Act’ means section 515 of Public Law 106–554, the Treasury and General Government Appropriations Act for Fiscal Year 2001, and guidelines issued by the Administrator of the Office of Information and Regulatory Affairs or other agencies pursuant to the Act; and

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

### SEC. 3. RULE MAKING.

(a) Section 553(a) of title 5, United States Code, is amended by striking “(a) This section applies” and inserting “(a) APPLICABILITY.—This section applies”.

(b) Section 553 of title 5, United States Code, is amended by striking subsections (b) through (e) and inserting the following:

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

“(1) The legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making.

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

“(3) The specific nature and significance of the problem the agency may address with a rule (including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activi-

ties within the agency's jurisdiction), whether the problem warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action.

"(4) Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or part.

"(5) Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including not only responses that mandate particular conduct or manners of compliance, but also—

"(A) the alternative of no Federal response;

"(B) amending or rescinding existing rules;

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

"(D) potential responses that—

"(i) specify performance objectives rather than conduct or manners of compliance;

"(ii) establish economic incentives to encourage desired behavior;

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

"(iv) incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance.

"(6) Notwithstanding any other provision of law—

"(A) the potential costs and benefits associated with potential alternative rules and other responses considered under section 553(b)(5), including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness;

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

"(C) incentives for innovation, consistency, predictability, lower costs of enforcement and compliance (to government entities, regulated entities, and the public), and flexibility.

"(c) ADVANCE NOTICE OF PROPOSED RULE MAKING FOR MAJOR RULES, HIGH-IMPACT RULES, AND RULES INVOLVING NOVEL LEGAL OR POLICY ISSUES.—In the case of a rule making for a major rule or high-impact rule or a rule that involves a novel legal or policy issue arising out of statutory mandates, not later than 90 days before a notice of proposed rule making is published in the Federal Register, an agency shall publish advance notice of proposed rule making in the Federal Register. In publishing such advance notice, the agency shall—

"(1) include a written statement identifying, at a minimum—

"(A) the nature and significance of the problem the agency may address with a rule, including data and other evidence and information on which the agency expects to rely for the proposed rule;

"(B) the legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making;

"(C) preliminary information available to the agency concerning the other considerations specified in subsection (b); and

"(D) in the case of a rule that involves a novel legal or policy issue arising out of statutory mandates, the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule;

"(2) solicit written data, views or argument from interested persons concerning the information and issues addressed in the advance notice; and

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

"(d) NOTICES OF PROPOSED RULE MAKING; DETERMINATIONS OF OTHER AGENCY COURSE.—(1) Before it determines to propose a rule, and following completion of procedures under subsection (c), if applicable, the agency shall consult with the Administrator of the Office of Information and Regulatory Affairs. If the agency thereafter determines to propose a rule, the agency shall publish a notice of proposed rule making, which shall include—

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

"(B) reference to the legal authority under which the rule is proposed;

"(C) the terms of the proposed rule;

"(D) a description of information known to the agency on the subject and issues of the proposed rule, including but not limited to—

"(i) a summary of information known to the agency concerning the considerations specified in subsection (b);

“(ii) a summary of additional information the agency provided to and obtained from interested persons under subsection (c);

“(iii) a summary of any preliminary risk assessment or regulatory impact analysis performed by the agency; and

“(iv) information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination to propose the rule;

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

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

“(F) a reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule (including all costs to be considered under subsection (b)(6)), based on the information described under subparagraph (D);

“(G) a discussion of—

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

“(ii) the costs and benefits of those alternatives (including all costs to be considered under subsection (b)(6));

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

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

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

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

All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination to propose the rule, including any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information prepared or described by the agency under subparagraph (D) and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the proposed rule and made accessible to the public by electronic means and otherwise for the public’s use when the notice of proposed rule making is published.

“(2)(A) If the agency undertakes procedures under subsection (c) and determines thereafter not to propose a rule, the agency shall, following consultation with the Office of Information and Regulatory Affairs, publish a notice of determination of other agency course. A notice of determination of other agency course shall include information required by paragraph (1)(D) to be included in a notice of proposed rule making and a description of the alternative response the agency determined to adopt.

“(B) If in its determination of other agency course the agency makes a determination to amend or rescind an existing rule, the agency need not undertake additional proceedings under subsection (c) before it publishes a notice of proposed rule making to amend or rescind the existing rule.

All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination of other agency course, including but not limited to any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information that would be required to be prepared or described by the agency under paragraph (1)(D) if the agency had determined to publish a notice of proposed rule making and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the determination and made accessible to the public by electronic means and otherwise for the public’s use when the notice of determination is published.

“(3) After notice of proposed rule making required by this section, the agency shall provide interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation, except that—

“(A) if a hearing is required under paragraph (4)(B) or subsection (e), opportunity for oral presentation shall be provided pursuant to that requirement; or

“(B) when other than under subsection (e) of this section rules are required by statute or at the discretion of the agency to be made on the record after opportunity for an agency hearing, sections 556 and 557 shall apply, and paragraph (4), the requirements of subsection (e) to receive comment outside of the procedures of sections 556 and 557, and the petition procedures of subsection (e)(6) shall not apply.

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

“(4)(A) Within 30 days of publication of notice of proposed rule making, a member of the public may petition for a hearing in accordance with section 556 to determine whether any evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act.

“(B)(i) The agency may, upon review of the petition, determine without further process to exclude from the rule making the evidence or other information that is the subject of the petition and, if appropriate, withdraw the proposed rule. The agency shall promptly publish any such determination.

“(ii) If the agency does not resolve the petition under the procedures of clause (i), it shall grant any such petition that presents a prima facie case that evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act, hold the requested hearing not later than 30 days after receipt of the petition, provide a reasonable opportunity for cross-examination at the hearing, and decide the issues presented by the petition not later than 60 days after receipt of the petition. The agency may deny any petition that it determines does not present such a prima facie case.

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

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

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

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

“(2) Whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including all costs to be considered under subsection (b)(6)) than the proposed rule.

“(3) If there is more than one alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost than the proposed rule, which alternative would achieve the relevant statutory objectives at the lowest cost.

“(4) Whether, if the agency proposes to adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives (including all costs to be considered under subsection (b)(6)), the additional benefits of the more costly rule exceed the additional costs of the more costly rule.

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

“(6) Upon petition by an interested person who has participated in the rule making, other issues relevant to the rule making, unless the agency determines that consideration of the issues at the hearing would not advance consideration of the rule or would, in light of the nature of the need for agency action, unreasonably delay completion of the rule making. An agency shall grant or deny a petition under this paragraph within 30 days of its receipt of the petition.

No later than 45 days before any hearing held under this subsection or sections 556 and 557, the agency shall publish in the Federal Register a notice specifying the proposed rule to be considered at such hearing, the issues to be considered at the hearing, and the time and place for such hearing, except that such notice may be issued not later than 15 days before a hearing held under subsection (d)(4)(B).

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

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

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

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

“(4) When it adopts a final rule, the agency shall publish a notice of final rule making. The notice shall include—

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

“(B) the agency’s reasoned final determination of need for a rule to address the problem the agency seeks to address with the rule, including a statement of whether a rule is required by statute and a summary of any final risk assessment or regulatory impact analysis prepared by the agency;

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

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

“(i) the agency’s reasoned final determination that no alternative considered achieved the relevant statutory objectives with lower costs (including all costs to be considered under subsection (b)(6)) than the rule; or

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

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

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

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

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

“(II) whether and how the agency intends to amend or rescind the existing rule separate from adoption of the rule;

“(F) the agency’s reasoned final determination that the evidence and other information upon which the agency bases the rule complies with the Information Quality Act; and

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

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

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

“(g) EXCEPTIONS FROM NOTICE AND HEARING REQUIREMENTS.—(1) Except when notice or hearing is required by statute, the following do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice:

“(A) Subsections (c) through (e).

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

“(C) Subparagraphs (B) through (H) of subsection (f)(4).

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

“(B) If, following compliance with subparagraph (A) of this paragraph, the agency adopts an interim rule, it shall commence proceedings that comply fully with subsections (d) through (f) of this section immediately upon publication of the interim

rule, shall treat the publication of the interim rule as publication of a notice of proposed rule making and shall not be required to issue supplemental notice other than to complete full compliance with subsection (d). No less than 270 days from publication of the interim rule (or 18 months in the case of a major rule or high-impact rule), the agency shall complete rule making under subsections (d) through (f) of this subsection and take final action to adopt a final rule or rescind the interim rule. If the agency fails to take timely final action, the interim rule will cease to have the effect of law.

“(C) Other than in cases involving interests of national security, upon the agency’s publication of an interim rule without compliance with subsections (c), (d), or (e) or requirements to render final determinations under subsection (f) of this section, an interested party may seek immediate judicial review under chapter 7 of this title of the agency’s determination to adopt such interim rule. The record on such review shall include all documents and information considered by the agency and any additional information presented by a party that the court determines necessary to consider to assure justice.

“(3) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are unnecessary, including because agency rule making is undertaken only to correct a de minimis technical or clerical error in a previously issued rule or for other noncontroversial purposes, the agency may publish a rule without compliance with subsections (c), (d), (e), or (f)(1)-(3) and (f)(4)(B)-(F). If the agency receives significant adverse comment within 60 days after publication of the rule, it shall treat the notice of the rule as a notice of proposed rule making and complete rule making in compliance with subsections (d) and (f).

“(h) ADDITIONAL REQUIREMENTS FOR HEARINGS.—When a hearing is required under subsection (e) or is otherwise required by statute or at the agency’s discretion before adoption of a rule, the agency shall comply with the requirements of sections 556 and 557 in addition to the requirements of subsection (f) in adopting the rule and in providing notice of the rule’s adoption.

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

“(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

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

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

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

“(k) RULE MAKING GUIDELINES.—(1)(A) The Administrator of the Office of Information and Regulatory Affairs shall establish guidelines for the assessment, including quantitative and qualitative assessment, of the costs and benefits of proposed and final rules and other economic issues or issues related to risk that are relevant to rule making under this title. The rigor of cost-benefit analysis required by such guidelines shall be commensurate, in the Administrator’s determination, with the economic impact of the rule.

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

“(2) The Administrator of the Office of Information and Regulatory Affairs shall also issue guidelines to promote coordination, simplification and harmonization of agency rules during the rule making process and otherwise. Such guidelines shall assure that each agency avoids regulations that are inconsistent or incompatible with, or duplicative of, its other regulations and those of other Federal agencies and drafts its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

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

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

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

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

“(1) INCLUSION IN THE RECORD OF CERTAIN DOCUMENTS AND INFORMATION.—The agency shall include in the record for a rule making, and shall make available by electronic means and otherwise, all documents and information prepared or considered by the agency during the proceeding, including, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, documents and information communicated by that Office during consultation with the Agency.

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

**SEC. 4. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR GUIDANCE; PRESIDENTIAL AUTHORITY TO ISSUE GUIDELINES FOR ISSUANCE OF GUIDANCE.**

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

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

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

“(1) make and document a reasoned determination that—

“(A) assures that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions (including any statutory deadlines for agency action);

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

“(C) identifies the costs and benefits (including all costs to be considered during a rule making under section 553(b) of this title) of conduct conforming to such guidance and assures that such benefits justify such costs; and

“(D) describes alternatives to such guidance and their costs and benefits (including all costs to be considered during a rule making under section 553(b) of this title) and explains why the agency rejected those alternatives; and

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

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

“(b) Agency guidance—

“(1) is not legally binding and may not be relied upon by an agency as legal grounds for agency action;

“(2) shall state in a plain, prominent and permanent manner that it is not legally binding; and

“(3) shall, at the time it is issued or upon request, be made available by the issuing agency to interested persons and the public by electronic means and otherwise.

Agencies shall avoid the issuance of guidance that is inconsistent or incompatible with, or duplicative of, the agency’s governing statutes or regulations, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

“(c) The Administrator of the Office of Information and Regulatory Affairs shall have authority to issue guidelines for use by the agencies in the issuance of major guidance and other guidance. Such guidelines shall assure that each agency avoids issuing guidance documents that are inconsistent or incompatible with, or duplicative of, the law, its other regulations, or the regulations of other Federal agencies and drafts its guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.”.

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

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

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

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

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

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

“(f) When an agency conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rule making under section 553(c), the matters to be considered and determinations to be made shall include, among other relevant matters and determinations, the matters and determinations described in subsections (b) and (f) of section 553.

“(g) Upon receipt of a petition for a hearing under this section, the agency shall grant the petition in the case of any major rule, unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rule making. The agency shall publish its decision to grant or deny the petition when it renders the decision, including an explanation of the grounds for decision. The information contained in the petition shall in all cases be included in the administrative record. This subsection shall not apply to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.”

**SEC. 6. ACTIONS REVIEWABLE.**

Section 704 of title 5, United States Code, is amended—

(1) by striking “Agency action made” and inserting “(a) Agency action made”; and

(2) by adding at the end the following: “Denial by an agency of a correction request or, where administrative appeal is provided for, denial of an appeal, under an administrative mechanism described in subsection (b)(2)(B) of the Information Quality Act, or the failure of an agency within 90 days to grant or deny such request or appeal, shall be final action for purposes of this section.

“(b) Other than in cases involving interests of national security, notwithstanding subsection (a) of this section, upon the agency’s publication of an interim rule without compliance with section 553(c), (d), or (e) or requirements to render final determinations under subsection (f) of section 553, an interested party may seek immediate judicial review under this chapter of the agency’s determination to adopt such rule on an interim basis. Review shall be limited to whether the agency abused its discretion to adopt the interim rule without compliance with section 553(c), (d), or (e) or without rendering final determinations under subsection (f) of section 553.”

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

Section 706 of title 5, United States Code is amended—

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

(2) in paragraph (2)(A) of subsection (a) (as designated by paragraph (1) of this section), by inserting after “in accordance with law” the following: “(including the Information Quality Act)”; and

(3) by adding at the end the following:

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

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

“(2) determination of the costs and benefits or other economic or risk assessment of the action, if the agency failed to conform to guidelines on such determinations and assessments established by the Administrator of the Office of Information and Regulatory Affairs under section 553(k);

“(3) determinations made in the adoption of an interim rule; or  
“(4) guidance.

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

**SEC. 8. ADDED DEFINITION.**

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

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

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

(3) by adding at the end the following:

“(3) ‘substantial evidence’ means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision.”.

**SEC. 9. EFFECTIVE DATE.**

The amendments made by this Act to—

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

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

(3) paragraphs (2) and (3) of section 706(b) of such title; and

(4) subsection (c) of section 706 of such title;

shall not apply to any rule makings pending or completed on the date of enactment of this Act.

## Purpose and Summary

The Regulatory Accountability Act of 2011 (“the Bill” or “the Act”) will promote job creation and economic growth by requiring regulatory agencies to lower the costs of regulation while meeting statutory objectives; to improve agencies’ decision-making processes and enhance regulatory transparency and accountability; and to strengthen judicial review of agency action.

## Background and Need for the Legislation

### I. INTRODUCTION

On September 22, 2011, Representative Lamar Smith (R–TX) introduced H.R. 3010, with Representative Howard Coble (R–NC) and Representative Collin Peterson (D–MN) as original co-sponsors. The Act currently has 29 additional co-sponsors.

Government regulation is a fact of American life in the 21st Century. It is also true that wasteful, excessive and unnecessary regulations undermine job creation and economic growth. A recent Small Business Administration study found that Federal regulations impose an annual cost on the American economy of \$1.75 trillion dollars, which is equal to about 14% of the national income<sup>1</sup> and “nearly twice as much as all individual income taxes collected last year.”<sup>2</sup> “Had every U.S. household paid an equal share of the Federal regulatory burden, each would have owed \$15,586 in 2008.”<sup>3</sup> Another study found that “[e]ach million-dollar increase in the regulatory budget costs the economy 420 private sector jobs.”<sup>4</sup>

<sup>1</sup>See Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, SMALL BUSINESS ADMINISTRATION, 6 & 48 (Sept. 2010), available at <http://www.sba.gov/sites/default/files/rs371tot.pdf> (last accessed Nov. 18, 2011).

<sup>2</sup>James Gattuso, Diane Katz & Stephen Keen, *Red Tape Rising: Obama’s Torrent of New Regulation*, HERITAGE FOUNDATION (Oct. 26, 2010), available at <http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation> (last accessed Nov. 18, 2011).

<sup>3</sup>Crain & Crain, note 1 *supra*, at iv.

<sup>4</sup>T. Randolph Beard et al., *Regulatory Expenditures, Economic Growth and Jobs: An Empirical Study*, PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC POLICY STUDIES, 5 (Apr. 2011),

This burden, coupled with uncertainty over what additional Federal regulations may be imposed in the near term, have been cited as key factors holding back economic recovery and the creation of new jobs. For example, President Clinton recently recognized that over-regulation is inimical to job creation, by proposing that the Federal Government grant states waivers from environmental regulations for construction projects.<sup>5</sup>

The future threat of excessive Federal regulations—such as those intended to implement the Patient Protection and Affordable Care Act<sup>6</sup> and the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>7</sup>—have created immense burdens and uncertainty for the economy—chilling job creation, investment and economic growth and suppressing America’s economic freedom and standing among the world’s economies.<sup>8</sup> Nor does the regulatory deluge show any sign of slackening:

President Obama’s December 2010 *Unified Agenda of Regulatory and Deregulatory Activities* does not presage a slow-down in activity. The Agenda lists 4,225 regulatory actions under development by Federal regulatory agencies. That is 182 more entries than the previous year, representing a 5-percent increase in activity. The regulatory road ahead looks even more ambitious when one focuses on the largest regulations. The Agenda reveals a twenty percent increase in economically significant regulations, or forty more regulations with impacts of over \$100 million under development now than at this time last year. Of the 224 economically significant rules listed in the 2010 Agenda, forty-eight appear there for the first time. There are 100 more economically significant regulations listed in last

available at <http://www.phoenix-center.org/PolicyBulletin/PCPB28Final.pdf> (last accessed Nov. 18, 2011).

<sup>5</sup>Bill Clinton, *It’s Still the Economy, Stupid*, NEWSWEEK, June 19, 2011, available at <http://www.thedailybeast.com/newsweek/2011/06/19/it-s-still-the-economy-stupid.html> (last accessed Nov. 18, 2011).

<sup>6</sup>Pub. L. No. 111–148, 124 Stat. 119 (2010). “The health care law provides for the creation of nearly 160 boards, bureaus, bureaucracies, and commissions. . . . Overall, the Federal Government is expected to issue roughly 10,000 pages of new regulations to govern the implementation of the new law.” *ObamaCare: A Budget-Busting, Job-Killing Health Care Law*, Jan. 6, 2011, at 7–8, available at <http://www.speaker.gov/UploadedFiles/ObamaCareReport.pdf> (last accessed Nov. 18, 2011).

<sup>7</sup>Pub.L. No. 111–203, 124 Stat. 1376 (2010). “[T]he Dodd-Frank Act is the most farreaching financial regulatory undertaking since the 1930’s, authorizing or requiring agencies to enact 447 new rules and complete 63 reports and 59 studies.” Michael J. Ryan, Jr., *U.S. Capital Markets Competitiveness: The Unfinished Agenda*, Summer 2011, at 3, available at [https://www.uschamber.com/sites/default/files/reports/1107\\_UnfinishedAgenda\\_WEB.pdf](https://www.uschamber.com/sites/default/files/reports/1107_UnfinishedAgenda_WEB.pdf) (last accessed Nov. 18, 2011).

<sup>8</sup>See, e.g., Editorial, *The Uncertainty Principle*, WALL ST. J., July 14, 2010, available at <http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html?KEYWORDS=rulmakings> (last accessed Nov. 18, 2011); *Jobs for America: an Open Letter to the President of the United States, the United States Congress, and the American People*, CHAMBER OF COMMERCE, (July 14, 2010), available at [http://www.uschamber.com/sites/default/files/hill-letters/100713\\_jobs\\_openletter.pdf](http://www.uschamber.com/sites/default/files/hill-letters/100713_jobs_openletter.pdf) (last accessed Nov. 18, 2011) (stating, e.g., that, substantially due to regulatory uncertainty, American corporations are sitting on well over \$1 trillion that they could otherwise invest); Terry Miller & Kim R. Holmes, “Mostly Free”—*The Startling Decline of America’s Economic Freedom and What to Do About It*, HERITAGE FOUNDATION (July 14, 2010), available at [http://thf\\_media.s3.amazonaws.com/2010/pdf/sr0082.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/sr0082.pdf) (last accessed Nov. 18, 2011); Terry Miller, *The U.S. Loses Ground on Economic Freedom*, WALL ST. J., Jan. 12, 2011, available at [http://online.wsj.com/article/SB10001424052748703779704576074193214999486.html?utm\\_source=Newsletter&utm\\_medium=Email&utm\\_campaign=Heritage%2BHotSheet](http://online.wsj.com/article/SB10001424052748703779704576074193214999486.html?utm_source=Newsletter&utm_medium=Email&utm_campaign=Heritage%2BHotSheet) (last accessed Nov. 18, 2011); Heritage Foundation & Wall Street Journal, *2011 Index of Economic Freedom: Executive Highlights* (Jan. 2011) at 6 (placing America as ninth in economic freedom among countries surveyed and recording a further decline in U.S. economic freedom).

December's Agenda than there were in 1995 (the first year for which electronic data are available).<sup>9</sup>

"[T]hrough the end of March 2011, the Obama Administration added close to \$40 billion in new costs to the economy, more than twice the Bush rate."<sup>10</sup>

The regulatory burden currently weighing down the American economy is largely caused by inadequate administrative law. The Administrative Procedure Act ("APA"), known as the "constitution" of agency rulemaking, imposes only a few light-handed constraints on most agency rulemaking proceedings. For example, the APA does not require an agency to consider the costs or benefits of a proposed regulation.

The APA has not been updated in the 65 years since it was enacted on June 11, 1946. The American economy, however, has changed a great deal since the end of the Second World War. "Regulation has grown in scope and impact far beyond anything the framers of the APA (or for that matter the New Deal) could have anticipated. The APA has not kept up, and special-purpose administrative agencies have acquired an unsettling degree of power over our economy and society."<sup>11</sup>

In the 109th Congress, the Subcommittee on Commercial and Administrative Law documented a host of potential rulemaking reforms to modernize the APA.<sup>12</sup> Continuing this effort, this year the Subcommittee on Courts, Commercial and Administrative Law held a series of four hearings to discuss how Congress could improve the APA to create jobs and promote economic growth by improving agencies' decision-making processes and enhancing regulatory transparency and accountability.

On February 28, 2011, the Subcommittee held a hearing entitled, "The APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?"<sup>13</sup> Witnesses at this hearing were Susan E. Dudley, director of George Washington University's Regulatory Studies Center and former Administrator of the Office of Information and Regulatory Affairs ("OIRA") (2007–09); Jeffrey A. Rosen, Esq., Kirkland & Ellis LLP and former general counsel to the Office of Management and Budget ("OMB") (2006–09); and Professor Peter L. Strauss, Betts Professor of Law, Columbia University Law School.

On March 29, 2011, the Subcommittee held a hearing entitled, "Raising the Agencies' Grades: Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need."<sup>14</sup> At this hearing the Subcommittee heard testimony from Jerry Ellig, Ph.D., director of the Regulatory Report Card project

<sup>9</sup>Susan E. Dudley, *Prospects for Regulatory Reform in 2011*, 11 ENGAGE 7, 9–10 (2011).

<sup>10</sup>James L. Gattuso, *Obama's Red Tape: Tsunami or Ripple?*, HERITAGE FOUNDATION (Nov. 8, 2011), available at <http://www.heritage.org/Research/Reports/2011/11/Obamas-Regulations-Red-Tape-Tsunami-or-Ripple> (last accessed Nov. 18, 2011).

<sup>11</sup>H.R. 3010, the "Regulatory Accountability Act of 2011": *Hearing Before the House Committee on the Judiciary*, 112th Cong. (Oct. 25, 2011) (records on file with the Committee) (Testimony of Christopher DeMuth).

<sup>12</sup>H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY (Comm. Print 2010).

<sup>13</sup>APA at 65: *Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law*, 112th Cong. (Feb. 28, 2011).

<sup>14</sup>*Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law*, 112th Cong. (Mar. 29, 2011).

at George Mason University's Mercatus Center, and former deputy director and acting director of the Office of Policy Planning at the Federal Trade Commission; Richard A. Williams, Ph.D., Director of Policy Research at the Mercatus Center and former OMB and FDA regulatory development and review official; and Professor Robert L. Glicksman, J.B. and Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School.

On May 4, 2011, the Subcommittee held a hearing entitled, "Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits."<sup>15</sup> Witnesses at this hearing were John D. Graham, Dean of Indiana University's School of Public and Environmental Affairs and former OIRA Administrator (2001–06); Jeffrey R. Holmstead, Esq., Bracewell & Giuliani LLP and former Environmental Protection Agency Assistant Administrator for Air and Radiation (2001–05); Harold Furchtgott-Roth, Ph.D., former Commissioner, Federal Communications Commission (1997–2001); and Sally Katzen, Visiting Professor, New York University School of Law, Senior Advisor at the Podesta Group, and former OIRA Administrator (1993–98).

On May 31, 2011, the Subcommittee held a hearing entitled, "Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability."<sup>16</sup> The Subcommittee heard testimony from Noel J. Francisco, Esq., former White House Associate Counsel (2001–03), Deputy Assistant Attorney General for the Department of Justice's Office of Legal Counsel (2003–05), and current member, Government Regulation Practice Group, Jones Day LLP; Edward W. Warren, Esq., Environmental Practice Group, Kirkland & Ellis LLP; and Professor Matthew Stephenson, Harvard Law School.

Finally, on October 25, 2011, the Full Committee held a legislative hearing on the Bill.<sup>17</sup> The Committee heard testimony from the Honorable C. Boyden Gray, Esq., Boyden Gray & Associates, former Counsel to the President (1989–93) and Ambassador to the European Union (2006–07); Arnold Baker, Chair of the National Black Chamber of Commerce and CEO of Baker Ready-Mix, a concrete supply company in New Orleans; the Honorable Christopher C. DeMuth, former OIRA Administrator (1981–84) and President of the American Enterprise Institute (1986–2008); and Professor Sidney Shapiro, University Distinguished Chair in Law, Wake Forest University School of Law.

## II. THE ADMINISTRATIVE PROCEDURE ACT: ORIGINAL INTENT AND HISTORY OF PRACTICE

### A. *Early History of Rulemaking under the APA*

As originally conceived and practiced under the APA, the rule-making process would begin when an agency proposed a rule under Section 553, 5 U.S.C., drawing upon any available sources of information or analysis, including expertise from business or consumer

<sup>15</sup>*Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, 112th Cong. (May 4, 2011).*

<sup>16</sup>*Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, 112th Cong. (May 31, 2011).*

<sup>17</sup>*H.R. 3010, note 11 supra.*

representatives, academicians, or from the agency itself. The agency would then publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register and open the matter to written comment for an unspecified period. During that time, any interested person could introduce into the record “data, views, or arguments” regarding the proposed rule.<sup>18</sup> The agency had discretion to hold oral hearings or to take additional procedural steps to develop the rule.

After considering the proposed rule in light of the comments, the agency could withdraw the proposal, publish a revision, or promulgate a final rule accompanied by a concise statement of basis and purpose explaining its action. In this original APA model, the final statement also could draw upon sources of information or arguments not previously raised or revealed.<sup>19</sup>

On review, a court would uphold the agency action if it found that the rule was within the scope of the agency’s authority and was not arbitrary and capricious. In other words, the court would uphold the rule if the agency could construct a plausible supporting hypothesis connected to the agency record. Agencies had no duty to consider all possible alternatives. They were expected to demonstrate that their policies were “rational” in a minimal sense.<sup>20</sup> This standard of review gave agencies immense discretion and was mitigated only by the countervailing limitation that the supporting rationale had to be provided by the agency itself. A reviewing court would neither invent a hypothesis upon which the agency could have acted<sup>21</sup> nor accept inventions counsel might develop in the context of an appeal.<sup>22</sup>

During this era, no one thought the comments required by Section 553 were intended to constitute a complete record for decision either by the agency or by the reviewing court.<sup>23</sup> Under the original APA model, the agency acted primarily on the basis of its expertise, using whatever internal processes and information it desired.<sup>24</sup> Requiring comment simply gave the agency the opportunity to hear views of knowledgeable outsiders before exercising its own independent judgment; comments were regarded solely as “instruments for the education of the administrator.”<sup>25</sup> The agency was free, at the time of review, to support a rule with a “record” not based on the information available to various decision-makers during the rule’s formation.<sup>26</sup> These *post hoc* rationalizations were acceptable, although courts at the time may have examined them

<sup>18</sup> 5 U.S.C. § 553(c). The APA does not specify the length of the comment period. Presidential executive orders since the Carter Administration have suggested a period of not less than 60 days “in order to afford the public a meaningful opportunity to comment on any proposed regulation.” See, e.g., Exec. Order No. 12866, 58 Fed. Reg. 51,735, § 6(a)(1) (Oct. 4, 1993).

<sup>19</sup> See, e.g., *Pac. Coast European Conf. v. United States*, 350 F.2d 197, 205 (9th Cir. 1965).

<sup>20</sup> See, e.g., *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346–47 (1953) (order will be upheld unless it is attempting to achieve ends other than those set forth in statute); *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947) (order will be overturned only if it lacks “any rational and statutory foundation”).

<sup>21</sup> See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943).

<sup>22</sup> See, e.g., *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

<sup>23</sup> See Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 755 (1975) (“there is not the slightest indication that the purpose of the notice-and-comment proceeding was to develop a record by which a reviewing court could test the validity of the rule which the Administrator finally adopted.”).

<sup>24</sup> See Martin Shapiro, *On Predicting the Future of Administrative Law*, 6 REGULATION 18, 19–20 (May/June 1982).

<sup>25</sup> Nathanson, note 23 *supra*, at 755.

<sup>26</sup> See William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 62–65 (1975).

with skepticism.<sup>27</sup> The agency could base its decision on expertise, unstated political considerations, or an inarticulable intuition.<sup>28</sup> If questions of fact, rather than agency policy judgments, were determinative of the regulation's validity, then an enforcement proceeding was deemed an adequate forum for review.<sup>29</sup> In such proceedings, it was assumed the challenger could assail the rule as applied to his particular situation. Thus, under the original APA model, settlement of issues of policy and fact were not based on the rulemaking record.

Professor Martin Shapiro has characterized the rule of the agencies and courts during this period and the reasons for this posture as follows:

In the early 1930's the New Deal created a government based on concentrating power in the hands of technically expert administrative agencies. By the early 1940's administrative law had been well shaped to express this theory. The new judges enunciated a theory of review that was a restatement of Progressive political theory. Power must be concentrated to be effective; and it must be wielded by experts in order to achieve rational results. Thus judges, who were not technically expert, must defer to the agencies, who were. The central doctrines of the administrative law of the 1940's were the twin presumptions that agencies had correctly found the facts and had correctly found the law. Given such presumptions, there was nothing for the judges to do. They effectively transferred their power over regulation to the agencies at the same time they gave constitutional approval to the delegation of congressional regulatory power to the same agencies. *Voilà* technocracy—rule by expert agencies.<sup>30</sup>

### *B. Developments since the 1960's*

Criticism of the original rulemaking model had begun to swell by the 1960's. Presidential commissions,<sup>31</sup> jurists,<sup>32</sup> academicians,<sup>33</sup> and "public interest advocates"<sup>34</sup> all expressed skepticism about both the substance and form of government decision-making. This skepticism was fueled by the immense growth of the Federal Gov-

<sup>27</sup> See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 246–50 (1972).

<sup>28</sup> See James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 272 (1979).

<sup>29</sup> See ADMIN. PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 77–8, at 115–20 (1st Sess. 1941); Nathanson, note 23 *supra*, at 755–57; Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 405 (1981).

<sup>30</sup> Shapiro, note 24 *supra*, at 19.

<sup>31</sup> See James M. Landis, *Report on Regulatory Agencies to the President Elect* (Government Printing Office, 1960); American Bar Association, Commission to Study the FTC, *Report of the ABA Commission to Study the Federal Trade Commission* (Sept. 15, 1969); Roy L. Ash, *A New Regulatory Framework: Report on Selected Independent Agencies* (Government Printing Office, 1971).

<sup>32</sup> See, e.g., Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263 (1962); Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894 (1980).

<sup>33</sup> See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (Baton Rouge: Louisiana State Univ. Press ed., 1969); MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 22–26 (Univ. of Illinois Press ed., 1964); Theodore J. Lowi, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92–126 (W. W. Norton & Co., Inc. ed., 2d ed. 1979).

<sup>34</sup> See, e.g., EDWARD F. COX, RICHARD C. FELLMETH & JOHN E. SCHULZ, *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* (Grove Press ed., 1969); ROBERT C. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION, THE PUBLIC INTEREST AND THE ICC; THE RALPH NADER STUDY GROUP REPORT ON THE INTERSTATE COMMERCE COMMISSION AND TRANSPORTATION* (Grossman ed., 1970).

ernment, in terms of both its power and resources. The product of many agencies' deliberations, these critics argued, was not a flexible policy, but no policy at all and which in some instances resulted in favoritism or uncertainty. The proliferation of the government's reach also raised questions regarding the continued validity of the notion of the "expert" administrator.

The cumulative effect of these criticisms was essentially an overhaul of the structure of administrative regulation. Led by the courts, beginning in the mid-1960's and accelerating rapidly during the early years of the 1970's, a new consensus about agency policy-making emerged.<sup>35</sup> The key doctrinal shift was enhanced emphasis on rulemaking as a method of formulating policy. Doubts about some agencies' legal authority to issue binding rules were erased by a series of judicial decisions.<sup>36</sup> Congress joined in this trend by granting broad rulemaking power in new regulatory statutes<sup>37</sup> and by increasingly resorting to "action-forcing" techniques to compel prospective adoption of policies.<sup>38</sup> Courts invoked a variety of legal grounds—due process,<sup>39</sup> organic statutes and internal agency procedures,<sup>40</sup> or abuse of discretion<sup>41</sup>—for finding an obligation to proceed by rulemaking. Informal rulemaking became the presumptive and judicially preferred mode of policymaking procedure.<sup>42</sup>

The courts not only demanded greater use of rulemaking for policymaking, but also radically transformed the ways in which agencies make rules and courts review them. Led by the U.S. Court of Appeals for the District of Columbia Circuit,<sup>43</sup> creative judicial interpretation of the APA and of the agencies' organic statutes made rulemaking more accessible. First, the courts lowered barriers for public access to agencies and to courts by relaxing standing, ripeness, and exhaustion rules.<sup>44</sup> Those rules originally had been designed to exclude from the rulemaking process everyone except those few individuals who had suffered direct legal injury by government action. Now, any interest group can gain access to the decision-making process of government by asserting a small or indirect potential injury.

Next, courts attempted to ensure more meaningful access by judicial construction of Section 553's spare and cryptic notice and comment requirements. The courts now required a rulemaking record which had to contain the material on which the agency

<sup>35</sup> See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978); DeLong, note 28 *supra*.

<sup>36</sup> See *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Fed. Power Comm'n v. Texaco, Inc.*, 377 U.S. 33 (1964); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

<sup>37</sup> See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2051.

<sup>38</sup> See RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 371-73 (Bobbs-Merrill ed., 2d ed. 1978).

<sup>39</sup> See, e.g., *Soglin v. Kauffman*, 418 F.2d 163, 168 (7th Cir. 1969); *Holmes v. N.Y. Housing Auth.*, 398 F.2d 262, 264-65 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964).

<sup>40</sup> See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 231-36 (1974).

<sup>41</sup> See *Bokat v. Sureck*, 637 F.2d 1315, 1317 (9th Cir. 1981).

<sup>42</sup> Cf. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973).

<sup>43</sup> See, e.g., *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968); *Am. Airlines v. Civil Aeronautics Bd.*, 359 F.2d 624 (D.C. Cir. 1966); *Mobil Oil Corp. v. Fed. Power Comm'n*, 483 F.2d 1238 (D.C. Cir. 1973).

<sup>44</sup> See, e.g., *Barlow v. Collins*, 397 U.S. 159 (1970); *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150 (1970) (standing); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (ripeness); see generally Ralph F. Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817 (1976).

based its decision.<sup>45</sup> Even if the record as it stood would support the agency decision, the court could find an abuse of discretion if other, unrevealed sources affected the rulemaking process.<sup>46</sup> The courts also required agencies to place the relevant materials, particularly those of a complicated or technical nature, on the record at a time and in a form that would allow other parties an opportunity to evaluate them.<sup>47</sup> Last-minute additions to the record were insufficient because they deprived participants of the opportunity to respond.<sup>48</sup> Interested parties had to have the opportunity to test the bases of the agency's position—factual, technical, analytical or theoretical.<sup>49</sup> Although the timely entry of material into the record would suffice in most cases, some decisions stated that an agency should allow cross-examination or a specific opportunity for rebuttal if such procedures are the best method of illuminating issues.<sup>50</sup>

Finally, the courts developed a series of requirements on the agency's final statement of basis and purpose:

The “concise and general statement” required by section 553 must be sufficiently complete and detailed to enable the court to accomplish its reviewing function, assuring itself that the agency has engaged in reasoned decision-making, has given serious thought to alternative rulings, and has provided reasoned explanations for controversial normative and empirical determinations. In short, “the reviewing court must satisfy itself that the requisite dialogue occurred and that it was not a sham.”<sup>51</sup>

Thus, the agency's statement must identify the major issues in the proceeding; explain the agency's reasoning on those issues; and establish that the agency has indeed identified and taken a hard look at all the relevant factors.<sup>52</sup> For important conclusions, the statement must point to specific materials in the record. Vague allu-

<sup>45</sup> *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977); *Indus. Union Dept. v. Hodgson*, 499 F.2d 267, 475–76, 488 (D.C. Cir. 1974); *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973). See generally William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

<sup>46</sup> *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 526 (D.C. Cir. 1978); *Sangamon Valley TV Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). But cf. *Action for Children's Television v. FCC*, 564 F.2d 458, 477–78 (D.C. Cir. 1977).

<sup>47</sup> *Portland Cement*, 486 F.2d at 392–94, 402; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54–55 (D.C. Cir. 1977); *Nova Scotia Food*, 568 F.2d at 252; *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631–32 (D.C. Cir. 1973).

<sup>48</sup> *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 533–36, 541–42 (D.C. Cir. 1978); *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 658–60 (D.D.C. 1978).

<sup>49</sup> See *Home Box Office*, 567 F.2d at 35–36; *Mobil Oil Corp. v. Fed. Power Comm'n*, 483 F.2d 1238, 1259–60 (D. C. Cir. 1973).

<sup>50</sup> See, e.g., *Bunker Hill Co. v. E.P.A.*, 572 F.2d 1286, 1305 n.41 (9th Cir. 1977). In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), the Supreme Court precluded the invalidation of rules solely because an agency failed to use specific procedures not required by section 553. The decision, however, did not overturn all the law of informal rulemaking that had been developed by the lower courts, and did not affect continuing strict scrutiny of agency adherence to the procedural requirements in the APA or in agency regulations and the obligation of agencies to engage in “reasoned decisionmaking,” which was to include the consideration of alternatives. See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>51</sup> *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 633, 658 n.3 (D.C. Cir. 1976) (Tamm, J., concurring) (quoting J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381 (1974)), *rev'd sub nom.*, *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978). The Supreme Court specifically approved Judge Tamm's characterization of the role of the reviewing court.

<sup>52</sup> *Auto. Parts*, 407 F.2d at 338; *Nova Scotia Food*, 568 F.2d at 252–53.

sions to material on file or to the agency's general expertise will not suffice.<sup>53</sup>

Courts also have held that, when preparing the final statement, agencies must answer cogent comments in terms of the particular record.<sup>54</sup> A significant part of the statement's function is seen as responding to public comments and explaining how the agency resolved the problems raised. The obligation to respond to serious objections may even extend to criticisms that might have been made, but were not. The agency itself may have to refute serious arguments against its positions or contentions.<sup>55</sup>

The rulemaking revolution of the 1970's is now the status quo. In essence, courts now seek to ensure that agencies listen and respond to citizen comments by reading the APA's "concise and general statement" language as a requirement that they conduct a dialogue with the public, and that the agency's statement contains responses to the comments received. The hope is that if the agency must respond to public comments, it actually will listen to the public. Thus, courts have attempted to force agencies to grant real access to the public by demanding that they respond in detail to what the public has said to it. Nevertheless, and as the Subcommittee's hearings revealed, it remains energetically disputed whether the administrative rulemaking process is fully responsive to the public and to the information put before the agencies.

### III. DEVELOPMENTS IN EXECUTIVE BRANCH PRACTICE: THE ADVENT OF PRESIDENTIAL REVIEW AND COST-BENEFIT ANALYSIS

Since the early 1970's, presidents of both parties have required agencies to evaluate the costs and benefits of proposed regulations. But the breadth and depth of these cost-benefit analysis requirements for Executive Branch agencies have waxed and waned over the course of eight presidential administrations.

#### A. *Nixon and Ford Administrations*

In 1971, President Nixon established a "Quality of Life Review" program in which executive departments and independent agencies submitted all "significant" draft proposed and final rules pertaining to "environment quality, consumer protection, and occupational and public health and safety" to OMB.<sup>56</sup> In their submissions, agencies were required to provide a summary of their proposals, including their principal objectives, the alternatives that they considered, and a comparison of the expected benefits and costs of those alternatives.

In 1974, President Ford issued Executive Order 11821, requiring agencies to prepare an "inflation impact statement" for each "major" proposed rule and directing OMB to identify major rules that may have a significant impact on inflation.<sup>57</sup> Executive Order 11821 specified that OMB must consider costs, effects on produc-

<sup>53</sup> *U.S. Lines*, 584 F.2d at 533-35.

<sup>54</sup> *Office of Comm'n of United Church of Christ v. FCC*, 560 F.2d 529, 532-33 (2d Cir. 1977).

<sup>55</sup> *Motor Vehicle Mfrs.*, 463 U.S. at 43.

<sup>56</sup> This requirement was formally established through an October 1971 memorandum from then-OMB Director George Schultz. According to some observers, the requirements were routinely imposed only on the EPA.

<sup>57</sup> Exec. Order No. 11,821, *Inflation Impact Statements*, 39 Fed. Reg. 41501 (Nov. 29, 1974). The order also required such statements for agency-proposed major legislation.

tivity, effects on competition, and effects on supplies of important products and services.<sup>58</sup>

### B. Carter Administration

President Carter's Executive Order 12044 required agencies to publish semiannual agendas of any significant rules under development or review, and to prepare a regulatory analysis for all rules with at least a \$100 million impact on the economy.<sup>59</sup> The analysis was to contain a succinct statement of the problem, a description of the alternative approaches considered, and the "economic consequences" of those alternatives.<sup>60</sup> OMB was instructed to "assure the effective implementation of this Order," but was not given specific review responsibilities.<sup>61</sup>

### C. Reagan and George H.W. Bush Administrations

Shortly after taking office, President Reagan issued the most detailed Executive Order up to that time regarding cost-benefit analysis. Executive Order 12291 greatly increased the scope and importance of presidential review of Federal regulations.<sup>62</sup> Administratively, President Reagan consolidated new regulatory review authority in the OMB's Office of Information and Regulatory Affairs ("OIRA"). Substantively, the Executive Order required Cabinet departments (but not independent regulatory agencies) to:

- Refrain from taking regulatory action "unless the potential benefits to society for the regulation outweigh the potential costs to society," identify regulatory objectives to maximize net benefits to society, and select the regulatory alternative that involves the least net cost to society;<sup>63</sup>
- Prepare a "regulatory impact analysis" for each "major" rule, defined as any regulation likely to result in (among other things) an annual effect on the economy of \$100 million. Those analyses were required to describe the potential benefits and costs of the rule, alternative approaches that could achieve the regulatory goal at lower cost (and why they were not selected), and the rule's net benefits. The issuing agency was to make the initial determination of whether a rule was "major," but the Executive Order gave OMB the authority to require a rule to be considered "major";<sup>64</sup> and
- Send a copy of each draft proposed and final rule to OMB before publication in the Federal Register. The Order authorized OMB to review "any preliminary or final regulatory impact analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order." Non-major rules

<sup>58</sup> *Id.* § 3.

<sup>59</sup> Exec. Order No. 12,044, *Improving Government Regulations*, 43 Fed. Reg. 12661 (Mar. 23, 1978).

<sup>60</sup> *Id.* § 3(b).

<sup>61</sup> *Id.* § 5(c).

<sup>62</sup> Exec. Order No. 12,291, *Federal Regulation*, 46 Fed. Reg. 13193 (Feb. 17, 1981). See generally Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984) (describing effect of this Order).

<sup>63</sup> Exec. Order No. 12,291, § 2.

<sup>64</sup> *Id.* § 3.

had to be submitted to OMB 10 days before publication, but major rules had to be submitted up to 60 days in advance.<sup>65</sup>

In 1985, President Reagan consolidated in OIRA the White House's review of agencies' regulatory development agendas.<sup>66</sup> The basic regulatory framework developed by the Reagan Administration was continued through the George H.W. Bush Administration.

#### *D. Clinton Administration*

In September 1993, President Clinton replaced Executive Order 12291 with Executive Order 12866, which is still in effect today.<sup>67</sup> This executive order carried forward the coordinated planning process for Federal agencies' development and promulgation of regulations; required yearly planning of regulatory proposals; mandated coordination of proposals with OMB and among agencies; required reviews to assure that proposed regulations were necessary and cost-beneficial; and, called for the naming of Regulatory Policy Officers who would report to agency heads and carry out hands-on oversight throughout the regulatory process.

Specifically regarding cost-benefit analysis, in its statement of regulatory philosophy Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives, including both quantitative and qualitative measures.<sup>68</sup> It also provides that agencies should select regulatory approaches that maximize net benefits (unless a statute requires another approach).<sup>69</sup> When permissible and applicable, the Order states that agencies should adhere to a set of principles when developing rules, including, for example:

- Identify the problem, such as the failures of private markets or public institutions, and its significance, that warrants new regulations;
- Consider the degree and nature of risk when setting regulatory priorities;
- Adopt regulations only upon a “reasoned determination that the benefits of the intended regulation justify its costs” while “recognizing that some costs and benefits are difficult to quantify”;
- Tailor regulations to impose the least burden on society needed to achieve regulatory objectives; and,
- Base regulatory decisions on the “best reasonably obtainable” data.<sup>70</sup>

Executive Order 12866 limits OIRA reviews to actions identified by the rulemaking agency or OIRA as “significant” regulatory actions, which are defined as:

[A]ny regulatory action that is likely to result in a rule that may (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

<sup>65</sup>*Id.* § 3(c).

<sup>66</sup>Exec. Order No. 12,498, *Regulatory Planning Process*, 50 Fed. Reg. 1036 (Jan. 4, 1985).

<sup>67</sup>Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>68</sup>*Id.* § 1(a).

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* §§ 1(b)(1), (4), (6) & (11).

economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.<sup>71</sup>

By focusing OIRA review on significant rules, the number of draft proposed and final rules that OIRA reviewed fell from between 2,000 and 3,000 per year under Executive Order 12291 to between 500 and about 700 rules per year under Executive Order 12866.<sup>72</sup>

#### *E. George W. Bush Administration*

In his first term, President George W. Bush left Executive Order 12866 largely in place, except for some minor administrative revisions mainly designed to remove the Vice President from the regulatory review process.<sup>73</sup> In 2007, however, President Bush expanded its scope by bringing major agency guidance documents within the OIRA review process.<sup>74</sup> President Bush also required agencies to calculate a best estimate of the cumulative costs and benefits associated with all of the regulations planned for a given year, whereas Executive Order 12866 had only required regulation-by-regulation cost-benefit analysis.<sup>75</sup>

Additionally, Executive Order 13422 required that Regulatory Policy Officers be drawn from the ranks of the Presidential appointees.<sup>76</sup> This was controversial: Democrats and various interest groups accused President Bush of unduly politicizing the regulatory process, instituting hurdles in the way of agency efforts to protect public health, safety and welfare, and shifting authority to the President at the expense of the agencies and Congress. Steven Aitken, then-Acting Administrator of OIRA, responded in testimony to Congress that this aspect of the Executive Order would have little practical effect, because “the fact is that, in many departments and major agencies, the Regulatory Policy Officer has been a Presidential appointee.”<sup>77</sup> Acting Administrator Aitken further clarified “that the term ‘Presidential appointee’ should not be confused with ‘political appointee.’”<sup>78</sup>

#### *F. Obama Administration*

Promptly upon taking office, President Obama revoked Executive Order 13422, thus restoring Executive Order 12866 from the Clin-

<sup>71</sup>*Id.* § 3(f).

<sup>72</sup>United States General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO 03-929, at 24 (Sept. 2003), available at <http://www.gao.gov/new.items/d03929.pdf> (last accessed Nov. 18, 2011).

<sup>73</sup>Exec. Order No. 13,258, *Amending Executive Order 12866 on Regulatory Planning and Review*, 67 Fed. Reg. 9385 (Feb. 26, 2002).

<sup>74</sup>Exec. Order No. 13,422, *Further Amendment to Executive Order 12866 on Regulatory Planning and Review*, 72 Fed. Reg. 2763 (Jan. 18, 2007).

<sup>75</sup>*See id.* § 4(c).

<sup>76</sup>*See id.* § 5(b).

<sup>77</sup>*Amending Executive Order 12866: Good Governance or Regulatory Usurpation?: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 110th Cong., at 41 (Feb. 13, 2007).

<sup>78</sup>*Id.*

ton Administration as the core charter for presidential review of rulemaking.<sup>79</sup> In January 2011, President Obama issued Executive Order 13563, reaffirming Executive Order 12866’s principles while adding a number of additional provisions.<sup>80</sup> Executive Order 13563 states, “Our regulatory system . . . must take into account benefits and costs, both quantitative and qualitative.”<sup>81</sup> Specifically regarding cost-benefit analysis, it purports to “supplement” and “reaffirm” Executive Order 12866:

[E]ach agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.<sup>82</sup>

#### IV. SUGGESTIONS TO UPDATE AND IMPROVE THE APA

During this first Session of the 112th Congress, the Subcommittee on Courts, Commercial and Administrative Law held four hearings regarding the need for APA reform and received testimony from thirteen witnesses: administrative law scholars and practitioners alike, many of whose testimony was informed by years of public service in regulatory and Executive Branch agencies. The Full Committee also heard testimony about the Act itself from four distinguished witnesses. The witnesses’ suggestions to reform the APA can be organized broadly under three categories: helping agencies make better regulations; enhancing the accountability of regulatory agencies; and, increasing the transparency of the regulatory process. These suggestions are discussed below.

##### A. *Helping Agencies Make Better Regulations*

###### i. *Codifying established rulemaking principles from the Executive Orders*

“Whereas Congress has *never* amended the APA in a material way, the Executive Branch has frequently created its own require-

<sup>79</sup> Exec. Order No. 13,497, *Revocation of Certain Executive Orders Concerning Regulatory Planning and Review*, 74 Fed. Reg. 6113 (Jan. 30, 2009).

<sup>80</sup> Exec. Order No. 13,563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>81</sup> *Id.* § 1(a).

<sup>82</sup> *Id.* § 1(b).

ments for how Federal agencies ought to function, and established a variety of principles, requirements, coordination mechanisms, and the like . . . .”<sup>83</sup> Over the last 30 years, presidents from both parties have issued executive orders that require regulatory agencies to take steps in addition to those required by the APA. Executive Orders 12291, 12866, 13422 and 13563 all required regulatory agencies in the Executive Branch to conduct regulatory impact analyses, including cost-benefit analysis requirements, and to coordinate rulemaking with OIRA. Other requirements of the orders include consideration of reasonable alternatives to proposed rules, identification of the least burdensome alternative, and consideration of whether it would be more appropriate to defer to State and local authorities than to issue a Federal rule.

Enforcing the requirements of these executive orders, however, has been up to White House discretion, not to the courts; an agency’s compliance is not judicially reviewable by any court.<sup>84</sup> As a result, “agency regulatory analysis is often incomplete and seldom used in decisions. This pattern persists across administrations, suggesting that the source of the problem is institutional, not political.”<sup>85</sup> In the Mercatus Center’s Regulatory Report Card project, Drs. Ellig and Williams “examine[d] how well the executive-branch regulatory agencies do what presidents have been telling them to do for more than three decades.”<sup>86</sup> Overall, Drs. Ellig and Williams found that the quality of agencies’ regulatory impact analysis is lacking,<sup>87</sup> and that agencies rarely utilize the analysis in the decision-making process.<sup>88</sup> Specifically, in evaluating 34 major rulemakings conducted by 17 agencies from 2008 through 2011, the highest average score obtained by any agency (the Department of Justice) was a meager 35 points out of 60. The Social Security Administration earned the worst performance with a score of seven points.

<sup>83</sup>APA at 65, note 13 *supra*, at 31 (Testimony of Jeffrey Rosen).

<sup>84</sup>See Exec. Order No. 12,866, §10 (“*Judicial Review*. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”); see also *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 8 (D.C. Cir. 1999) (Executive Order 12893, “which requires a ‘systematic analysis of expected benefits and costs’ . . . for infrastructure investments of Federal agencies,” also “provides that it is ‘intended only to improve the internal management of the executive branch and does not create any right . . . enforceable against the United States,’” and so “is not subject to judicial review”); *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (this language evinces “clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review”); *Alliance for Natural Health U.S. v. Sebelius*, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011) (agency compliance with Executive Order 12866 is not subject to judicial review); *Idaho Mining Ass’n v. Browner*, 90 F. Supp. 2d 1078, 1102 (D. Idaho 2000) (same); *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 932 (E.D.N.C. 1995) (same), *aff’d sub. nom. Trawler Diane Marie, Inc. v. Kantor*, 91 F.3d 134 (4th Cir. 1996); *Louisiana ex rel. Guste v. Verity*, 681 F. Supp. 1178, 1181–82 (E.D. La. 1988) (“this Court may not review the agency’s compliance with’ Executive Order 12291), *aff’d*, 850 F.2d 211 (5th Cir. 1988); *Ishtyaq v. Nelson*, 627 F. Supp. 13, 24 (E.D.N.Y. 1983) (same).

<sup>85</sup>*Raising the Agencies’ Grades*, note 14 *supra*, at 20 (Testimony of Jerry Ellig).

<sup>86</sup>*Id.* at 21.

<sup>87</sup>*Id.* at 23 (“One of the major areas where regulatory analysis is weakest is identification of the systemic problem the regulation is supposed to solve.”).

<sup>88</sup>*Id.* at 21 (“All too often, agency economists have to conduct regulatory analysis after most major decisions about regulations have already been made. The analysis then becomes an advocacy document written to justify the agency’s decisions, or a mere paperwork exercise to fulfill requirements imposed by the Office of Management and Budget.”).

Dr. Williams observed that agencies only have an incentive to regulate; there is no incentive *not* to issue a new regulation.<sup>89</sup> Drawing upon his 27 years of experience as an FDA economist, Dr. Williams testified that “there is no discussion [within agencies] of whether or not a regulation is required. There is also no discussion as to whether there is a failure of the market or some other reason for regulatory intervention; whether the market will solve the problem in the near future without intervention (baseline analysis); or if there is a need for federal, as opposed to some other level of government, intervention.”<sup>90</sup> Consequently, “the regulatory analysis analyzes a decision, not a problem.”<sup>91</sup>

Mr. DeMuth explained,

Federal regulation today presents a political problem and an economic problem. The political problem is that regulatory agencies often operate under extremely broad grants of authority from Congress. . . . The economic problem is that regulatory agencies are single-purpose organizations operating with scant restraint on the resources their decisions command. The costs and benefits of regulation are realized almost entirely in the private sector. . . . The cost-benefit standard addresses these problems by imposing a resource constraint that is the regulatory analogue of the budget constraint on spending programs; by applying a decision rule that is the best approximation of how a representative legislature should want otherwise unspecified lawmaking discretion to be exercised; and by promoting transparency and accountability.<sup>92</sup>

Ambassador Gray cited new regulations from the Commodity Futures Trading Commission, charged with implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Federal Communications Commission’s net neutrality regulation, as examples of the need to require independent agencies to perform cost-benefit analysis: “Only by requiring Federal agencies to calculate the costs and benefits of their regulations, and then subjecting those projections to the scrutiny of public comment, can we know with greater certainty whether new regulatory initiatives, especially landmark initiatives affecting economic growth and energy infrastructure, do more harm than good.”<sup>93</sup>

Dr. Ellig testified, “[r]egulatory analysis needs to be legislatively required for all Federal agencies, including independent agencies.”<sup>94</sup> An independent regulatory agency is constitutionally part of the Executive Branch but is insulated from direct presidential control because by statute its “members are not subject to the plenary removal power of the President.”<sup>95</sup> The Board of Governors of the Federal Reserve System, the Federal Communications Commission, the Federal Trade Commission, the Securities and Ex-

<sup>89</sup>*Id.* at 73–74.

<sup>90</sup>*Id.* at 74.

<sup>91</sup>*Ibid.*

<sup>92</sup>*H.R. 3010*, note 11 *supra* (Testimony of Christopher DeMuth).

<sup>93</sup>*Id.* (Testimony of C. Boyden Gray).

<sup>94</sup>*Raising the Agencies’ Grades*, note 14 *supra*, at 20.

<sup>95</sup>Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 492 (1987).

change Commission, and the Nuclear Regulatory Commission are examples of independent regulatory agencies.<sup>96</sup>

“President Reagan considered subjecting the independent agencies to [Executive Order 12291], but ultimately declined to do so, partly because of concerns about legal authority, but mostly because of fears of an adverse congressional reaction. The independent agencies were asked voluntarily to comply with Executive Order 12291, but not one of them formally acknowledged their willingness to do so.”<sup>97</sup> In Executive Order 12866, President Clinton required independent regulatory agencies to contribute to the Unified Regulatory Agenda, but he did not take the next step of requiring them to conduct cost-benefit analysis of proposed major rules, like other Executive Branch agencies.

On July 11, 2011, President Obama issued an Executive Order that independent agencies “should comply” with the “general requirements” of Executive Order 13563 “to the extent permitted by law.”<sup>98</sup> Whether this gesture will bring independent agencies to heel is very much in doubt. For example, by letter of September 8, 2011, Commissioner Nord of the Consumer Product Safety Commission informed OIRA Administrator Cass Sunstein that “a majority of the Commissioners at this agency have proactively decided to ignore the President’s direction [to conduct cost-benefit analysis for new regulations].”<sup>99</sup> Independent regulatory agencies—such as those charged with enacting the 447 new rules and completing 63 reports and 59 studies authorized or required by Dodd-Frank<sup>100</sup>—thus may escape the good-government requirements of these Executive Orders, including the cost-benefit analysis requirements.

The proposal to codify some or all of the Executive Orders’ decision-making criteria also was endorsed by Mr. Rosen,<sup>101</sup> Ms. Dudley,<sup>102</sup> Prof. Strauss,<sup>103</sup> Dean Graham,<sup>104</sup> Mr. Holmstead,<sup>105</sup> and Dr. Furchtgott-Roth.<sup>106</sup> Similarly, at a hearing before the Subcommittee on Commercial and Administrative Law in the 111th Congress, Ms. Katzen endorsed extending the cost-benefit analysis requirements of Executive Order 12,866 to independent agencies.<sup>107</sup> Current OIRA Administrator Sunstein also has endorsed requiring independent regulatory agencies to perform cost-benefit analysis, as well as granting limited judicial review to the cost-benefit analyses performed by government agencies.<sup>108</sup>

<sup>96</sup> See, e.g., 44 U.S.C. § 3502(5) (listing independent regulatory agencies for the purposes of the Paperwork Reduction Act of 1995).

<sup>97</sup> Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 15 (1995).

<sup>98</sup> Exec. Order No. 13,579, *Regulation and Independent Regulatory Agencies*, 76 Fed. Reg. 41587 (July 11, 2011).

<sup>99</sup> Letter on file with the Committee.

<sup>100</sup> Ryan, note 7 *supra*, at 3.

<sup>101</sup> APA at 65, note 13 *supra*, at 33–35.

<sup>102</sup> *Id.* at 20–21.

<sup>103</sup> *Id.* at 47.

<sup>104</sup> *Cost-Justifying Regulations*, note 15 *supra*, at 6.

<sup>105</sup> *Id.* at 16.

<sup>106</sup> *Id.* at 38.

<sup>107</sup> *Federal Rulemaking and the Regulatory Process: Hearing Before the H. Comm. on the Judiciary, Subcommittee on Commercial and Administrative Law*, 111th Cong., at 28 (2010).

<sup>108</sup> Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, John M. Olin Law and Economics Working Paper No. 150, UNIV. OF CHICAGO LAW SCHOOL (2002), available at [http://www.law.uchicago.edu/files/files/150.CRS\\_Cost-Benefit.pdf](http://www.law.uchicago.edu/files/files/150.CRS_Cost-Benefit.pdf) (last accessed Nov. 18, 2011). See also Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 205 (1986) (“The same considerations that justify a coordinating presidential role

*ii. Improving the process for notice-and-comment rulemaking*

In his testimony to the Subcommittee on May 4, 2011, Dr. Furchtgott-Roth discussed the importance of having a functional, transparent notice-and-comment rulemaking process:

One of the most important aspects of the Notice of Proposed Rulemaking process is to obtain guidance from the public about how best to craft a rule. A Federal agency should solicit ideas from the public first rather than develop a predetermined rule before seeking public comment. An agency that can articulate in detail the possible costs and benefits to various segments of our economy of each proposed rule and alternatives to it demonstrates some thoughtful analysis behind the proposed rule. And the agency can explain other forms of the rule, including no new rule, that can be considered.<sup>109</sup>

Drawing on his experience at the FCC, Dr. Furchtgott-Roth described how that independent regulatory agency falls short in its decision-making processes.<sup>110</sup> Specifically regarding cost-benefit analysis, Mr. Holmstead remarked, “I have also seen, however, that Federal agencies sometimes do not use [cost-benefit analysis] to *inform* their regulatory decision, but rather to *justify* actions they may want to take for other reasons.”<sup>111</sup> To support his statement that “[f]ederal agencies need to do a much better job of understanding the full impact their regulations will have on businesses and jobs—along with possible alternatives—before they impose the most costly new rules,” Mr. Baker cited the EPA’s new Fly Ash, Greenhouse Gas, and Cement Maximum Achievable Control Technology rules.<sup>112</sup> Taken together, these rules will cause a 33% price increase for one component of Mr. Baker’s business, severely impacting his bottom line and hampering his ability to create jobs in New Orleans.

In the Regulatory Report Card project, Drs. Ellig and Williams found that agencies do a poor job of both analyzing the problem they are trying to solve<sup>113</sup> and then applying whatever analysis is

with respect to ‘executive’ agencies apply with full force to those characterized as ‘independent.’ For these reasons, we believe that Executive Orders 12,291 and 12,498 should be applied to the latter set of agencies.”).

<sup>109</sup>*Cost-Justifying Regulations*, note 15 *supra*, at 37.

<sup>110</sup>*Id.* at 38 (“Perhaps partly because it is not covered by the executive orders, the FCC does not directly weigh or even itemize the benefits and costs of a particular regulation. The FCC does not systematically consider alternative forms of regulation including no regulation. The FCC certainly does not focus on the alternative with the greatest net benefit. The only presentation of the costs and benefits of a regulation is an appendix for the Regulatory Flexibility Act. This appendix is at best an afterthought: a short, rarely read boilerplate passage that is outside the deliberative process. Sometimes it is forgotten altogether. I have seen little change in the regulatory analyses at the FCC since I left the Commission.”).

<sup>111</sup>*Id.* at 15.

<sup>112</sup>*H.R. 3010*, note 11 *supra* (Testimony of Arnold Baker).

<sup>113</sup>*Raising the Agencies’ Grades*, note 14 *supra*, at 23 (Testimony of Jerry Ellig) (“One of the major areas where regulatory analysis is weakest is identification of the systemic problem the regulation is supposed to solve (criterion 6). This is a key weakness. . . . If the agency cannot identify and demonstrate the existence of a systemic problem that a regulation might solve, how can it assess whether the regulation is likely to solve the problem or identify alternative solutions that might be more effective?”); *id.* at 74 (Testimony of Richard Williams) (“Discussion of whether there is a problem and whether Federal regulation is the best way to solve that problem is ‘off the table.’ That is, there is no discussion of whether or not a regulation is required. There is also no discussion as to whether there is a failure of the market or some other reason for regulatory intervention; whether the market will solve the problem in the near future without intervention (baseline analysis); or if there is a need for federal, as opposed to some other level of government, intervention.”).

conducted to the drafting of a new regulation.<sup>114</sup> This is not to say that agencies are ignorant of how to make good decisions. Drs. Ellig and Williams found that in 2008 and 2009, across Republican and Democratic administrations, “a few regulatory analyses received a score of ‘5’ [out of 5] for employing potential best practices.”<sup>115</sup> This shows that “[t]he *knowledge* required to produce better regulatory analysis exists, dispersed throughout agencies in the Federal Government. OMB Circular A–4 also summarizes a great deal of this knowledge. What’s lacking are institutional *incentives* to produce good analysis and use it to guide decisions.”<sup>116</sup>

*iii. Bringing major guidance within the rulemaking process*

In 2007, President Bush expanded the scope of Executive Order 12866 to bring major agency guidance documents within the OIRA review process.<sup>117</sup> Promptly upon taking office, however, President Obama revoked this Executive Order, thus excluding major guidance documents from the OIRA review process.<sup>118</sup>

In his testimony on May 31, 2011, Mr. Francisco described how current judicial review doctrines encourage agencies to issue broad, ambiguous regulations, and then interpret those regulations through mere guidance documents, which do not have to be promulgated through any established processes.<sup>119</sup> Under these circumstances, a court will defer to the agency’s interpretation of its own ambiguous regulation even though the guidance document does not have the force of law. On May 4, Dean Graham and Mr. Holmstead both recommended requiring agencies to follow some decision-making criteria when issuing significant guidance documents.<sup>120</sup>

*B. Enhancing Regulatory Accountability*

*i. Modernizing judicial review doctrines*

The “substantial evidence” standard of review for agency decisions pre-existed the APA. The *Attorney General’s Manual on the Administrative Procedure Act*, published shortly after Congress adopted the APA in 1946, describes Section 706(2)(E), 5 U.S.C., as “a general codification of the substantial evidence rule which, either by statute or judicial rule, has long been applied to the review

<sup>114</sup>*Id.* at 74 (Testimony of Richard Williams) (regulatory impact analysis “is generally begun after the decision on how to regulate has been announced. That is a key part of the problem: the regulatory analysis analyzes a decision, not a problem.”); *id.* at 25 (Testimony of Jerry Ellig) (“But the average scores on our Use criteria are relatively low—less than 2.5 out of a possible 5 points on each of these criteria. Even under our relatively liberal definition of ‘use,’ agencies claim to use the regulatory impact analysis for significant decisions only about 20 percent of the time at best. . . .”).

<sup>115</sup>*Id.* at 27 (Testimony of Jerry Ellig).

<sup>116</sup>*Ibid.*

<sup>117</sup> Exec. Order No. 13,422, *Further Amendment to Executive Order 12866 on Regulatory Planning and Review*, 72 Fed. Reg. 2763 (Jan. 18, 2007).

<sup>118</sup> Exec. Order No. 13,497, *Revocation of Certain Executive Orders Concerning Regulatory Planning and Review*, 74 Fed. Reg. 6113 (Jan. 30, 2009).

<sup>119</sup> *Formal Rulemaking and Judicial Review*, note 16 *supra*, at 179–80 (discussing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

<sup>120</sup> *Cost-Justifying Regulations*, note 15 *supra*, at 7 (Testimony of John Graham) (“Third, I recommend that Congress expand the scope of the statutory mandate to include significant guidance documents as well as legislative rules, at least in cases where the agency’s action to issue a guidance document has the same practical effect on regulated parties as a regulation.”); *id.* at 18 (Testimony of Jeffrey Holmstead) (“I also recommend that the Subcommittee go beyond just rules and regulations to require that significant guidance documents are subject to analysis and interagency review.”).

of Federal administrative action.”<sup>121</sup> The seminal case interpreting the APA’s “substantial evidence” test is *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). In *Universal Camera*, the Court observed that, pre-APA, “substantial evidence” was akin to what is known as the jury standard, the most deferential standard of review for findings of fact. As the Court put it, substantial evidence “must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”<sup>122</sup> The Court, however, held that although “retention of the familiar ‘substantial evidence’ terminology indicates that no drastic reversal of attitude was intended,” by adopting the APA “Congress expressed a mood” that “courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past.”<sup>123</sup> The Court further held that “substantial evidence” is to be measured in light of the whole record, not on one piece of evidence taken in isolation.<sup>124</sup>

The *Universal Camera* statement of the “substantial evidence” standard remains good law. According to one scholar, “No verbal formula adequately expresses the quantum of evidence needed to satisfy this new test, but one can fairly say that the substantial evidence standard, as articulated by the Court in *Universal Camera* and as applied day-to-day by the lower courts that have followed it, is less deferential than the jury standard but more deferential than the clearly erroneous standard of Fed. R. Civ. P. 52(a).”<sup>125</sup> In *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), the Supreme Court stated that the question posed by the substantial evidence standard is “whether on this record it would have been possible for a reasonable jury to reach the Board’s conclusion.”<sup>126</sup> Taken literally, *Allentown Mack* suggests a more deferential gloss on the “substantial evidence” standard than *Universal Camera*. Congress could resolve this ambiguity by defining the term “substantial evidence” in the APA itself.

When reviewing factual findings made at informal proceedings, the APA directs courts to accept those findings unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>127</sup> Whether this “arbitrary or capricious” standard of review differs in content from the “substantial evidence” standard is unsettled. Justice Scalia, then a judge on the U.S. Court of Appeals for the District of Columbia Circuit, stated

<sup>121</sup> Quoted in GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 207–08 (West ed., 5th ed. 2009).

<sup>122</sup> 340 U.S. at 477 (citing *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

<sup>123</sup> *Id.* at 489, 487, 490.

<sup>124</sup> *Id.* at 488 (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

<sup>125</sup> LAWSON, note 121 *supra*, at 386.

<sup>126</sup> 522 U.S. at 366–67.

<sup>127</sup> 5 U.S.C. § 706(2)(A).

they are substantively equivalent.<sup>128</sup> This remains the view of the D.C. Circuit,<sup>129</sup> and it is shared by Justice Breyer.<sup>130</sup>

*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), famously establishes a two-step process for courts to employ when confronted with an agency's interpretation of its statutory authority in rulemaking:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>131</sup>

An agency's re-interpretation of its own previous interpretation of an ambiguous statute does not preclude *Chevron* deference. Such a re-interpretation is still reviewed under the lenient "permissible construction" standard applied at *Chevron* step two.<sup>132</sup>

Neither informal ruling letters,<sup>133</sup> nor an agency's interpretive rules,<sup>134</sup> receive *Chevron* deference. The Supreme Court has "recognized a very good indicator of delegation meriting *Chevron* treatment [exists] in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."<sup>135</sup> "It is fair to assume generally that Congress contemplates administrative action with the effect of law [and thus compelling *Chevron* deference] when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."<sup>136</sup> In other words, congressional intent to delegate power to an agency to make rules with the force of law

<sup>128</sup> See *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683, 683–84, 685 (D.C. Cir. 1984) ("[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. . . . When the arbitrary or capricious standard is performing that function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense. . . . What we have said suggests that the normal (APA) meaning of the 'substantial evidence' terminology connotes a substantive standard no different from the arbitrary or capricious test.")

<sup>129</sup> See, e.g., *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007) ("Nonetheless, . . . the agency's decision still must be supported by substantial evidence—otherwise it would be arbitrary and capricious. For 'it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense.'" (citations omitted).

<sup>130</sup> STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 384 (Aspen Publishers, Inc. ed., 6th ed. 2006) ("It is increasingly thought that the two tests are the same.") (quoted in Notes, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1910 n.6 (May 2009)).

<sup>131</sup> 467 U.S. at 842–43.

<sup>132</sup> See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>133</sup> See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>134</sup> See *Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>135</sup> *Mead Corp.*, 533 U.S. at 229.

<sup>136</sup> See *id.*

is the “touchstone” for determining whether the *Chevron* analysis is triggered.<sup>137</sup>

Another unsettled issue is how much deference a court should give to an agency’s interpretation of its own regulations. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Court was called upon to interpret a wartime price control regulation issued by the Administrator of the Office of Price Administration, which required that each seller could charge no more for a commodity than it charged in March 1942. Maximum Price Regulation No. 188 refined this General Maximum Price Regulation to define the phrase “highest price charged during March 1942.” The Court explained, “In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188.”<sup>138</sup> “Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>139</sup> Thus, the Court deferred to the Administrator’s interpretation of Maximum Price Regulation No. 188. The Court directly re-affirmed the holding of *Seminole Rock* in *Auer v. Robbins*, 519 U.S. 452 (1997). Notably, Justice Scalia—the author of *Auer*—recently admitted that he has “become increasingly doubtful of its validity.”<sup>140</sup>

It is important to note that *Seminole Rock* deference only applies if the regulation itself is ambiguous. If the regulation is not ambiguous, then the court applies the regulation according to its plain language and the agency’s interpretation—whether in an opinion letter, policy statement, agency manual, enforcement guidelines, or another document lacking the force of law—is “entitled to respect” under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but only, as *Skidmore* states, insofar as the agency interpretation has the “power to persuade.”<sup>141</sup>

Some scholars have advocated overturning *Seminole Rock* deference altogether, and giving *Skidmore* deference to all informal agency documents, whether the underlying regulation they purport to interpret is ambiguous or not.<sup>142</sup> In dissent, Justice Thomas also

<sup>137</sup>Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1526 (2009).

<sup>138</sup>325 U.S. at 414.

<sup>139</sup>*Id.* at 413–14.

<sup>140</sup>*Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule’s meaning. . . . ‘When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.’”) (quoting Montesquieu, *THE SPIRIT OF THE LAWS*).

<sup>141</sup>323 U.S. at 140 (cited in *Christensen v. Harris County*, 529 U.S. 576, 587–88 (2000)).

<sup>142</sup>See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); William Funk, *Legislating for Non-legislative Rules*, 56 ADMIN. L. REV. 1023, 1034 (2004); Peter L. Strauss, *Within Marbury: The Importance of Judicial Limits on the Executive’s Power To Say What the Law Is*, 116 YALE L.J.

has noted the perverse incentives created by giving maximum deference to ambiguous regulations.<sup>143</sup>

At its February 28 and May 31 hearings, the Subcommittee received testimony that “federal courts in general are exceedingly deferential” to regulatory agencies in the Executive Branch.<sup>144</sup> Messrs. Rosen<sup>145</sup> and Francisco<sup>146</sup> both testified to this effect, and they both commented on the apparently counter-intuitive system whereby agency decisions made by informal rulemaking receive a lower standard of judicial review, and therefore a greater degree of judicial deference, than agency decisions made by more rigorous formal rulemaking.<sup>147</sup> Similarly, in her written responses to the Subcommittee’s Questions for the Record from the May 4 hearing, Ms. Katzen observed, “Even though there are occasional newsworthy stories of courts’ remanding regulatory actions to the issuing agencies, for the most part courts defer to agency expertise so long as the basis for the decision is recorded and documented.”<sup>148</sup>

Consistent with academic criticism, Mr. Francisco specifically questioned the deference doctrines established by the Supreme Court in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997).<sup>149</sup> Mr. Francisco also objected to the notion, over which the courts of appeals are split, that a court should defer to an agency’s interpretation of its own jurisdiction.<sup>150</sup>

## ii. Reviewing “Interim-Final” Rules

The APA allows an agency to make what is known as an “interim-final rule” “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are im-

POCKET PART 59, 65 n.23 (2006) (citing, inter alia, Manning, *supra*, and *Thomas Jefferson Univ.*, note 143 *infra*).

<sup>143</sup> See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (“Here, far from resolving ambiguity in the Medicare program statutes, the Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law.”).

<sup>144</sup> *APA at 65*, note 13 *supra*, at 35 (Testimony of Jeffrey Rosen).

<sup>145</sup> *Ibid.*

<sup>146</sup> *Formal Rulemaking and Judicial Review*, note 16 *supra*, at 179 (“Over time, however, the balance between deference and judicial oversight has tended strongly toward deference and away from rigorous judicial review. This shift toward ever-increasing deference weakens the primary check on agency discretion.”).

<sup>147</sup> *APA at 65*, note 13 *supra*, at 39 (Testimony of Jeffrey Rosen); *Formal Rulemaking and Judicial Review*, note 16 *supra*, at 175 (Testimony of Noel Francisco).

<sup>148</sup> *Cost-Justifying Regulations*, note 15 *supra*, at 70.

<sup>149</sup> *Formal Rulemaking and Judicial Review*, note 16 *supra*, at 179–81.

<sup>150</sup> *Id.* at 180 (citing Sales & Adler, note 135 *supra*, at 1518 (“In all, four courts of appeals have concluded that Chevron is fully applicable to jurisdictional interpretations: the Second, Third, Fourth, and Ninth Circuits. The Federal and Seventh Circuits have declined to extend Chevron deference. The D.C. and Eighth Circuits appear to have resolved the issue both ways. After initially signaling that Chevron is inapplicable to jurisdictional questions, the courts have shown their willingness to extend deference in more recent cases. The question remains unresolved in the remaining circuits.”)); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2099 (Dec. 1990) (“[C]ourts should probably refuse to defer to agency decisions with respect to issues of jurisdiction—again, if we assume that the distinction between jurisdictional and nonjurisdictional questions is easily administrable. The principal reason is that Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers. To accord such power to agencies would be to allow them to be judges in their own cause, in which they are of course susceptible to bias.”).

practicable, unnecessary, or contrary to the public interest.”<sup>151</sup> The interim-final rule is effective immediately, but “[t]he adopting agency declares that it will consider . . . public comments” after the interim-final rule is issued, “will modify the rule in light of those comments, and will then adopt a final rule.”<sup>152</sup> Because interim-final rules necessarily “restrict public participation”<sup>153</sup> and “hinder APA procedures,”<sup>154</sup> both Ms. Dudley and Mr. Rosen suggested that Congress examine this aspect of the APA.

### C. Increasing Regulatory Transparency

#### i. Requiring advance notice of potential rulemakings

At the Subcommittee’s March 29, 2011, hearing, Drs. Ellig and Williams both testified that agencies often make the decision to regulate behind closed doors, away from the public eye and before commencing the legally required regulatory process.<sup>155</sup> “This doesn’t mean that no stakeholders have influence over the early decisions. Generally, those that have petitioned for and favor regulations are heard from early in the process to help shape the initial decisions.”<sup>156</sup> For example, the Center for Progressive Reform recently accused the Administration of “put[ting] the cart before the horse” by directly negotiating fuel economy and greenhouse gas emission standards with automakers, which “short-circuited” the notice-and-comment rulemaking process and reduced it to an empty formality.<sup>157</sup> Consequently, “the number the President will roll out [54.5 mpg by 2025] was the result of raw political wrangling, not the rational policymaking process that the Administration purports to pride itself on.”<sup>158</sup> This is consistent with Professor Strauss’s testimony at the February 28 hearing:

Often what occurs before a notice of proposed rulemaking has been published produces commitments that, in the words of President George H.W. Bush’s General Counsel at the EPA, convert notice and comment rulemaking into a form of Kabuki theater—‘a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.’<sup>159</sup>

Dr. Williams observes that this phenomenon is a result of the agency’s overriding incentive to regulate whenever possible, and that what is needed is “to decouple the agency’s decision from both early analysis of and democratic input into a problem. That is, initially, agencies should perform regulatory analysis and make that

<sup>151</sup> 5 U.S.C. § 553(b)(3)(B).

<sup>152</sup> Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (Summer 1999).

<sup>153</sup> *APA at 65*, note 13 *supra*, at 37 (Testimony of Jeffrey Rosen).

<sup>154</sup> *Id.* at 21 (Testimony of Susan Dudley).

<sup>155</sup> *Raising the Agencies’ Grades*, note 14 *supra*, at 21 (Testimony of Jerry Ellig) (“All too often, agency economists have to conduct regulatory analysis after most major decisions about regulations have already been made. The analysis then becomes an advocacy document written to justify the agency’s decisions, or a mere paperwork exercise to fulfill requirements imposed by the Office of Management and Budget.”); *id.* at 74 (Testimony of Richard Williams) (“But that analysis is generally begun after the decision on how to regulate has been announced. That is a key part of the problem: the regulatory analysis analyzes a decision, not a problem.”).

<sup>156</sup> *Id.* at 78 (Testimony of Richard Williams).

<sup>157</sup> Amy Sinden & Lena Pons, *White House Flouts Agency Heads, Rolls Out Backroom Deal on Fuel Economy Standard*, CPRBlog (July 29, 2011), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=7426C8E2-CF0F-8446-72B4F05FF595E94B> (last accessed Nov. 18, 2011).

<sup>158</sup> *Id.*; see also Letter from Hon. Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, to Hon. Kathryn Ruemmler, Counsel to the President (Aug. 11, 2011) (letter on file with Committee).

<sup>159</sup> *APA at 65*, note 13 *supra*, at 48–49 (quoting E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (June 1992)).

analysis available for public comment. There should be no discussion of the agency's preferred solutions in this document."<sup>160</sup> Specifically, Dr. Williams recommended requiring agencies to give:

- A clear definition of the problem that the agency seeks to solve and the evidence it relied on to define the problem;
- An explanation, supported by evidence, of why a Federal solution is necessary;
- The possible ways to solve the problem; and
- A preliminary estimate of the benefits and costs of each option.<sup>161</sup>

Dr. Ellig concurs in these recommendations.<sup>162</sup> Mr. Rosen also testified, "[g]reater use of the Advanced Notice of Proposed Rule-making and similar advance processes would be a good thing."<sup>163</sup> Ms. Dudley recommended Congress consider this proposal as well.<sup>164</sup> Relatedly, on May 4, 2011, Mr. Holmstead described how potentially collusive litigation between regulatory agencies and interested parties can undermine the regulatory process.<sup>165</sup>

*ii. Enhancing the effectiveness of the Information Quality Act*

Congress enacted the Information Quality Act as Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001.<sup>166</sup> The IQA requires the OMB Director to "issue guidelines . . . that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of" the Paperwork Reduction Act.<sup>167</sup> Further, the IQA instructs that Federal agencies shall "issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency," to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency" and to report both "the number and nature of complaints received by the agency regarding the accuracy of information disseminated" and "how such complaints were handled."<sup>168</sup>

The U.S. Court of Appeals for the Fourth Circuit has held, "[n]either the Act itself nor its very limited legislative history provide a mechanism for judicial review of information quality or any avenue for judicial relief."<sup>169</sup> Several lower courts also have held

<sup>160</sup> *Raising the Agencies' Grades*, note 14 *supra*, at 77.

<sup>161</sup> *Id.* at 78.

<sup>162</sup> *Id.* at 28.

<sup>163</sup> *APA at 65*, note 13 *supra*, at 37.

<sup>164</sup> *Id.* at 20.

<sup>165</sup> *Cost-Justifying Regulations*, note 15 *supra*, at 18.

<sup>166</sup> See Pub. L. No. 106-554.

<sup>167</sup> *Id.* § 515(a).

<sup>168</sup> *Id.* § 515(b).

<sup>169</sup> *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 593 (E.D. Va. 2004), *aff'd sub nom. Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006) ("By its terms, [the IQA] creates no legal rights in any third parties. Instead, it orders the Office of Management and Budget to draft guidelines concerning information quality and specifies what those guidelines should contain. Because the statute upon which appellants rely does not create a legal right to access to information or to correctness, appellants have not alleged an invasion of a legal right and, thus, have failed to establish an injury in fact sufficient to satisfy Article III."). *But cf. Prime Time Int'l Co. v.*

that an agency's failure to comply with the IQA is not judicially reviewable.<sup>170</sup>

On February 28, 2011, Mr. Rosen recommended Congress clarify that judicial review is available under the IQA.<sup>171</sup> Ms. Dudley suggested Congress "consider amending the IQA to make agency decisions reviewable."<sup>172</sup> In the same vein, on May 31, 2011, Mr. Francisco suggested that one way to enhance the effectiveness of the IQA would be to incorporate it into the APA.<sup>173</sup>

*iii. Improving the record to support significant rules*

The APA establishes two basic methods for agencies to take action: rulemaking and adjudication, with formal and informal procedures for each method. In rulemakings, formal procedures are required when a statute requires rules "to be made on the record after opportunity for an agency hearing."<sup>174</sup> Formal rulemaking entails some trial-like procedures and "requires the agency to provide private parties potentially affected by the rule with an oral hearing in which they can present witnesses and cross examine opposing witnesses."<sup>175</sup>

"Agencies made little use of rulemaking in the first two decades following enactment of the APA. The New Deal agencies viewed themselves as akin to special purpose courts. They eschewed the opportunity to issue rules in favor of near exclusive reliance on adjudicatory proceedings."<sup>176</sup> As discussed earlier in this Report, in the 1960's and 1970's agencies began to utilize rulemaking under the APA more frequently. This shift from adjudication towards rulemaking was due in part to a growing belief among administrative law scholars that rulemaking is superior to adjudication, and in part to a new wave of regulatory agencies created by Congress (e.g., the Environmental Protection Agency and the Occupational Safety and Health Administration).<sup>177</sup> "These agencies differed from their 1930's predecessors in important respects. The New Deal agencies were headed by commissions that included members from both political parties serving statutory terms; the new ones were generally headed by a single administrator serving at the President's pleasure. While most of the older agencies regulated single industries, the new ones regulated wide sectors of the economy."<sup>178</sup>

Despite the growing trend toward rulemaking and away from adjudication, rulemaking typically still remained of the formal variety. The *Attorney General's Manual on the Administrative Procedure Act* explains that when a statute requires an agency to formu-

*Vilsack*, 599 F.3d 678 (D.C. Cir. 2010) (affirming the dismissal of appellant's IQA challenge not because the IQA "creates no legal rights in any third party" as the district court held, but pursuant to OMB's decision "to exclude documents prepared and distributed in the context of adjudicative proceedings" from the IQA).

<sup>170</sup> See, e.g., *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 964 (E.D. Cal. 2010); *Habitat for Horses v. Salazar*, 745 F. Supp. 2d 438, 455–56 (S.D.N.Y. 2010); *In re Operation of the Missouri River Sys. Litig.*, 363 F. Supp. 2d 1145, 1174–75 (D. Minn. 2004).

<sup>171</sup> APA at 65, note 13 *supra*, at 39.

<sup>172</sup> *Id.* at 18.

<sup>173</sup> *Formal Rulemaking and Judicial Review*, note 16 *supra*, at 183.

<sup>174</sup> 5 U.S.C. §§ 553(c), 556 & 557.

<sup>175</sup> Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106 (2003) (citing 5 U.S.C. § 556(d)).

<sup>176</sup> Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 187 (1996).

<sup>177</sup> *Id.* at 188–90.

<sup>178</sup> H.R. 3010, note 11 *supra* (Testimony of Christopher DeMuth).

late a rule after a “hearing,” “the agencies and the courts have long assumed that the agency’s action must be based upon the record made in the hearing,” and therefore that the organic statute requires formal rulemaking.<sup>179</sup> Thus, “[u]ntil 1973, most agencies believed that they were required to use formal rulemaking procedures, including an oral evidentiary hearing, if a statute authorized them to act only after providing an opportunity for a ‘hearing.’ This belief, reinforced by some judicial decisions, acted as a powerful deterrent to the use of rulemakings by the many agencies whose statutes conditioned their power to act on provision of a ‘hearing.’”<sup>180</sup>

Today, however, agencies “avoid formal rulemaking whenever possible. The United States Supreme Court facilitated the avoidance of formal rulemaking procedures through a series of decisions that made clear that formal rulemaking procedures are seldom required by due process, the APA, or an agency’s organic statute.”<sup>181</sup> In *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), the Supreme Court held that the words “after hearing” in a statute did not require the agency to hold a formal hearing in order to make a rule establishing certain railroad rates. The Court based its conclusion on the fact that the Interstate Commerce Act “does not require that such rules ‘be made on the record,’” which is the particular phrase used for formal rulemaking in the APA.<sup>182</sup>

Consequently, “formal rulemaking has turned out to be a null set;”<sup>183</sup> it has “virtually disappeared as a procedural category.”<sup>184</sup> It is studiously eschewed by agencies. “Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so.”<sup>185</sup> Lower courts may deny that their analysis of whether formal rulemaking is required “turn[s], mechanically, on the absence of magic words,”<sup>186</sup> but the fact remains that “since [*Florida East Coast Railway*] was decided, no statute that does not contain the magic words ‘on the record’ has been found to require formal rulemaking.”<sup>187</sup>

Notwithstanding the trend of court decisions and agency practice, formal rulemaking continues to offer the advantages that it more rigorously proves facts and more transparently reveals agency decision-making. As rulemaking subjects have become more complex and the real costs of agency rules have risen ever higher, there has been renewed interest in using some formal rulemaking procedures to assure better agency fact-finding and decision-making.

At the Subcommittee’s February 28, 2011, hearing, Mr. Rosen discussed how formal rulemaking—*i.e.*, rulemaking based on formal agency hearings—was specifically contemplated by the APA, but

<sup>179</sup> Quoted in LAWSON, note 121 *supra*, at 207–08.

<sup>180</sup> Pierce, note 176 *supra*, at 194.

<sup>181</sup> Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 KAN. L. REV. 473, 485 (2003).

<sup>182</sup> 406 U.S. at 757 (citing 5 U.S.C. § 553(c)). See also *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 241 (1973) (“Similarly, even where the statute requires that the rulemaking procedure take place ‘on the record after opportunity for an agency hearing,’ thus triggering the applicability of § 556. . . .”).

<sup>183</sup> Rubin, note 175 *supra*, at 106.

<sup>184</sup> LAWSON, note 121 *supra*, at 229.

<sup>185</sup> Rubin, note 175 *supra*, at 107.

<sup>186</sup> *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 448 (D.C. Cir. 1989).

<sup>187</sup> LAWSON, note 121 *supra*, at 229.

has become a dead letter over the past several decades.<sup>188</sup> Mr. Rosen testified that the formal procedures discussed in 5 U.S.C. §§ 556 and 557 (with evidence presentation and cross-examination) “can be especially beneficial for issues involving complex empirical or scientific issues.”<sup>189</sup> Mr. Rosen added, “[t]here is no better tool than cross-examination to expose unsupportable factual assertions and assure the public that only the best science underlies agency action.”<sup>190</sup> One option Mr. Rosen suggested is that “all ‘major rules’ above a certain threshold could be subject to formal rule-making. . . .”<sup>191</sup> Ms. Dudley suggested that “legislators might consider amending the APA to [] expand the use of formal rule-making procedures.”<sup>192</sup>

On May 31, 2011, Mr. Francisco observed that “[f]ormal rule-making is often called ‘rulemaking on a record’ because these trial-type proceedings provide much more opportunity for the agency to develop a formal record before issuing a final rule.”<sup>193</sup> Mr. Francisco also explained that formal rulemaking is subject to a higher standard of judicial review than informal rulemaking, *i.e.*, “substantial evidence” versus “arbitrary or capricious” review.<sup>194</sup> Mr. Francisco suggested that Congress consider legislation to put “a renewed emphasis on formal rulemaking procedures.”<sup>195</sup>

Also on May 31, Mr. Warren testified at length in favor of “mak[ing] carefully-tailored amendments to the Administrative Procedure Act (‘APA’) which would permit slightly more formal procedures for major rules currently reviewed by [OIRA] under Executive Orders 12866 and 13563.” Believing “that additional procedures are warranted in the interest of improving the agency work product,”<sup>196</sup> Mr. Warren suggested that the additional formal procedures should be “in addition to, not in lieu of,” the procedures for informal rulemaking.<sup>197</sup>

### Hearings

This year the Subcommittee on Courts, Commercial and Administrative Law held a series of four hearings featuring thirteen witnesses to consider how the APA could be improved to create jobs and promote economic growth by improving agencies’ decision-making processes and enhancing regulatory transparency and accountability. The Subcommittee’s hearings were held on February 28, March 29, May 4 and May 31, 2011, and the witnesses are listed earlier in this Report. On October 25, 2011, the Full Committee held a legislative hearing on the Bill, with testimony from four witnesses, also listed above.

### Committee Consideration

On November 3, 2011, the Committee met in open session and ordered the bill, H.R. 3010, favorably reported with an amendment

<sup>188</sup> *APA at 65*, note 13 *supra*, at 35, 38.

<sup>189</sup> *Id.* at 35.

<sup>190</sup> *Id.* at 38.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Id.* at 17.

<sup>193</sup> *Formal Rulemaking and Judicial Review*, note 16 *supra*, at 177.

<sup>194</sup> *Id.* at 178.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Id.* at 39.

<sup>197</sup> *Ibid.*

in the nature of a substitute, by a rollcall vote of 16 to 6, a quorum being present.

**Committee Votes**

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 3010.

1. Amendment #8, offered by Mr. Watt. The Amendment would strike Section 3(e) from the Act, which requires hearings for high-impact rules. Defeated 13 to 16.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....			
Mr. Lungren .....			
Mr. Chabot .....			
Mr. Issa .....			
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....			
Ms. Adams .....			
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....			
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	13	16	

2. Amendment #12, offered by Mr. Nadler. The Amendment would exempt from the Act “any proposed rule, final rule, or guid-

ance made by the Nuclear Regulatory Commission under the Atomic Energy Act.” Defeated 13 to 16.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....			
Mr. Lungren .....			
Mr. Chabot .....			
Mr. Issa .....			
Mr. Pence .....			
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....			
Ms. Adams .....			
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....			
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	13	16	

3. Amendment #10, offered by Mr. Cohen. The Amendment would strike Section 7 from the Act, which pertains to the scope of judicial review. Defeated 14 to 18.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Goodlatte .....			
Mr. Lungren .....			
Mr. Chabot .....		X	
Mr. Issa .....			
Mr. Pence .....		X	
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Jordan .....			
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....		X	
Ms. Adams .....			
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	14	18	

4. Amendment #5, offered by Mr. Nadler. The Amendment would strike Section 3 from the Act, which requires agencies to consult with OIRA during the rulemaking process. Defeated 13 to 20.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....			
Mr. Lungren .....			
Mr. Chabot .....		X	
Mr. Issa .....			
Mr. Pence .....		X	
Mr. Forbes .....		X	
Mr. King .....		X	

## ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Jordan .....		X	
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....		X	
Ms. Adams .....		X	
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....		X	
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	13	20	

5. Amendment #2, offered by Mr. Cohen. The Amendment would specify that the cost-benefit analysis requirements in Sections 3 and 4 apply only if they do not conflict with any other law. Defeated 14 to 15.

## ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman .....		X	
Mr. Sensenbrenner, Jr. ....		X	
Mr. Coble .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....			
Mr. Lungren .....			
Mr. Chabot .....		X	
Mr. Issa .....			
Mr. Pence .....			
Mr. Forbes .....			
Mr. King .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Jordan .....			
Mr. Poe .....		X	
Mr. Chaffetz .....		X	
Mr. Griffin .....		X	

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Marino .....		X	
Mr. Gowdy .....		X	
Mr. Ross .....			
Ms. Adams .....		X	
Mr. Quayle .....		X	
Mr. Amodei .....		X	
Mr. Conyers, Jr., Ranking Member .....	X		
Mr. Berman .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Cohen .....	X		
Mr. Johnson .....	X		
Mr. Pierluisi .....	X		
Mr. Quigley .....	X		
Ms. Chu .....	X		
Mr. Deutch .....	X		
Ms. Sánchez .....	X		
(Vacant) .....			
Total .....	14	15	

6. Reporting H.R. 3010 as amended. The Act will improve and reform the Federal regulatory process to reduce unnecessary burdens on job creators. Approved 16 to 6.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman .....	X		
Mr. Sensenbrenner, Jr. ....			
Mr. Coble .....	X		
Mr. Gallegly .....	X		
Mr. Goodlatte .....	X		
Mr. Lungren .....			
Mr. Chabot .....			
Mr. Issa .....	X		
Mr. Pence .....			
Mr. Forbes .....	X		
Mr. King .....	X		
Mr. Franks .....	X		
Mr. Gohmert .....			
Mr. Jordan .....			
Mr. Poe .....	X		
Mr. Chaffetz .....	X		
Mr. Griffin .....	X		
Mr. Marino .....	X		
Mr. Gowdy .....	X		
Mr. Ross .....	X		
Ms. Adams .....	X		
Mr. Quayle .....			
Mr. Amodei .....	X		
Mr. Conyers, Jr., Ranking Member .....			

## ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Berman .....			
Mr. Nadler .....			
Mr. Scott .....		X	
Mr. Watt .....			
Ms. Lofgren .....			
Ms. Jackson Lee .....			
Ms. Waters .....		X	
Mr. Cohen .....			
Mr. Johnson .....		X	
Mr. Pierluisi .....		X	
Mr. Quigley .....			
Ms. Chu .....		X	
Mr. Deutch .....			
Ms. Sánchez .....		X	
(Vacant) .....			
Total .....	16	6	

### Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

### Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3010, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, November 21, 2011.*

Hon. LAMAR SMITH, CHAIRMAN,  
*Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3010, the Regulatory Accountability Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Sean Dunbar, who can

be reached at 226–9010, and Susanne S. Mehlman, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

*H.R. 3010—Regulatory Accountability Act of 2011.*

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As ordered reported by the House Committee on the Judiciary on  
November 3, 2011

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#### SUMMARY

H.R. 3010 would amend the Administrative Procedures Act (APA), which is the law that governs how Federal agencies propose and establish regulations. Enacting this legislation would codify many practices aimed at increasing regulatory transparency and accountability that are currently required under several executive orders. However, this legislation also would impose some new requirements on Federal agencies related to the rulemaking process and would extend some of the current requirements under the executive orders to additional Federal agencies. Except for changes permitting judicial review for compliance with the Information Quality Act (enacted as part of the Consolidated Appropriations Acts, 2001 [Public Law 106–554]), the changes contained in this legislation would not apply to any rulemaking pending or completed on the date of enactment.

CBO estimates that implementing H.R. 3010 would cost about \$70 million over the 2012–2016 period, assuming appropriation of the necessary funds. Such funding would cover the government-wide costs of additional personnel, contractor costs, and other administrative expenses associated with meeting the new requirements under the legislation.

CBO also expects that enacting H.R. 3010 could delay the issuance of some final rules each year. As a result, CBO and the staff of the Joint Committee on Taxation (JCT) expect that enacting H.R. 3010 could have effects on both direct spending and revenues. Therefore, pay-as-you-go procedures apply to the legislation. However, given the large number of major rules issued each year and the extent to which rules vary in their nature and scope, we cannot determine the level of costs or savings stemming from delaying the effective date of some rules. In addition, while enacting the bill could affect direct spending and revenues if agencies not funded through annual appropriations incur additional costs, CBO estimates that any net increase in spending or change in revenues for those agencies would not be significant.

CBO expects that H.R. 3010 would impose no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

## ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 3010 on discretionary spending is shown in the following table. The costs of this legislation fall within all budget functions that include agencies that issue regulations.

By Fiscal Year, in Millions of Dollars

	2012	2013	2014	2015	2016	2012– 2016
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	5	10	15	20	20	70
Estimated Outlays	4	9	14	20	20	67

Enacting H.R. 3010 also would affect direct spending and revenues, but CBO and JCT cannot determine the extent or sign of those effects.

## BASIS OF ESTIMATE

For this estimate, CBO assumes that the legislation will be enacted near the beginning of calendar year 2012, that the necessary amounts will be appropriated near the start of each fiscal year, and that spending will follow historical patterns for regulatory analysis activities.

*Background*

CBO is unaware of any comprehensive information on current spending for regulatory activities governmentwide. However, according to the Congressional Research Service, Federal agencies issue 3,000 to 4,000 final rules each year. Most are promulgated by the Departments of Transportation, Homeland Security, and Commerce, and the Environmental Protection Agency (EPA). Agencies that issue the most major rules (those with an estimated economic impact on the economy of more than \$100 million per year) include the Department of Health and Human Services, the Department of Agriculture, and EPA.

H.R. 3010 would amend the APA to codify certain practices currently required under several executive orders, including Executive Orders 12866, 13563, and 13422. (Those instructions require agencies in the executive branch to analyze the impacts of regulations (including costs and benefits), to coordinate with the Office of Information and Regulatory Affairs (OIRA) during the rulemaking, and to perform other activities and analyses related to the rulemaking process.) The legislation would add several definitions to the APA, including **major rule**, **major guidance**, and **high-impact** rule.

A major rule would be defined as any rule, as determined by OIRA, likely to impose: An annual cost on the economy of \$100 million or more, adjusted annually for inflation;

- A major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions;

- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or
- Significant impacts on multiple sectors of the economy.

This definition of a major rule differs from the one contained in the Congressional Review Act (CRA) of 1996, which defines a major rule as one having an annual effect on the economy instead of an annual cost as defined in H.R. 3010.

The legislation would define the term major guidance issued by Federal agencies using the same criteria as that used for a major rule. A high-impact rule would be defined as any rule that OIRA determines is likely to impose an annual cost on the economy of \$1 billion or more. That threshold would be adjusted annually for inflation.

Enacting H.R. 3010 also would add several new requirements that would broadly change the current rulemaking process. For all major and high-impact rules as well as rules that involve “novel legal or policy issues,” agencies would be required to publish an advance notice of proposed rulemaking (ANPRM) in the Federal Register 90 days prior to publishing a Notice of Proposed Rulemaking (NPRM). The legislation specifies minimum requirements for the ANPRM, including a period of not less than 60 days during which interested parties may submit data, views, or argument to the agency. A pre-proposal process occurs on a voluntary basis for some rules under current law, as guided by Executive Order 13563.

The NPRM process, as defined in the APA, would be amended to codify certain requirements in place under Executive Orders 12866 and 13563. While many agencies subject to the executive orders may already be implementing those practices for certain rules, some independent agencies outside the purview of executive orders may face an increase in workload with respect to the rulemaking process. For all agencies, H.R. 3010 would increase requirements for documenting cost-benefit analyses as well as placing other supporting documentation in the docket for the proposed rule. Furthermore, the legislation would incorporate into the rulemaking process a remedy for members of the public to petition for a hearing to determine if any information used by the agency in developing the proposed rule violates the Information Quality Act.

The legislation would require agencies to hold a hearing for all high-impact rules. The hearing would occur after comments have been received on the proposed rule and after any hearings were held under the NPRM process but before adoption of the rule. The hearing could be waived if all participants-not including the agency-agree.

#### *Spending Subject to Appropriation*

Based on information from several Federal agencies, CBO estimates that more resources would be needed for Federal agencies to produce additional guidance documents and cost-benefit analyses, support judicial reviews and hearings, and perform other administrative tasks related to the rulemaking process. Eventually, CBO estimates that Federal agencies would spend about \$20 million an-

nually to meet the requirements under this legislation. We expect that it would take about three years to reach that level of effort.

#### *Direct Spending*

CBO expects that enacting H.R. 3010 would delay a number of major and high-impact rules from taking effect each year. Therefore, in assessing the budgetary effects of H.R. 3010, CBO considered the costs and savings that would be realized if anticipated major and high-impact rules were delayed. Delaying the issuance of some major or high-impact rules, which would delay when they take effect, could result in costs, while delaying others could result in savings. CBO expects that the rules with the largest effects on Federal spending would be those related to Federal health programs, particularly Medicare; thus, enacting H.R. 3010 could significantly affect Medicare spending relative to current law.

CBO cannot determine the level of costs or savings in direct spending over the 2012–2021 period. However, we expect that such budgetary effects would largely be driven by delaying annual updates to payment schedules for providing Medicare services and other routine revisions to aspects of other government programs.

#### *Revenues*

Enacting H.R. 3010 also would affect revenues by changing the way the Internal Revenue Service could issue its nonregulatory guidance and by slowing down rulemaking generally. JCT expects those delays would reduce revenue collections in some cases and increase them in others. However, JCT cannot determine the level of costs or savings of those possible effects.

#### PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Pay-as-you-go procedures apply to H.R. 3010 because enacting the legislation would affect direct spending and revenues. CBO and JCT cannot determine the level of costs or savings associated with those effects.

#### INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

CBO expects that H.R. 3010 would impose no intergovernmental or private-sector mandates as defined in UMRA. By potentially delaying Federal rules, the bill could affect public or private entities in a number of other ways, for example by slowing reimbursements or delaying the implementation of regulatory requirements. While the costs and savings associated with such effects could be significant, because we cannot predict the nature or number of regulations that could be delayed, CBO has no basis for estimating the level of costs or savings that would result.

#### ESTIMATE PREPARED BY:

Federal Spending: Sean Dunbar and Susanne S. Mehlman  
 Impact on State, Local, and Tribal Governments: Elizabeth Cove  
 Delisle  
 Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Theresa Gullo  
Deputy Assistant Director for Budget Analysis

Holly Harvey  
Deputy Assistant Director for Budget Analysis

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3010 will create jobs and promote economic growth by improving agencies' decision-making processes and enhancing regulatory transparency and accountability.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3010 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

**Sec. 1. *Short Title.*** Section 1 designates H.R. 3010 the “Regulatory Accountability Act of 2011.”

**Sec. 2. *Definitions.*** Section 2 adds to the APA definitions of the following terms: “major rule,” based in part on the definition given to that term in Section 1(b) of Executive Order 12866 (narrowing the term to include rules that “impose costs” of \$100 million or more annually on the economy, rather than rules that have annual “effects” of \$100 million or more, and including rules with “significant impacts on multiple sectors of the economy”), and in part on the definition used in H.R. 10, the “Regulations from the Executive in Need of Scrutiny Act”; “high-impact rule” as any rule likely to impose an annual cost of \$1 billion or more on the economy; “guidance,” based on the definition given to that term in Section 3(g) of Executive Order 13422; “major guidance,” based on the definition given to the term “significant guidance document” in Section 3(h) of Executive Order 13422; “Information Quality Act,” as Section 515 of Public Law 106–554 and its implementing OMB and agency guidelines; and, the “Office of Information and Regulatory Affairs.”

**Sec. 3. *Rulemaking.*** Section 3 updates and reforms the rulemaking process in Section 553, U.S.C. 5. At Section 553(b), the Act incorporates into the APA universally applicable rulemaking principles rooted in Executive Orders 12291, 12866, 13422 and 13563, making them statutorily mandatory and judicially enforceable. In a rulemaking, the agency must consider:

- The legal authority for the rule and other relevant statutory considerations (5 U.S.C. § 553(b)(1)-(2));
- The specific nature of the problem, whether it genuinely warrants new regulations, and countervailing risks that may be posed by alternatives for new agency action (5 U.S.C. § 553(b)(3));

- Whether the problem could be addressed by repealing or modifying existing regulations (5 U.S.C. § 553(b)(4));
- Potential alternatives to adopting a new regulation, including no Federal response and a regional/State/local/tribal response (5 U.S.C. § 553(b)(5));
- Notwithstanding any other law, the potential costs and benefits—direct, indirect and cumulative—associated with each alternative, as well as estimated impacts on jobs, economic growth, innovation and economic competitiveness (5 U.S.C. § 553(b)(6)).

The last of these terms overrides provisions of existing law that limit agencies from considering costs in a small number of rule-making settings. The term does not, however, require agencies to base their final rulemaking decisions in those settings on cost considerations, irrespective of other statutory considerations.

Consistent with President Obama's call in Executive Order 13563 for earlier, more transparent outreach to the public and affected entities, the Bill requires Advance Notices of Proposed Rulemaking (ANPRs) 90 days before an agency may propose any major or high-impact rule or a rule involving novel legal or policy issues that arise from statutory mandates. ANPRs must disclose in writing information already known to the agency and the legal basis for a potential rulemaking. The agency must solicit information from interested persons and allow the public 60 days to submit written views about the information and issues discussed in the advance notice. (5 U.S.C. § 553(c)) For a rule involving novel legal or policy issues, the agency must disclose the nature of and reasons to adopt the novel legal or policy position. This builds upon Executive Orders 12866 and 13563 and gives the public an opportunity to offer views on rules that involve novel legal or policy issues early in the rule-making process, when agencies could profit significantly from them. In parallel, Section 4 requires agencies to consult with OIRA before issuing major guidance based on novel legal or policy issues that arise from statutory mandates.

The Act contains improved Notice of Proposed Rulemaking requirements that assure major and high-impact proposed rules are built upon the sound, transparent decision-making platform made possible by the ANPR process and that other proposed rules also rest on a more robust and transparent decision-making platform. Before proposing a rule, the agency is required to consult with OIRA. These requirements will crystallize for public comment the agency's preliminary determinations of whether a Federal regulation is needed; whether the benefits of the proposed rule meet statutory objectives and justify its costs, and whether the agency has conducted a preliminary risk assessment or regulatory impact analysis; whether alternatives exist that could achieve statutory objectives at lower costs; whether and why the agency has not proposed a lower-cost alternative; whether existing regulations or other laws have produced or contributed to the problem the agency seeks to correct with new regulation; and, if so, whether modification or repeal of those other regulations or laws could resolve the problem more effectively than a new rule. (5 U.S.C. § 553(d)(1))

After concluding the ANPR process, if applicable, an agency may alternatively publish a Determination of Other Agency Course, de-

scribing the alternative response the agency chose rather than to issue a new rule. The agency must consult with OIRA, and disclose all information provided to or considered by the agency in its decision-making process, including but not limited to any preliminary risk assessment or regulatory impact analysis. (5 U.S.C. § 553(d)(2))

If the agency proceeds with the rulemaking, then the agency must give interested parties at least 60 days to submit written data, views or arguments related to the proposed rule, and 120 days to do so for any proposed major or high-impact rule. (5 U.S.C. § 553(d)(3))

The Bill also provides an early opportunity for quick administrative appeals of whether the key studies or other information on which agencies base their proposed rules meet vital standards set under the Information Quality Act. (5 U.S.C. § 553(d)(4))

For any high-impact rule, after following the steps prescribed by Section 553(d)(1)-(3), the Act requires agencies to hold limited formal hearings with opportunities for cross-examination on the most critical factual issues for proposed rules that impose a \$1 billion burden on the economy. These issues concern the key information on “whether the agency’s asserted factual predicate for the rule is supported by the evidence”; whether there is a lower-cost alternative for regulation that achieves statutory objectives, and why the agency did not choose it; and whether the final information on which the agency relies satisfies the Information Quality Act. The agency must publish public notice of the hearing not less than 45 days in advance. Upon petition, hearings or issues may be waived by participants in the rulemaking other than the agency. Issues also may be added to hearings on high-impact rules, and hearings may be granted on major rules, upon petition and at the agency’s discretion.

The Act contains improved requirements at the final rulemaking stage as well. In adopting a final rule, an agency must:

- Consult with the OIRA Administrator; (5 U.S.C. § 553(f)(1))
- Rely only on the best reasonably obtainable scientific, technical and economic information; (5 U.S.C. § 553(f)(2))
- Adopt only the least-cost alternative considered during rulemaking that meets statutory objectives, unless the agency explains why a more costly rule is justified to serve interests of public health, safety or welfare clearly within the scope of the statutory provision that authorizes the rule and the more costly rule’s additional benefits justify its additional costs; (5 U.S.C. § 553(f)(3))
- Publish a notice of final rulemaking giving: “a concise, general statement of the rule’s basis and purpose,” an explanation of the need for the rule, the costs and benefits, any final risk assessment or regulatory impact analysis, and why the agency did not adopt an alternative rule or amend or rescind an existing rule. The agency must rest on specific, final determinations on the critical issues considered during formal rulemaking hearings, based on data that meets the strictures of the Information Quality Act; (5 U.S.C. § 553(f)(4))

- Publish plans for periodic review of high-impact and major rules to determine whether the agency’s final rule still is needed, achieves statutory objectives, and produces benefits that justify its costs or whether the rule could be modified or rescinded. (5 U.S.C. § 553(f)(4)(G))

The Bill seeks to prevent the abuse of “interim-final rules.” The Bill allows agencies in cases of public urgency to issue “interim-final rules” that are effective before full rulemaking procedures are completed, but also requires prompt subsequent completion of full rulemaking procedures and allows affected entities to seek rapid judicial review of agency decisions to adopt interim-final rules (except for national security rules). An agency may forego the rulemaking process when the “rulemaking is undertaken only to correct a de minimis technical or clerical error in a previously issued rule or for other noncontroversial purposes.” To prevent abuse of this feature, if the agency receives significant adverse comment on such rules within 60 days, then it must conduct normal notice-and-comment rulemaking. (5 U.S.C. § 553(g))

The Act requires publication of a substantive final or interim rule no less than 30 days before its effective date. (5 U.S.C. § 553(i)) “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” (5 U.S.C. § 553(j))

OIRA is required to issue guidelines for agencies to follow as they assess scientific and economic issues in rulemaking, including cost-benefit analysis and assessment of risks; as they observe statute-specific rulemaking regimes in conjunction with the generally applicable procedures of the APA as amended; to assure better coordination, simplification and coordination by agencies in rulemaking; and, as they conduct hearings under sections 553, 556 and 557 of title 5. (5 U.S.C. § 553(k))

The agency must include in the rulemaking record “all documents and information prepared or considered by the agency during the proceeding” including, at the discretion of the President or the OIRA Administrator, communications from OIRA to the agency. The record shall be made available to the public online whenever feasible, but if not then by other electronic means, and otherwise. (5 U.S.C. § 553(l))

The Bill exempts the Board of Governors of the Federal Reserve System and the Federal Open Markets Committee from performing cost-benefit analysis or holding formal hearings for monetary policy rules. This parallels an exemption for such rules granted by Congress in the Congressional Review Act.<sup>198</sup> (5 U.S.C. § 553(m))

**Sec. 4. Agency Guidance.** The Bill contains reforms to curb agency abuse of purportedly non-binding “guidance”—particularly guidance with major economic impacts—to avoid statutory rulemaking requirements. Specifically, when issuing major guidance, the agency must consult with OIRA; document that the guidance is “understandable and complies with relevant statutory objectives and regulatory provisions”; summarize the underlying evidence; identify the costs and benefits of the guidance; and, describe alternatives to the guidance, their costs and benefits, and why the agency rejected them. This documentation must be published online or made available to the public by electronic means, or otherwise. The

<sup>198</sup> See 5 U.S.C. § 807.

Act specifies that agency guidance is not legally binding, and requires agencies to disclose this on its guidance. Agencies should not issue guidance that is duplicative of, or inconsistent or incompatible with, existing statutes or regulations. (5 U.S.C. § 553a)

**Sec. 5. Hearings.** The Bill adopts technical changes to existing APA requirements for formal, on-the-record rulemaking hearings that support hearing-based reforms in Section 3. (5 U.S.C. § 556)

**Sec. 6. Actions Reviewable.** The Act clarifies that an agency's denial of an Information Quality Act correction petition, or an agency's failure to grant or deny such petition within 90 days, is reviewable by a court as a final action. The Act provides for immediate judicial review of agency decisions to establish "interim-final rules" before complying with normal rulemaking requirements. An abuse of discretion standard will apply in such review. (5 U.S.C. § 704)

**Sec. 7. Scope of Review.** Section 7 clarifies the scope and standards of judicial review available under the APA. First, courts may review agency action for violations of the Information Quality Act. Further, Section 7 prohibits judicial deference to agency guidance and other interpretive statements rendered outside of the rulemaking process; agency determinations of cost-benefit issues, other economic assessments or risk assessments that do not comply with applicable OIRA guidelines; and, agency determinations of law and fact to support interim-final rules. Section 7 allows agency denials of petitions for hearings or consideration of specific issues in hearings to be reviewed for abuse of discretion. (5 U.S.C. § 706).

The Bill otherwise preserves traditional principles of judicial review and deference, including with respect to cost-benefit analysis. As discussed above, the requirements for agencies to consider costs and benefits in rulemaking, found in Section 3 of the Bill, supersede other statutory provisions that in limited circumstances preclude agencies from considering the costs of a new regulation. If, however, only one regulatory alternative considered in a rulemaking can achieve the relevant statutory objectives, cost considerations will not constrain the agency from adopting that alternative. By contrast, if there is more than one alternative for the rule that can achieve the relevant statutory objectives, then the required consideration of costs will place the agency in a position to adopt the alternative that achieves those objectives at the lowest cost. This determination is judicially reviewable, but a court is entitled to give *Chevron* deference to the agency's interpretation of the relevant statutory objectives. A court is also entitled to defer to the agency's determination of which alternative achieved those objectives at the lowest cost, provided that the agency has followed the applicable OIRA guidelines for how to assess costs and benefits or other economic issues or risks. Regardless of whether the court grants the agency an extra margin of deference under *Chevron* or other applicable deference doctrines, the court will review the agency's determination under the APA's "arbitrary or capricious standard"—or, if the agency rule was based on a hearing, under the "substantial evidence" standard. This follows traditional rules for judicial review of the determinations on which agencies base final rules.

**Sec. 8. Added Definition.** The Act codifies the definition of the term "substantial evidence" given by the Supreme Court in *Uni-*

*versal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). (5 U.S.C. § 701(b))

**Sec. 9. Effective Date.** In general, the Bill’s provisions do not apply to any rulemaking pending or completed on the date of enactment. Exceptions are made for the Act’s amendments to establish definitions in Section 551, 5 U.S.C.; to prohibit judicial deference to agency interpretations of regulations outside of rulemaking; and, to guarantee judicial review of Information Quality Act violations.

**Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

**TITLE 5, UNITED STATES CODE**

**PART I—THE AGENCIES GENERALLY**

\* \* \* \* \*

**CHAPTER 5—ADMINISTRATIVE PROCEDURE**

SUBCHAPTER I—GENERAL PROVISIONS

Sec.  
500. Administrative practice; general provisions.

\* \* \* \* \*

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

\* \* \* \* \*  
553a. *Agency guidance; procedures to issue major guidance; authority to issue guidelines for issuance of guidance.*

\* \* \* \* \*

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

**§ 551. Definitions**

For the purpose of this subchapter—

(1) \* \* \*

\* \* \* \* \*

(13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; **[and]**

(14) “ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter**[.]**;

(15) “major rule” means *any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose—*

- (A) *an annual cost on the economy of \$100,000,000 or more, adjusted annually for inflation;*
  - (B) *a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions;*
  - (C) *significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or*
  - (D) *significant impacts on multiple sectors of the economy;*
- (16) *“high-impact rule” means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose an annual cost on the economy of \$1,000,000,000 or more, adjusted annually for inflation;*
- (17) *“guidance” means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue;*
- (18) *“major guidance” means guidance that the Administrator of the Office of Information and Regulatory Affairs finds is likely to lead to—*
- (A) *an annual cost on the economy of \$100,000,000 or more, adjusted annually for inflation;*
  - (B) *a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions;*
  - (C) *significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or*
  - (D) *significant impacts on multiple sectors of the economy;*
- (19) *the “Information Quality Act” means section 515 of Public Law 106–554, the Treasury and General Government Appropriations Act for Fiscal Year 2001, and guidelines issued by the Administrator of the Office of Information and Regulatory Affairs or other agencies pursuant to the Act; and*
- (20) *the “Office of Information and Regulatory Affairs” means the office established under section 3503 of chapter 35 of title 44 and any successor to that office.*

\* \* \* \* \*

**§ 553. Rule making**

**[(a) This section applies]** (a) *APPLICABILITY.—This section applies, according to the provisions thereof, except to the extent that there is involved—*

(1) \* \* \*

\* \* \* \* \*

**[(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—**

[(1) a statement of the time, place, and nature of public rule making proceedings;

[(2) reference to the legal authority under which the rule is proposed; and

[(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

[(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

[(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

[(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

[(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

[(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

[(2) interpretative rules and statements of policy; or

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

[(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.]

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

*(1) The legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making.*

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

*(3) The specific nature and significance of the problem the agency may address with a rule (including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction), whether the problem warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action.*

*(4) Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or part.*

(5) Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including not only responses that mandate particular conduct or manners of compliance, but also—

(A) the alternative of no Federal response;

(B) amending or rescinding existing rules;

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

(D) potential responses that—

(i) specify performance objectives rather than conduct or manners of compliance;

(ii) establish economic incentives to encourage desired behavior;

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

(iv) incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance.

(6) Notwithstanding any other provision of law—

(A) the potential costs and benefits associated with potential alternative rules and other responses considered under section 553(b)(5), including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness;

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

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

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

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

(A) the nature and significance of the problem the agency may address with a rule, including data and other evidence and information on which the agency expects to rely for the proposed rule;

(B) the legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making;

(C) preliminary information available to the agency concerning the other considerations specified in subsection (b); and

(D) in the case of a rule that involves a novel legal or policy issue arising out of statutory mandates, the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule;

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

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

(d) *NOTICES OF PROPOSED RULE MAKING; DETERMINATIONS OF OTHER AGENCY COURSE.*—(1) Before it determines to propose a rule, and following completion of procedures under subsection (c), if applicable, the agency shall consult with the Administrator of the Office of Information and Regulatory Affairs. If the agency thereafter determines to propose a rule, the agency shall publish a notice of proposed rule making, which shall include—

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

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

(C) the terms of the proposed rule;

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

(i) a summary of information known to the agency concerning the considerations specified in subsection (b);

(ii) a summary of additional information the agency provided to and obtained from interested persons under subsection (c);

(iii) a summary of any preliminary risk assessment or regulatory impact analysis performed by the agency; and

(iv) information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination to propose the rule;

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

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

(F) a reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule (including all costs to be considered under subsection (b)(6)), based on the information described under subparagraph (D);

(G) a discussion of—

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

(ii) the costs and benefits of those alternatives (including all costs to be considered under subsection (b)(6));

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

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

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

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

All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination to propose the rule, including any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information prepared or described by the agency under subparagraph (D) and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the proposed rule and made accessible to the public by electronic means and otherwise for the public's use when the notice of proposed rule making is published.

(2)(A) If the agency undertakes procedures under subsection (c) and determines thereafter not to propose a rule, the agency shall, following consultation with the Office of Information and Regulatory Affairs, publish a notice of determination of other agency course. A notice of determination of other agency course shall include information required by paragraph (1)(D) to be included in a notice of proposed rule making and a description of the alternative response the agency determined to adopt.

(B) If in its determination of other agency course the agency makes a determination to amend or rescind an existing rule, the agency need not undertake additional proceedings under subsection (c) before it publishes a notice of proposed rule making to amend or rescind the existing rule.

All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination of other agency course, including but not limited to any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information that would be required to be prepared or described by the agency under paragraph (1)(D) if the agency had determined to publish a notice of proposed rule making and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the determination and made accessible to the public by electronic means and otherwise for the public's use when the notice of determination is published.

(3) After notice of proposed rule making required by this section, the agency shall provide interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation, except that—

(A) if a hearing is required under paragraph (4)(B) or subsection (e), opportunity for oral presentation shall be provided pursuant to that requirement; or

(B) when other than under subsection (e) of this section rules are required by statute or at the discretion of the agency to be made on the record after opportunity for an agency hearing, sections 556 and 557 shall apply, and paragraph (4), the requirements of subsection (e) to receive comment outside of the procedures of sections 556 and 557, and the petition procedures of subsection (e)(6) shall not apply.

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

*(4)(A) Within 30 days of publication of notice of proposed rule making, a member of the public may petition for a hearing in accordance with section 556 to determine whether any evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act.*

*(B)(i) The agency may, upon review of the petition, determine without further process to exclude from the rule making the evidence or other information that is the subject of the petition and, if appropriate, withdraw the proposed rule. The agency shall promptly publish any such determination.*

*(ii) If the agency does not resolve the petition under the procedures of clause (i), it shall grant any such petition that presents a prima facie case that evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act, hold the requested hearing not later than 30 days after receipt of the petition, provide a reasonable opportunity for cross-examination at the hearing, and decide the issues presented by the petition not later than 60 days after receipt of the petition. The agency may deny any petition that it determines does not present such a prima facie case.*

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

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

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

*(1) Whether the agency's asserted factual predicate for the rule is supported by the evidence.*

*(2) Whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including all costs to be considered under subsection (b)(6)) than the proposed rule.*

*(3) If there is more than one alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost than the proposed rule, which alternative would achieve the relevant statutory objectives at the lowest cost.*

*(4) Whether, if the agency proposes to adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives (including all costs to be considered under subsection (b)(6)), the additional benefits of the*

more costly rule exceed the additional costs of the more costly rule.

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

(6) Upon petition by an interested person who has participated in the rule making, other issues relevant to the rule making, unless the agency determines that consideration of the issues at the hearing would not advance consideration of the rule or would, in light of the nature of the need for agency action, unreasonably delay completion of the rule making. An agency shall grant or deny a petition under this paragraph within 30 days of its receipt of the petition.

No later than 45 days before any hearing held under this subsection or sections 556 and 557, the agency shall publish in the Federal Register a notice specifying the proposed rule to be considered at such hearing, the issues to be considered at the hearing, and the time and place for such hearing, except that such notice may be issued not later than 15 days before a hearing held under subsection (d)(4)(B).

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

(2) The agency shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule.

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

(B) The agency may adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives only if the additional benefits of the more costly rule justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule.

(4) When it adopts a final rule, the agency shall publish a notice of final rule making. The notice shall include—

(A) a concise, general statement of the rule's basis and purpose;

(B) the agency's reasoned final determination of need for a rule to address the problem the agency seeks to address with the rule, including a statement of whether a rule is required by statute and a summary of any final risk assessment or regulatory impact analysis prepared by the agency;

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

(D) the agency's reasoned final determination not to adopt any of the alternatives to the proposed rule considered by the agency during the rule making, including—

(i) the agency's reasoned final determination that no alternative considered achieved the relevant statutory objectives with lower costs (including all costs to be considered under subsection (b)(6)) than the rule; or

(ii) the agency's reasoned determination that its adoption of a more costly rule complies with subsection (f)(3)(B);

(E) the agency's reasoned final determination—

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

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

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

(II) whether and how the agency intends to amend or rescind the existing rule separate from adoption of the rule;

(F) the agency's reasoned final determination that the evidence and other information upon which the agency bases the rule complies with the Information Quality Act; and

(G)(i) for any major rule or high-impact rule, the agency's plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.

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

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

(g) EXCEPTIONS FROM NOTICE AND HEARING REQUIREMENTS.—(1) Except when notice or hearing is required by statute, the following do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice:

(A) Subsections (c) through (e).

(B) Paragraphs (1) through (3) of subsection (f).

(C) Subparagraphs (B) through (H) of subsection (f)(4).

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

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

(C) Other than in cases involving interests of national security, upon the agency's publication of an interim rule without compliance with subsections (c), (d), or (e) or requirements to render final determinations under subsection (f) of this section, an interested party may seek immediate judicial review under chapter 7 of this title of the agency's determination to adopt such interim rule. The record on such review shall include all documents and information considered by the agency and any additional information presented by a party that the court determines necessary to consider to assure justice.

(3) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are unnecessary, including because agency rule making is undertaken only to correct a de minimis technical or clerical error in a previously issued rule or for other noncontroversial purposes, the agency may publish a rule without compliance with subsections (c), (d), (e), or (f)(1)-(3) and (f)(4)(B)-(F). If the agency receives significant adverse comment within 60 days after publication of the rule, it shall treat the notice of the rule as a notice of proposed rule making and complete rule making in compliance with subsections (d) and (f).

(h) **ADDITIONAL REQUIREMENTS FOR HEARINGS.**—When a hearing is required under subsection (e) or is otherwise required by statute or at the agency's discretion before adoption of a rule, the agency shall comply with the requirements of sections 556 and 557 in addition to the requirements of subsection (f) in adopting the rule and in providing notice of the rule's adoption.

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

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretive rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

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

(k) **RULE MAKING GUIDELINES.**—(1)(A) The Administrator of the Office of Information and Regulatory Affairs shall establish guidelines for the assessment, including quantitative and qualitative assessment, of the costs and benefits of proposed and final rules and

*other economic issues or issues related to risk that are relevant to rule making under this title. The rigor of cost-benefit analysis required by such guidelines shall be commensurate, in the Administrator's determination, with the economic impact of the rule.*

*(B) To ensure that agencies use the best available techniques to quantify and evaluate anticipated present and future benefits, costs, other economic issues, and risks as accurately as possible, the Administrator of the Office of Information and Regulatory Affairs shall regularly update guidelines established under paragraph (1)(A) of this subsection.*

*(2) The Administrator of the Office of Information and Regulatory Affairs shall also issue guidelines to promote coordination, simplification and harmonization of agency rules during the rule making process and otherwise. Such guidelines shall assure that each agency avoids regulations that are inconsistent or incompatible with, or duplicative of, its other regulations and those of other Federal agencies and drafts its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.*

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

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

*(B) issue guidelines for the conduct of hearings under subsections 553(d)(4) and 553(e) of this section, including to assure a reasonable opportunity for cross-examination. Each agency shall adopt regulations for the conduct of hearings consistent with the guidelines issued under this subparagraph.*

*(4) The Administrator of the Office of Information and Regulatory Affairs shall issue guidelines pursuant to the Information Quality Act to apply in rule making proceedings under sections 553, 556, and 557 of this title. In all cases, such guidelines, and the Administrator's specific determinations regarding agency compliance with such guidelines, shall be entitled to judicial deference.*

*(l) INCLUSION IN THE RECORD OF CERTAIN DOCUMENTS AND INFORMATION.—The agency shall include in the record for a rule making, and shall make available by electronic means and otherwise, all documents and information prepared or considered by the agency during the proceeding, including, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, documents and information communicated by that Office during consultation with the Agency.*

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

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

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

(1) make and document a reasoned determination that—

(A) assures that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions (including any statutory deadlines for agency action);

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

(C) identifies the costs and benefits (including all costs to be considered during a rule making under section 553(b) of this title) of conduct conforming to such guidance and assures that such benefits justify such costs; and

(D) describes alternatives to such guidance and their costs and benefits (including all costs to be considered during a rule making under section 553(b) of this title) and explains why the agency rejected those alternatives; and

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

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

(b) Agency guidance—

(1) is not legally binding and may not be relied upon by an agency as legal grounds for agency action;

(2) shall state in a plain, prominent and permanent manner that it is not legally binding; and

(3) shall, at the time it is issued or upon request, be made available by the issuing agency to interested persons and the public by electronic means and otherwise.

Agencies shall avoid the issuance of guidance that is inconsistent or incompatible with, or duplicative of, the agency's governing statutes or regulations, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

(c) The Administrator of the Office of Information and Regulatory Affairs shall have authority to issue guidelines for use by the agencies in the issuance of major guidance and other guidance. Such guidelines shall assure that each agency avoids issuing guidance documents that are inconsistent or incompatible with, or duplicative of, the law, its other regulations, or the regulations of other Federal agencies and drafts its guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

\* \* \* \* \*

**§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**

(a) \* \* \*

\* \* \* \* \*

[(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.]

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

*(2) Notwithstanding paragraph (1) of this subsection, in a proceeding held under this section pursuant to section 553(d)(4) or 553(e), the record for decision shall also include any information that is part of the record of proceedings under section 553.*

*(f) When an agency conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rule making under section 553(c), the matters to be considered and determinations to be made shall include, among other relevant matters and determinations, the matters and determinations described in subsections (b) and (f) of section 553.*

*(g) Upon receipt of a petition for a hearing under this section, the agency shall grant the petition in the case of any major rule, unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rule making. The agency shall publish its decision to grant or deny the petition when it renders the decision, including an explanation of the grounds for decision. The information contained in the petition shall in all cases be included in the administrative record. This subsection shall not apply to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.*

\* \* \* \* \*

**CHAPTER 7—JUDICIAL REVIEW**

\* \* \* \* \*

**§ 701. Application; definitions**

(a) \* \* \*

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) \* \* \*

\* \* \* \* \*

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; [and]

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title[.]; and

(3) "substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision.

\* \* \* \* \*

**§ 704. Actions reviewable**

[Agency action made] (a) Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Denial by an agency of a correction request or, where administrative appeal is provided for, denial of an appeal, under an administrative mechanism described in subsection (b)(2)(B) of the Information Quality Act, or the failure of an agency within 90 days to grant or deny such request or appeal, shall be final action for purposes of this section.

(b) Other than in cases involving interests of national security, notwithstanding subsection (a) of this section, upon the agency's publication of an interim rule without compliance with section 553(c), (d), or (e) or requirements to render final determinations under subsection (f) of section 553, an interested party may seek immediate judicial review under this chapter of the agency's determination to adopt such rule on an interim basis. Review shall be limited to whether the agency abused its discretion to adopt the interim rule without compliance with section 553(c), (d), or (e) or without rendering final determinations under subsection (f) of section 553.

\* \* \* \* \*

**§ 706. Scope of review**

[To the extent necessary] (a) To the extent necessary to decision and when presented, the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) \* \* \*

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (*including the Information Quality Act*);

\* \* \* \* \*

(b) *The court shall not defer to the agency's—*

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

(2) *determination of the costs and benefits or other economic or risk assessment of the action, if the agency failed to conform to guidelines on such determinations and assessments established by the Administrator of the Office of Information and Regulatory Affairs under section 553(k);*

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

(4) *guidance.*

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

## Committee Jurisdiction Letters

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CHAIRMAN

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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States  
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

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JUDY CHU, California  
TED DEUTON, Florida  
LINDA T. SANCHEZ, California  
(Vacancy)

November 17, 2011

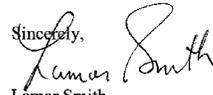
The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Mr. Chairman Issa,

Thank you for your letter regarding the Committee on Oversight and Government Reform's jurisdictional interest in H.R. 3010, "Regulatory Accountability Act of 2011," and your willingness to forego consideration of H.R. 3010 by your committee.

I agree that the Committee on Oversight and Government Reform has a valid jurisdictional interest in certain provisions of H.R. 3010 and that the Committee's jurisdiction will not be adversely affected by your decision to not request a sequential referral of H.R. 3010. As you have requested, I will support your request for an appropriate appointment of outside conferees from your Committee in the event of a House-Senate conference on this or similar legislation should such a conference be convened.

Finally, I will include a copy of your letter and this response in the Committee Report and in the *Congressional Record* during the floor consideration of this bill. Thank you again for your cooperation.

Sincerely,  
  
Lamar Smith  
Chairman

cc: The Honorable John Boehner, Speaker  
The Honorable John Conyers  
The Honorable Elijah Cummings  
The Honorable John V. Sullivan, Parliamentarian

DARRELL ISSA, CALIFORNIA  
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 CLERK DIRECTOR

ONE HUNDRED TWELFTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
 COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
 2157 RAYBURN HOUSE OFFICE BUILDING  
 WASHINGTON, DC 20515-6143

November 17, 2011

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 CHRISTOPHER S. MUMFORD, CONNECTICUT  
 JACQUELYNNE, CALIFORNIA

The Honorable Lamar Smith  
 Chairman  
 Committee on the Judiciary  
 2138 Rayburn House Office Building  
 Washington, DC 20515

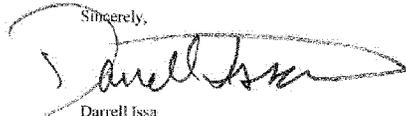
Dear Mr. Chairman:

On November 3, 2011, the Committee on the Judiciary ordered H.R. 3010, the "Regulatory Accountability Act of 2011," reported to the House. Thank you for consulting with the Committee on Oversight and Government Reform with regard to H.R. 3010 on those matters within the committee's jurisdiction. I am writing to confirm our mutual understanding with respect to the consideration of H.R. 3010.

The Office of Information and Regulatory Affairs (OIRA) was created by the Paperwork Reduction Act of 1980 (PRA), legislation that originated in the House Committee on Government Operations. The PRA assigned OIRA responsibility for significant areas of the rulemaking process, including information collection request clearance and paperwork control and statistical policy and coordination. Additionally, the PRA's requirements cover rules issued by virtually all agencies, including Cabinet departments, independent agencies, and independent regulatory agencies and commissions.

In the interest of expediting the House's consideration of H.R. 3010, I will not request a sequential referral of the bill. However, I do so only with the understanding that this procedural route will not be construed to prejudice the Committee on Oversight and Government Reform's jurisdictional interest and prerogatives on this bill or any other similar legislation and will not be considered as precedent for consideration of matters of jurisdictional interest to my Committee in the future.

I respectfully request your support for the appointment of outside conferees from the Committee on Oversight and Government Reform should this bill or a similar bill be considered in a conference with the Senate. I also request that you include our exchange of letters on this matter in the Committee Report on H.R. 3010 and in the *Congressional Record* during consideration of this bill on the House floor. Thank you for your attention to these matters.

Sincerely,  
  
 Darrell Issa  
 Chairman

The Honorable Lamar Smith  
November 17, 2011  
Page 2

cc: The Honorable John A. Boehner, Speaker of the House of Representatives  
The Honorable Elijah Cummings, Ranking Minority Member,  
Committee on Oversight and Government Reform  
The Honorable John Conyers, Ranking Member, Committee on the Judiciary  
John V. Sullivan, Parliamentarian of the House of Representatives

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## Dissenting Views

### INTRODUCTION

H.R. 3010, the “Regulatory Accountability Act of 2011,” amends the Administrative Procedure Act (“APA”)<sup>1</sup> in many problematic respects. We are very concerned that these drastic changes, if enacted, would seriously undermine the agency rulemaking process by hobbling the ability of agencies to effectively regulate consumer health and product safety, environmental protection, workplace safety, and financial services industry misconduct, among other matters. More than 50 leading administrative law academics,<sup>2</sup> the Administrative Law and Regulatory Practice Section of the American Bar Association (“ABA”),<sup>3</sup> the AFL–CIO,<sup>4</sup> the Union of Concerned Scientists,<sup>5</sup> U.S. PIRG,<sup>6</sup> American Association for Justice,<sup>7</sup> the Alliance for Justice,<sup>8</sup> the American Association of University Professors,<sup>9</sup> and the Coalition for Sensible Safeguards (“Coalition”), representing more than 60 organizations,<sup>10</sup> share many of our con-

<sup>1</sup> 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2011).

<sup>2</sup> Letter from 52 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 1 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (“strenuously” urging “rejection of this proposal”).

<sup>3</sup> American Bar Ass’n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>4</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from William Samuel, Director, the American Federation of Labor and Congress of Industrial Organizations, at 1 (Nov. 1, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (noting that the bill will “cripple” the regulatory process).

<sup>5</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Francesca T. Grifo, Senior Scientist and Director—Scientific Integrity Program, Union of Concerned Scientists (Nov. 3, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (noting that the bill “jeopardizes” the ability of agencies to provide public protections).

<sup>6</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Nasima Hossain, U.S. PIRG Public Health Advocate, at 1 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (noting that the bill “would override decades of legislation enacted by Congress to protect the public and American workers from harm”).

<sup>7</sup> Email to House Members from Jennie Rasmussen, Federal Relations Counsel, American Association for Justice (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>8</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from the Alliance for Justice, at 1 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (noting that the “bill is a dream come true for corporate special interests pushing to block or weaken regulatory safeguards in order to maximize short-term profits”).

<sup>9</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from John W. Curtis, Director of Research and Public Policy, American Association of University Professors (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (expressing “full-throated concurrence” with the 52 administrative law professor letter of Oct. 24, 2011 regarding H.R. 3010).

<sup>10</sup> According to the Coalition, the following entities are members: Ability Production, AFL–CIO, Alliance for Justice, American Association of University Professors, American Federation of State, County and Municipal Employees, American Lung Association, American Rivers, American Values Campaign, Americans for Financial Reform, ATTIC, Inc., BlueGreen Alliance, Campaign for Contract Agriculture Reform (CCAR), Center for Food Safety, Center for Independent Living, Center for Science in the Public Interest, Citizens for Sludge-Free Land, Clean Air Watch, Clean Water Network, Consortium for Citizens with Disabilities, Consumer Federation of America, Consumers Union, CounterCorp, Cumberland Countians for Peace & Justice, Demos, Economic Policy Institute, Edmonds Institute, Free Press, Friends of the Earth, Green for All, Health Care for America Now, In the Public Interest, International Brotherhood of Teamsters, International Center for Technology Assessment, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Jam On! Music Production & Recording, League of Conservation Voters, Los Angeles Alliance for a New Economy, National Center for Healthy Housing, National Consumers League, National Council for Occupational Safety and Health, National Employment Law Project, National Lawyers Guild, Louisville Chapter, National Women’s Health Network, National Women’s Law Center, Natural Resources Defense Council, Network for Environmental & Economic, Responsibility of United

cerns about the bill. The Coalition, for example, observes that H.R. 3010 represents “the biggest threat to environmental standards, workplace safety rules, public health, and financial reform regulations to appear in decades.”<sup>11</sup> Similarly, the AFL–CIO states that this legislation “would upend more than 40 years of labor, health, safety and environmental laws and threaten new needed protections.”<sup>12</sup>

Our principal concerns about H.R. 3010 include the following: (1) the bill is based on the faulty premise that regulations result in economically stifling costs; (2) if enacted, the bill’s cumulative effect would be to halt agency rulemaking; (3) H.R. 3010 prioritizes cost-cutting over public health and safety by overriding existing statutes such as the Clean Air Act that prohibit or limit consideration of cost when promulgating rules and by unnecessarily expanding and codifying cost-benefit analysis requirements; (4) the bill dangerously concentrates unaccountable power in the Office of Information and Regulatory Affairs; and (5) the bill tilts the rulemaking playing field in industry’s favor through several mechanisms, including expanded use of formal rulemaking; expanded and less deferential judicial review; providing numerous opportunities for the private sector to challenge agency compliance with the Information Quality Act, thereby encouraging dilatory tactics by opponents of regulation; and promoting a regulatory “race to the bottom” between the United States and developing nations that have lax regulatory structures.

For these reasons, and others discussed below, we strongly oppose H.R. 3010 and must respectfully dissent.

#### CONCERNS WITH H.R. 3010

##### I. H.R. 3010 IS BASED ON FALSE PREMISES

H.R. 3010’s proponents rely on unsupported assertions that regulations stifle economic growth and job creation and impose burdensome costs on business. Evidence, however, demonstrates that these assertions are completely unfounded.

##### *A. Regulations Have No Discernible Impact on Job Creation and They Do Not Inhibit Business Development*

Proponents of deregulatory measures like H.R. 3010 wrongly and without any proof insist that regulations impose burdensome compliance costs on businesses and thereby stifle job creation. As the author of this legislation explained:

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Church of Christ, New Jersey Work Environment Council, New York Committee for Occupational Safety and Health (NYCOSH), OMB Watch, Oregon PeaceWorks, People for the American Way, Protect All Children’s Environment, Public Citizen, Reproductive Health Technologies Project, Safe Tables Our Priority (S.T.O.P.), Service Employees International Union, Southern Illinois Committee for Occupational Safety and Health, The Partnership for Working Families, Union of Concerned Scientists, Union Plus, United Food and Commercial Workers Union, U.S. Chamber Watch, U.S. PIRG, Waterkeeper Alliance, and Worksafe. Coalition for Sensible Safeguards website—About Us, *available at* [http://www.sensible safeguards.org/about\\_us](http://www.sensible safeguards.org/about_us) (last visited Nov. 8, 2011).

<sup>11</sup>Coalition for Sensible Safeguards, *The Regulatory Accountability Act of 2011: Legislation Would Override and Threaten Decades of Public Protections*, at 1 (undated) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>12</sup>Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from William Samuel, Director, the American Federation of Labor and Congress of Industrial Organizations, at 1 (Nov. 1, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

The American people urgently need jobs that only economic growth can give. Standing in the way of growth and job creation is a wall of Federal regulation.

\* \* \* \* \*

New regulatory burdens and uncertainty about the economy have helped to keep trillions of dollars of private sector capital on the sidelines. Companies cannot safely invest if they cannot tell whether tomorrow's regulations will make their investments unprofitable.<sup>13</sup>

These types of arguments are part of a deregulatory mantra embraced by conservatives.<sup>14</sup>

Nevertheless, the Majority's own witness at the legislative hearing on H.R. 3010 clearly debunked the myth that regulations stymie job creation. Christopher DeMuth, who appeared on behalf of the American Enterprise Institute, a conservative think tank, stated in his prepared testimony that the "focus on jobs . . . can lead to confusion in regulatory debates" and that "the employment effects of regulation, while important, are indeterminate."<sup>15</sup> If anything, regulations may *promote* job growth and put Americans back to work. For instance, the BlueGreen Alliance, notes:

Studies on the direct impact of regulations on job growth have found that most regulations result in modest job growth or have no effect, and economic growth has consistently surged forward in concert with these health and safety protections. The Clean Air Act is a shining example, given that the economy has grown 204% and private sector job creation has expanded 86% since its passage in 1970.<sup>16</sup>

Also in reference to the Clean Air Act, the White House Office of Management and Budget ("OMB") recently observed that 40 years of success with this measure "have demonstrated that strong environmental protections and strong economic growth go hand in hand."<sup>17</sup> Similarly, the Natural Resources Defense Council and the United Auto Workers cite the fact that increased fuel economy

<sup>13</sup>*The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter "H.R. 3010 Hearing"] (remarks of Rep. Lamar Smith (R-TX), Chair, H. Comm. on the Judiciary).

<sup>14</sup>Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations, offers this explanation:

Republicans have a problem. People are increasingly concerned about unemployment, but Republicans have nothing to offer them. The G.O.P. opposes additional government spending for jobs programs and, in fact, favors big cuts in spending that would be likely to lead to further layoffs at all levels of government. . . .

These constraints have led Republicans to embrace the idea that government regulation is the principal factor holding back employment. They assert that Barack Obama has unleashed a tidal wave of new regulations, which has created uncertainty among businesses and prevents them from investing and hiring.

No hard evidence is offered for this claim; it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber.

Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs*, N.Y. Times Economix, Oct. 4, 2011, available at <http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/>.

<sup>15</sup>H.R. 3010 Hearing (prepared statement of Christopher DeMuth, American Enterprise Institute).

<sup>16</sup>Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from David A. Forster, Executive Director, BlueGreen Alliance, at 2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>17</sup>Executive Office of the President—Office of Management and Budget, Statement of Administration Policy on H.R. 2401, Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011 (Sept. 21, 2011).

standards have already led to the creation of more than 155,000 U.S. jobs.<sup>18</sup>

To highlight the fallacy of the bill’s premise that regulations result in job loss, Representative Henry C. “Hank” Johnson (D–GA) had been prepared to offer an amendment at the full Committee markup that would have exempted from H.R. 3010 any rule that OMB determines will result in net job creation. His amendment would have ensured that any rule that would help put unemployed Americans back to work could take effect without the unnecessary cost and delay that H.R. 3010 would impose. While Representative Johnson was *en route* to the Committee markup for the explicit purpose of offering his amendment, however, the Majority declined to wait for his arrival and pressed forward to final approval of the bill.

Another argument made by the bill’s proponents—namely, that regulatory uncertainty hurts businesses—was similarly debunked by Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations. He observes:

[R]egulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment.<sup>19</sup>

At the legislative hearing on H.R. 3010, Professor Sidney Shapiro similarly noted, “All of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment.”<sup>20</sup> This may explain the findings of a July 2011 *Wall Street Journal* survey of business economists, which found that the “main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies.”<sup>21</sup> Similarly, the most recent National Federation of Independent Business survey of its members likewise shows that “poor sales”—not regulation—is the biggest problem.<sup>22</sup> Indeed, the Main Street Alliance, an alliance of small businesses, observes:

In survey after survey and interview after interview, Main Street small business owners confirm that what we really need is more customers—more demand—not deregulation. Policies that restore our customer base are what we

<sup>18</sup>Natural Resources Defense Council *et al.*, *Supplying Ingenuity: U.S. Suppliers of Clean, Fuel-Efficient Vehicle Technologies* (2011), available at <http://www.nrdc.org/transportation/autosuppliers/files/SupplierMappingReport.pdf>.

<sup>19</sup>Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs*, N.Y. TIMES Economix Blog, Oct. 4, 2011, available at <http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/?scp=4&sq=bartlett&st=cse>.

<sup>20</sup>H.R. 3010 Hearing (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).

<sup>21</sup>Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring*, Wall St. J., July 18, 2011, available at <http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html>.

<sup>22</sup>Press Release, Nat’l Federation of Independent Businesses, *Small Business Confidence Takes Huge Hit: Optimism Index Now in Decline for Six Months Running* (Sept. 13, 2011) (“Of those reporting negative sales trends, 45 percent blamed faltering sales, 5 percent higher labor costs, 15 percent higher materials costs, 3 percent insurance costs, 8 percent lower selling prices and 10 percent higher taxes and regulatory costs.”), available at <http://www.nfib.com/press-media/press-media-item?cmsid=58190>.

need now, not policies that shift more risk and more costs onto us from big corporate actors.

\* \* \* \* \*

To create jobs and get our country on a path to a strong economic future, what small businesses need is customers—Americans with spending money in their pockets—not watered down standards that give big corporations free reign to cut corners, use their market power at our expense, and force small businesses to lay people off and close up shop.<sup>23</sup>

In sum, there is no credible evidence that regulations depress job creation.<sup>24</sup>

### *B. The Claim that Regulations Impose Burdensome Costs is a Canard*

In addition to falsely claiming that regulations “kill” jobs, supporters of H.R. 3010 assert that regulations impose burdensome costs on businesses. For example, in nearly every hearing before the House Judiciary Committee and its Subcommittee on Courts, Commercial and Administrative Law (“CCAL”) regarding regulatory issues this Congress,<sup>25</sup> Majority witnesses have cited the same widely discredited study by economists Mark and Nicole Crain (“Crain Study”), which claims that federal regulation imposes an annual cost of \$1.75 trillion on business.<sup>26</sup>

The Crain Study, however, has been thoroughly and repeatedly debunked and criticized for exaggerating regulatory costs. For example, the Center for Progressive Reform (“CPR”) notes that the \$1.75 trillion cumulative burden cited by the study fails to account for any benefits of regulation.<sup>27</sup> In addition, the study’s methodology is seriously flawed with respect to how it calculated economic costs. The study, which relied on international public opinion polling by the World Bank on how friendly a particular country was

<sup>23</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Jim Houser, Co-Chair, The Main Street Alliance, *et al.*, at 1–2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>24</sup> See also Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Minimal*, Wash. Post, Nov. 13, 2011, available at [http://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gIQAALRF5IN\\_story.html?hpid=z1](http://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gIQAALRF5IN_story.html?hpid=z1) (“In 2010, 0.3 percent of the people who lost their jobs in layoffs were let go because of ‘government regulations/intervention.’ By comparison, 25 percent were laid off because of a drop in business demand. . . . Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job creation.”).

<sup>25</sup> See, e.g., Hearing on H.R. 3010; *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter, “Formal Rulemaking Hearing”]; *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter, “Cost-Benefit Hearing”]; *Raising the Agencies’ Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter, “Scorecard Hearing”]; *The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter, “APA 65 Hearing”].

<sup>26</sup> Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Rep. No. SBAHQ-08-M-0466 (Sept. 2010), available at <http://archive.sba.gov/advo/research/rs371tot.pdf>.

<sup>27</sup> Sidney Shapiro, *et al.*, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, Center for Progressive Reform White Paper #1103 (Feb. 2011).

to business interests, ignored actual data on costs imposed by Federal regulation in the United States.<sup>28</sup>

The Congressional Research Service (“CRS”) also conducted an extensive examination of the Crain Study and criticized much of its methodology.<sup>29</sup> Moreover, CRS noted that the authors of the Crain Study themselves told CRS that their analysis was “not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the ‘right’ level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)”<sup>30</sup> CRS concluded that “a valid, reasoned policy decision can only be made after considering information on both costs and benefits” of regulation.<sup>31</sup> The Economic Policy Institute reached a similar conclusion.<sup>32</sup>

Perhaps our greatest macroscopic concern about H.R. 3010 is that it will undermine government’s ability to protect Americans from a wide range of harms, in complete disregard of the devastating impact that inadequate regulation has had on the health and economic well-being of Americans. Our Nation continues to struggle in the aftermath of the 2008 financial crisis and to deal with the ongoing costs of regulatory failure and underenforcement of current regulations. As observed by Americans for Financial Reform, it is estimated that the crisis has cost the United States economy “trillions of dollars and millions of jobs, and led to millions of families losing their homes.”<sup>33</sup> The BP oil spill and Massey coal mine explosion are further examples of regulatory failure. The supporters of H.R. 3010 appear, however, to suffer some form of collective amnesia about these devastating examples of regulatory failure.

H.R. 3010’s proponents downplay and, perhaps, even ignore the evidence demonstrating that whatever the costs of regulation, it results consistently in net benefits. “Federal regulation, like taxing and spending,” as CRS observed, “is one of the basic tools of government used to implement public policy.”<sup>34</sup> Impacting nearly every aspect of society, regulations have significant benefits as summarized in the following:

Agencies issue thousands of rules and regulations each year to implement statutes enacted by Congress. The public policy goals and benefits of regulations include, among other things, ensuring that workplaces, air travel, foods, and drugs are safe; that the nation’s air, water and land

<sup>28</sup> *Id.*

<sup>29</sup> Curtis W. Copeland, Analysis of an Estimate of the Total Costs of Federal Regulations, Congressional Research Service Report for Congress, R41763 (Apr. 6, 2011).

<sup>30</sup> *Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

<sup>31</sup> *Id.* The Economic Policy Institute also issued a critique of the Crain study outlining additional concerns with the study’s methodology and data. See John Irons & Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited \$1.75 Trillion Cost of Regulations Is Not Worth Repeating, Economic Policy Institute, July 19, 2011, available at <http://w3.epi-data.org/temp2011/IssueBrief308.pdf>.

<sup>32</sup> John Irons & Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited \$1.75 Trillion Cost of Regulations Is Not Worth Repeating, Economic Policy Institute, July 19, 2011, available at <http://w3.epi-data.org/temp2011/IssueBrief308.pdf>.

<sup>33</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Americans for Financial Reform, at 2 (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>34</sup> Curtis W. Copeland, The Federal Rulemaking Process: An Overview, Congressional Research Service Report for Congress, RL 32240, at 1 (Feb. 7, 2005).

are not polluted; and that the appropriate amount of taxes is collected. The costs of these regulations are estimated to be in the hundreds of billions of dollars, *and the benefits estimates are even higher*.<sup>35</sup>

Regulation routinely results in net benefits to society. This is in part because both the President and Congress have sought ways to oversee agency rulemaking to ensure that the rulemaking process is fair to affected parties and that the benefits of a rule outweigh its costs. Sally Katzen, a former Administrator of the Office of Information and Regulatory Affairs (“OIRA”) during the Clinton Administration, cited the OMB’s annual reports to Congress concerning the costs and benefits of regulations from the Clinton, Bush, and Obama Administrations in support of this fact. These reports demonstrate that, even using OMB’s highest estimate of costs and its lowest estimate of benefits, the regulations issued between fiscal years 1999 and 2009 produced a net benefit of \$73 billion.<sup>36</sup> The latest OMB report to Congress on the costs and benefits of regulations also concluded that for fiscal year 2010, federal regulations cost between \$6.5 billion and \$12.5 billion, but resulted in between \$18.8 billion and \$86.1 billion in benefits.<sup>37</sup> This overwhelming evidence undermines the unsupported assertion that regulatory costs are simply too burdensome.

*C. H.R. 3010 Is a Solution in Search of a Problem as the Current Regulatory Process Has Worked Well*

The APA, enacted in 1946, establishes the minimum rulemaking<sup>38</sup> and formal adjudication requirements for all executive branch administrative agencies. The APA also sets forth standards for judicial review of final agency actions. While the APA sets minimum standards, many agency actions may involve procedures that depart from or go beyond APA requirements. As one academic noted, “[T]he American administrative system, by evolution and design, is characterized by a considerable degree of informality, agency discretion and procedural flexibility.”<sup>39</sup> The APA’s baseline procedural requirements are designed to maintain a balance between this type of agency flexibility and the requirements of due process. As more than 50 leading administrative law academics recently observed, “The APA has served for 65 years as a kind of Constitution for administrative agencies and the affected public—flexible enough

<sup>35</sup> *Regulatory Reform: Are Regulations Hindering Our Competitiveness?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Government Reform*, 109th Cong. 56 (2005) (prepared statement of J. Christopher Mihm, Managing Director—Strategic Issues, U.S. Government Accountability Office) (emphasis added).

<sup>36</sup> *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulation: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) (statement of Sally Katzen).

<sup>37</sup> Office of Management and Budget, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities at 21, *available at* [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf)

<sup>38</sup> The APA defines “rulemaking” as the “agency process for formulating, amending or repealing a rule.” 5 U.S.C. § 551(5) (2011). A “rule,” in turn, is defined as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4) (2011).

<sup>39</sup> Gary J. Edles, *Lessons from the Administrative Conference of the United States*, 2 EUR. PUB. L. 571, 572 (1996).

to accommodate the variety of agencies operating under it and the changes in modern life.”<sup>40</sup>

The informal notice-and-comment rulemaking process outlined in section 553 of the APA is the process that agencies follow for promulgating rules in the overwhelming majority of cases.<sup>41</sup> Notice-and-comment rulemaking, while being flexible, is also subject to many procedural and analytical requirements, including those imposed by statutes other than the APA.<sup>42</sup> Agencies, however, may choose or may be required by statute to use other rulemaking procedures, including formal rulemaking, negotiated rulemaking, and hybrid or expedited approaches, which generally tend to have greater procedural requirements and be subject to stricter judicial review than section 553 notice-and-comment rulemaking.

## II. THE CUMULATIVE EFFECT OF H.R. 3010’S AMENDMENTS TO THE APA WILL BE TO PROMOTE, NOT LIMIT, MORE UNCERTAINTY BY GREATLY EXTENDING THE RULEMAKING PROCESS

Rather than reducing uncertainty, H.R. 3010 will substantially increase uncertainty by extending and multiplying the complexity of the rulemaking process.<sup>43</sup> As a result, it will leave “stakeholders (including businesses large and small) less able to plan effectively for the future.”<sup>44</sup> It does this by adding more than “60 new procedural and analytical requirements to the agency rulemaking process” and expands section 553 of the APA by approximately ten-

<sup>40</sup>Letter from 52 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 1 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>41</sup>Many commentators note that although notice-and-comment rulemaking is less rigid than formal rulemaking, it is still subject to numerous procedural and analytical requirements. If anything, the current process may already be too heavily proceduralized, or “ossified.” See, e.g., Formal Rulemaking Hearing (statement of Matthew C. Stephenson, Harvard Law School) (“It turns out, however, that the term ‘informal rulemaking’ is misleading. Nominally ‘informal’ notice-and-comment rulemaking is in fact heavily proceduralized, to the point where many commentators describe this process as a kind of ‘paper hearing.’ Agencies must provide a fairly detailed and specific proposal, or set of alternatives, in their initial published notice of proposed rulemaking. This notice must also disclose the scientific or evidentiary basis of the proposal, so that the agency’s evidence can be subjected to critical scrutiny. Any interested party (indeed, any member of the public) may submit written comments on the agency’s proposal. These submissions may criticize the agency’s analysis and evidence, and may also suggest alternatives. Under Executive Order 12866, executive branch agencies must also submit proposed rules, along with a detailed cost-benefit analysis, to the Office of Management and Budget for review. If the agency decides to promulgate a final rule, it must provide a detailed written explanation that includes responses to all material comments submitted by interested parties. If an agency fails to respond adequately to criticisms or proposed alternatives submitted by commenters, the agency risks judicial reversal. This creates powerful incentives for agencies to take comments seriously and to provide detailed responses. Furthermore, if the agency decides to change its policy substantially in response to comments, it may have to initiate a new round of notice-and-comment so that all parties have a fair opportunity to critique the new proposal. . . . Indeed, the more common criticism of notice-and-comment rulemaking is that it is *too demanding* of agencies. . . .”) (citations omitted); H.R. 3010 Hearing (statement of Prof. Sidney Shapiro, Wake Forest Law School) (“The regulatory system is already too ossified, and H.R. 3010 would only exacerbate this problem.”).

<sup>42</sup>See, e.g., Regulatory Flexibility Act, 5 U.S.C. §§ 603, 604 (2011) (requiring assessments of regulatory impact of proposed and final rules on small entities); Unfunded Mandates Reform Act, 2 U.S.C. §§ 1531–1538 (2011) (requiring assessments of regulatory impact on state and local government entities of proposed and final rules).

<sup>43</sup>H.R. 3010 Hearing (statement of Prof. Sidney Shapiro, Wake Forest Law School) (“It currently takes four to eight years for an agency to promulgate and enforce most significant rules, and the proposed procedures would likely add another two to three years to the process. Under H.R. 3010, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete. In the meantime, thousands of people would die and tens of thousands more would be injured or become ill because of the lack of regulation.”).

<sup>44</sup>Letter from 52 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 2 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

fold.<sup>45</sup> Whatever the merits of the individual amendments to the APA that are contained in H.R. 3010, the cumulative weight of all of the changes threatens to grind rulemaking to a halt. Many administrative law experts believe that the changes contained in H.R. 3010, taken as a whole, will pour “sand in the gears” of the rulemaking process.<sup>46</sup> The bill’s cost-benefit analysis requirements alone would slow down the rulemaking process, which some have already criticized as being “already too ossified,” and possibly bring rulemaking to a halt.<sup>47</sup>

Likewise, the AFL–CIO observes that the bill “adds dozens of new analytical and procedural requirements to the rulemaking process.”<sup>48</sup> It is particularly concerned that the “development of major workplace safety rules already takes 6–10 years” and that H.R. 3010 “will further delay these rules and cost workers their lives.”<sup>49</sup> Congress delegated legislative authority to agencies to issue rules to protect the American public from a wide spectrum of harms. H.R. 3010 effectively contravenes Congress’s intent in delegating that authority in the first place.

If enacted, the bill’s amendments to the APA “would likely lead to rulemaking avoidance by agencies—increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount the additional sections presented [by the bill],” as observed by more than 50 leading administrative law academics.<sup>50</sup> The ABA’s Administrative Law Section has also expressed similar concerns.<sup>51</sup>

In light of concerns about H.R. 3010’s cumulative effect on rulemaking and on society, Representative Steve Cohen (D–TN) offered an amendment at markup that would have delayed H.R. 3010’s effective date to 90 days after the Administrative Conference of the United States—a neutral body of administrative law experts—submits a report to Congress containing a cost-benefit analysis of H.R. 3010. Such analysis would have included consideration of both the quantitative and qualitative benefits and costs of H.R. 3010 for the rulemaking process, the federal government, and society. If H.R. 3010’s proponents were to be logically consistent in their view of

<sup>45</sup> *Id.*

<sup>46</sup> *See, e.g., id.* (“Collectively, the procedural and analytical requirements added by this bill would be enormously burdensome. . . . Not only new regulations, but amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Enforcement of these requirements on judicial review is available to regulatory proponents and regulatory opponents alike, adding to the burden of defensive lawyering agencies must carry. Thus, both affirmative regulation and deregulation may be impeded.”)

<sup>47</sup> H.R. 3010 Hearing (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law); *see, e.g.,* American Bar Ass’n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act, at 1 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff); Letter from 52 administrative law academics to Lamar Smith, House Judiciary Committee Chair, and John Conyers, Jr., House Judiciary Committee Ranking Member, at 2 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff); Administrative Conference of the United States Recommendation 93–4, 59 Fed. Reg. 4670, 4670 (1993) (concluding in 1993 that the state of the rulemaking process “has become increasingly less effective and more time-consuming.”)

<sup>48</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from William Samuel, Director, the American Federation of Labor and Congress of Industrial Organizations, at 1 (Nov. 1, 2011).

<sup>49</sup> *Id.*

<sup>50</sup> Letter from 52 administrative law academics to Lamar Smith, House Judiciary Committee Chair, and John Conyers, Jr., House Judiciary Committee Ranking Member, at 1 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>51</sup> American Bar Ass’n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act, at 5 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (noting that “[c]ollectively, these requirements would be enormously burdensome”).

the efficacy of cost-benefit analysis, they would have supported this amendment. Unfortunately, they did not, and the amendment was not adopted.

To highlight the potential cost to society of delaying regulation, Representative Jerrold Nadler (D-NY) offered an amendment that would have exempted from H.R. 3010 any proposed rule made by the Nuclear Regulatory Commission under the Atomic Energy Act.<sup>52</sup> The meltdown of the nuclear reactors at the Fukushima Daiichi power plant in Japan earlier this year in the aftermath of a devastating earthquake and tsunami highlights the dangers of regulatory failure when it comes to ensuring the safe operation of nuclear reactors. Representative Nadler was particularly concerned about the potential for a similar meltdown just north of New York City, at the Indian Point Nuclear Power Plant, which is an aged facility and potential terrorist target. H.R. 3010 would inhibit or prevent the Nuclear Regulatory Commission from being able to protect the tens of millions who live in the greater New York metropolitan area and millions of other Americans who live near nuclear power plants from a catastrophe akin to what happened at Fukushima. The amendment failed by a vote of 13 to 16.

### III. H.R. 3010'S SUPERMANDATES AND OTHER PROVISIONS PRIORITIZE COSTS OVER CRITICAL PUBLIC HEALTH, WORKPLACE SAFETY, AND ENVIRONMENTAL PROTECTIONS

H.R. 3010 prioritizes minimizing business costs over health, safety, and environmental protections in at least two ways. First, it imposes a “supermandate” on agencies that overrides numerous statutes that prohibit or limit the consideration of cost in promulgating public health and safety rules. Second, it goes well beyond the cost-benefit analysis requirements contained in Executive Orders 12,866 and 13,563 by codifying expanded analytical requirements that allow for much less agency discretion, threatening “paralysis by analysis.”

#### A. *H.R. 3010 Makes a Huge Substantive Change to Existing Law by Overturning Statutory Prohibitions or Limitations on Considering Costs in the Rulemaking Process*

H.R. 3010's requirement that agencies consider regulatory costs and benefits of proposed and final rules regardless of the dictates of other laws, thereby establishing a “supermandate,” imposes a major substantive change to existing law. Specifically, section 3(b)(6) of the bill, when combined with the bill's required cost and benefit information in the notice of proposed rulemaking and the issuance of a final rule, would require agencies to consider potential costs and benefits associated with proposed and final rules “[n]otwithstanding any other provision of law.”<sup>53</sup> As a result, H.R. 3010 overrides provisions in numerous other statutes that prohibit or limit agency consideration of costs when promulgating rules. These statutes include the Clean Air Act,<sup>54</sup> the Clean Water Act,<sup>55</sup>

<sup>52</sup>42 U.S.C. §§ 2011 *et seq.* (2011).

<sup>53</sup>H.R. 3010, 112th Cong. § 3(b)(6) (2011) (emphasis supplied).

<sup>54</sup>Pub. L. No. 91-604, 84 Stat. 1676 (1970), as amended. The cost prohibition is codified at 42 U.S.C. § 7142(d)(2) (2011).

<sup>55</sup>Pub. L. No. 95-217, 86 Stat. 816 (1977), as amended. The limitation on cost consideration is codified at 33 U.S.C. § 1311(b) (2011).

the Occupational Safety and Health Act,<sup>56</sup> and the Federal Mine Safety and Health Act.<sup>57</sup> Various environmental groups warn that this is a “cynical attempt” to overturn these measures and the carefully crafted legislative bargains that they represent.<sup>58</sup> One such organization, American Rivers, notes that “[m]any of our nation’s fundamental laws protecting our health, like the Clean Air Act and the Clean Water Act, would likely not have come into effect when their costs, the costs of keeping our air and water clean, were greater compared to less protective regulations.”<sup>59</sup> As the ABA’s Administrative Law Section observes:

In addition to burdening the rulemaking process with analytical requirements that appear to out of proportion to their likely payoffs, the bill’s “rulemaking considerations” are troubling because of the way in which they would, in some cases, alter the substantive law. The APA would thus become, in several respects, an “Administrative Substance Act.”<sup>60</sup>

In addition, H.R. 3010 imposes other supermandates that compromise public health, workplace safety, and environmental protections. New APA section 553(d) as proposed by H.R. 3010, for instance, requires agencies to “adopt the least costly rule considered during the rule making . . . that meets relevant statutory objectives” and permits agencies to chose a more expensive option only if the additional benefits “justify its additional costs.” As the AFL–CIO observed, this provision “would make protecting workers and the public secondary to limiting costs and impacts on business and corporations.”<sup>61</sup>

To rectify the pernicious effects of the bill’s supermandates, Representative Steve Cohen (D–TN) offered an amendment clarifying that these provisions apply only if they do not conflict with any other law. Representative Cohen’s amendment would have ensured that prior Congressional intent as expressed in these other measures, such as the Clean Air Act, would be preserved and would have prevented unelected agency bureaucrats from weighing costs against saving lives. His amendment, however, failed by a vote of 14 to 15.

<sup>56</sup> Pub. L. No. 91–596, 84 Stat. 1590, 84 Stat. 1590 (1970), as amended. The limitation on cost consideration is codified at 29 U.S.C. § 655(b)(5) (2011).

<sup>57</sup> Pub. L. No. 95–164, 91 Stat. 1290 (1977), as amended. The limitation on cost consideration is contained in section 101(a)(6)(A) of the Act.

<sup>58</sup> Letter to House Members from American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Environment America, League of Conservation Voters & the Natural Resources Defense Council (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>59</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Jim Bradley, Director of Government Relations, American Rivers (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>60</sup> American Bar Ass’n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act, at 12–13 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (noting that “[m]uch, perhaps most, of the safety and health legislation now on the books would seemingly be replaced”).

<sup>61</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from William Samuel, Director, the American Federation of Labor and Congress of Industrial Organizations, at 1 (Nov. 1, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

*B. Contrary To Its Proponent's Claims, H.R. 3010, Rather Than Merely Codifying the Existing Cost-Benefit Analysis Requirements, Greatly Expands Them, Threatening "Paralysis by Analysis"*

*1. Cost-Benefit Requirements in Executive Orders*

For more than 30 years, beginning with President Ronald Reagan, every Administration has required significant rules to undergo a comprehensive cost-benefit analysis. President Reagan's EO 12291, for example, which outlined certain cost-benefit analysis requirements for "major" rules, i.e., rules that would have at least a \$100 million annual effect on the economy, a major increase in costs or prices for consumers, industries, government agencies, or regions, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.<sup>62</sup>

President Bill Clinton carried forward the cost-benefit analysis requirement as reflected in his EO 12866, issued in 1993.<sup>63</sup> This EO mandates agencies to prepare cost-benefit analyses for "significant regulatory actions."<sup>64</sup> In particular, EO 12866 requires agencies to assess all costs and benefits of available regulatory alternatives, including, significantly, both quantitative *and qualitative* measures. It also provides that agencies should select regulatory approaches that maximize net benefits, unless a statute requires another approach. Under EO 12866, agencies should, among other priorities, adopt regulations only upon a "reasoned determination that the benefits of the intended regulation justify its costs," and tailor regulations so that they impose the least burden on society needed to achieve the regulatory objectives.

In 2007, President George W. Bush issued EO 13422,<sup>65</sup> which substantively amended EO 12866 in various ways. In pertinent part, it increased emphasis on cost-benefit analysis by agencies, including requiring agencies to include reasonable estimates of the aggregate costs and benefits of all regulations for each calendar year; and allowed for a greater role for political appointees in agency rulemaking.

On January 18, 2011, President Barack Obama issued EO 13563,<sup>66</sup> which supplemented and reaffirmed the principles of EO 12866 as issued by President Clinton. In relevant part, EO 13563 requires agencies to identify, "as appropriate, means to achieve regulatory goals designed to promote innovation," and to reduce costs and simplify and harmonize rules through inter-agency coordina-

<sup>62</sup> Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

<sup>63</sup> Exec. Ord. No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>64</sup> EO 12866 defines "significant regulatory action" as any action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal communities; (2) create a serious inconsistency with another agency's actions; (3) materially alter the budgetary impact or the rights of recipients of entitlement, grant, user fee, or loan programs; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866. *Id.*

<sup>65</sup> Exec. Ord. No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007). President Obama revoked EO 13422 on January 30, 2009. Exec. Ord. No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009).

<sup>66</sup> Exec. Ord. No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

tion.<sup>67</sup> The order also clarifies that agencies must identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.<sup>68</sup>

2. *H.R. 3010 Expands the Scope and Reach of Cost-Benefit Analysis Requirements Beyond the Executive Orders*

Contrary to the claims of H.R. 3010's proponents, the bill would add additional analytical requirements and expand the reach of the requirement for cost-benefit analysis. At the hearing on H.R. 3010, the Majority witnesses, perhaps tellingly, only made general platitudinal arguments about the benefits of cost-benefit analysis, without addressing the specific analytical factors required by H.R. 3010. The Minority witness, Professor Sidney Shapiro, however, explained that cost-benefit analysis "is, at best, inexact and manipulable."<sup>69</sup>

Belying the claims of the bill's proponents that H.R. 3010 merely codifies the requirements of the various Executive Orders, sections 3(b)(6), 3(d)(1), 3(f)(3), and 3(f)(4) of the bill impose a mandate on all agencies to conduct a cost-benefit analysis for virtually *all* rules, and not just economically significant ones. This expanded scope would apply to in excess of 3,000 rules annually, including minor ones. For example, if the Coast Guard wanted to issue a rule establishing a safety zone for a fireworks display (something the Coast Guard does frequently), the bill would require the agency to do a cost-benefit analysis, and to show that the benefits "justify" the costs.

The bill's cost-benefit analysis mandate itself will result in a tremendous expenditure of taxpayer dollars in the amount of resources that it will require agencies to comply. Even one of the Majority's witnesses at the legislative hearing on this bill acknowledged as much. He said cost-benefit analysis "summons the apparatus of cost (and benefit) estimation—which is itself costly."<sup>70</sup> More than 50 administrative law academics also highlighted their concern about the additional costs that the bill's burdensome requirements will impose on agencies, which is particularly problematic in this time of severe budgetary pressures.<sup>71</sup>

In addition to expanding cost-benefit analysis requirements to include all rules and not just economically significant ones per the existing Executive Orders, H.R. 3010 also adds numerous analytical requirements to the already substantial analytical requirements of the rulemaking process, threatening "paralysis by analysis." Moreover, H.R. 3010 expands the cost-benefit analysis requirement to include "major guidance" documents, i.e., documents that are not "rules" under current law. The bill also would require agencies to identify the costs and benefits of alternatives to rules that are ultimately proposed.

Additionally, as noted, H.R. 3010 would force agencies to adopt the least costly rule absent a compelling need to protect public

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> H.R. 3010 Hearing (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).

<sup>70</sup> H.R. 3010 Hearing (prepared statement of Christopher DeMuth, American Enterprise Institute).

<sup>71</sup> Letter from 52 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 1 (Oct. 24, 2011).

health and safety. Under EO 12866, in contrast, agencies must simply determine that the benefits of a proposed rule—including non-quantifiable benefits—justify their costs and that benefits are maximized. As U.S. PIRG observes:

The new bill would in effect slow down the regulatory process by adding unending cost-benefit analyses, followed by court challenges. New analyses mandated by the legislation would require estimates of future direct and *indirect* costs that are impossible to forecast with any reliability. These new hurdles and the increased influence given to big business and corporate special interests would cause significant problems for federal agencies such as the CDC and the FDA and would undermine their ability to fulfill their missions.<sup>72</sup>

We are concerned not only with the bill’s cost-benefit analysis provisions, but with its specific mandates as to the factors that must be considered as part of that analysis. While former OIRA Administrator Sally Katzen testified before the CCAL Subcommittee that both Democratic and Republican administrations have agreed on the basic principle that agencies should engage in cost-benefit analysis of proposed and final rules, she strongly opposed codification because each administration has chosen to place different emphases and nuances into its cost-benefit analysis requirements. Codifying a single, stringent standard would prohibit such flexibility.<sup>73</sup>

#### IV. H.R. 3010 USURPS CONGRESSIONAL INTENT BY SUBSTANTIALLY EXPANDING OIRA’S—AND, THEREFORE, THE PRESIDENT’S—CONTROL OVER RULEMAKING AND UNDERCUTS CURRENT TRANSPARENCY REQUIREMENTS

H.R. 3010 expands OIRA’s control over all agency rulemaking and undercuts the transparency requirements that currently exist in EO 12866. In the hands of the wrong administration, this extraordinary and unaccountable power over rulemaking threatens agencies’ ability to do the job that Congress tasked them with doing, which is to protect the American people from a broad array of harms.

##### A. *H.R. 3010 Would Empower OIRA To Exert a Choke Hold Over Rulemaking*

Within the Executive Office of the President, OMB is charged with the responsibility to oversee and coordinate Executive Branch agencies. OMB works with agencies “to help improve administrative management, to develop better performance measures and coordinating mechanisms, and to reduce any unnecessary burdens on the public.”<sup>74</sup> Since the 1930’s, OMB has been involved in “ques-

<sup>72</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Nasima Hossain, U.S. PIRG Public Health Advocate, at 2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff)

<sup>73</sup> Cost-Benefit Hearing (statement of Sally Katzen).

<sup>74</sup> Executive Office of the President of the United States, Office of Management and Budget Mission, available at [http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/). OMB’s “predominant mission,” however, is “is to assist the President in overseeing the preparation of the federal budget and to supervise its administration in Executive Branch agencies.” *Id.*

tions of management and organization of the executive branch” and the level of its involvement has fluctuated over time.<sup>75</sup>

With regard to the regulatory processes of Executive Branch agencies, OIRA, established by Congress in the Paperwork Reduction Act of 1980 as an arm of OMB, reviews significant proposed and final rules from federal agencies before they are published in the Federal Register.<sup>76</sup> As a result of OIRA’s review, draft rules may be revised before publication, withdrawn before a review is completed, or returned to the agencies “because, in OIRA’s analysis, certain aspects of the rule need to be reconsidered.”<sup>77</sup>

Excessive concentration of power in OIRA can be troubling. For instance, under the Bush Administration, OIRA’s role as a “gatekeeper for new rulemakings” was substantially strengthened.<sup>78</sup> The OIRA Administrator during the Bush Administration explained that one of his office’s functions was “to protect people from poorly designed rules,” and that OIRA review was a way to “combat the tunnel vision that plagues the thinking of single-mission regulators.”<sup>79</sup> This “return to the gatekeeper perspective of OIRA’s role [had] implications for an array of OIRA’s functions.”<sup>80</sup> During the Bush Administration, “OIRA’s increasingly aggressive role in controlling agency action” may have been “the biggest administrative law story of the new century.”<sup>81</sup> Manifestations of OIRA’s heightened role in the rulemaking process, as identified by the Government Accountability Office (“GAO”)<sup>82</sup> and CRS,<sup>83</sup> included the following:

<sup>75</sup> Committee Print: Office of Management and Budget: Evolving Roles and Future Issues Congressional Research Service Report, S. Comm. on Governmental Affairs, 99th Cong. 185 (1986).

<sup>76</sup> Paperwork Reduction Act of 1980 § 3503, 44 U.S.C. ch. 35 (2011).

<sup>77</sup> Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century, Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 109th Cong. 39 (2006) available at <http://judiciary.house.gov/Media/PDFS/Printers/109th/31505.pdf> [hereinafter “Interim Report”].

<sup>78</sup> Curtis W. Copeland, “Changes to the OMB Regulatory Review Process by Executive Order 13422,” CRS Report for Congress, RL 33862, at 56 (2007) (quoting Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Dec. 2002).

<sup>79</sup> John Graham, Administrator, OIRA, Remarks to the Board of Trustees, The Keystone Center, at Washington, DC (June 18, 2002), available at [http://www.whitehouse.gov/omb/inforeg/keystone\\_speech061802.html](http://www.whitehouse.gov/omb/inforeg/keystone_speech061802.html).

<sup>80</sup> Interim Report at 56.

<sup>81</sup> Lisa Heinzerling, “Statutory Interpretation in the Era of OIRA,” 33 Ford. Urb. L. Rev. 1097, 1117 (2006).

<sup>82</sup> U.S. General Accounting Office, *Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003.

<sup>83</sup> *The Rulemaking Process and the Unitary Executive Theory: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) (prepared statement of Curtis W. Copeland, Specialist in American National Government, Congressional Research Service) (footnotes omitted). Additional instances of this heightened role include the following:

- the increased use of “informal” OIRA reviews in which agencies share preliminary drafts of rules and analyses before final decisionmaking at the agencies—a period when OIRA says it can have its greatest impact on the rules, but when OIRA says that some of the transparency requirements in Executive Order 12866 do not apply;
- extensions of OIRA review for certain rules for months or years beyond the 90-day time limit delineated in the executive order;
- using a general statutory requirement that OIRA provide Congress with “recommendations for reform” to request the public to identify rules that it believes should be eliminated or reformed;
- a leadership role for OIRA in the development of electronic rulemaking, which has led to the development of a centralized rulemaking docket, but which some observers believe can lead to increased presidential influence over the agencies;
- the development of an OMB bulletin on peer review that, in its original form, some believed could have led to a centralized system within OMB that could be vulnerable to political manipulation or control;

- the development of a detailed economic analysis circular and what agency officials described as a perceptible “stepping up the bar” in the amount of support required from agencies for their rules, with OIRA reportedly more often looking for regulatory benefits to be quantified and a cost-benefit analysis for every regulatory option that the agency considered, not just the option selected;
- the issuance of 21 letters returning rules to the agencies between July 2001 and March 2002—three times the number of return letters issued during the last 6 years of the Clinton Administration;<sup>84</sup>
- the issuance of 13 “prompt letters” between September 2001 and December 2003 suggesting that agencies develop regulations in a particular area or encouraging ongoing efforts. However, OIRA issued two prompt letters in 2004, none in 2005, one in 2006, and none in 2007[.]

According to CRS, these and other Bush Administration initiatives “represent[ed] the strongest assertion of presidential power in the area of rulemaking in at least 20 years.”<sup>85</sup> A detailed analysis prepared by the Democratic staff of the House Judiciary Committee concerning the Bush Administration’s control of the rulemaking process concluded that such control was “to the detriment of the public interest and has served to circumvent legislative intent.”<sup>86</sup> Not surprisingly, President Obama, in one of his first acts in office, revoked EO 13422, which contained these expanded OIRA authority provisions, on January 30, 2009.<sup>87</sup>

Notwithstanding the serious concerns presented regarding greater presidential control over rulemaking, section 3 of H.R. 3010 would require *all* agencies—including independent regulatory agencies—to consult with OIRA *before* they could publish a proposed or final rule. This requirement represents an unprecedented delegation of power to OIRA and the President as it will effectively allow OIRA to control all rulemaking activity. Moreover, this provision would undermine the independence of independent regulatory agencies that Congress created to be independent of the President.<sup>88</sup> This requirement is particularly curious in light of the fact that many of the proponents of H.R. 3010 are also, somewhat hypocritically, proponents of H.R. 10, the Regulations from the Execu-

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- the development of a proposed bulletin standardizing agency risk assessment procedures that the National Academy of Sciences concluded was “fundamentally flawed,” and that OIRA later withdrew; and
  - the development of a “good guidance practices” bulletin that standardizes certain agency guidance practices.

*Id.*

<sup>84</sup> OIRA, however, returned only two rules in 2003, one rule in 2004, one rule in 2005, no rules in 2006, and one rule in 2007. OIRA officials indicated that the pace of return letters declined after 2002 because agencies had gotten the message about the seriousness of OIRA reviews.

<sup>85</sup> *The Rulemaking Process and the Unitary Executive Theory: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) (prepared statement of Curtis W. Copeland, Specialist in American National Government, Congressional Research Service).

<sup>86</sup> H. Comm. on the Judiciary Majority Staff, *Reining in the Imperial Presidency—Lessons and Recommendations Relating to the Presidency of George W. Bush*, 111th Cong., at 186 (Mar. 2009).

<sup>87</sup> Exec. Ord. No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009).

<sup>88</sup> Certain agencies are considered “independent” because the President has limited authority to remove their leaders (usually, heads of such agencies can only be removed for cause, rather than at the President’s pleasure). Stephen G. Breyer, *et al.*, *Administrative Law and Regulatory Policy*, at 100 (4th ed. 1999).

tive in Need of Scrutiny Act, or “REINS Act.”<sup>89</sup> That bill requires, among other things, that Congress approve all major rules before they can go into effect. Therefore, in H.R. 10, proponents of this legislation are seeking to regain control from the Executive Branch over the rulemaking process, while in H.R. 3010, they seek to give the Executive Branch even more power over the rulemaking process.

Rather than learning from prior mistakes, the proponents of H.R. 3010, in effect, seek to revitalize and codify the Bush Administration’s view that OIRA should act as a rulemaking “gatekeeper” by mandating OIRA review authority in some of the same ways specified in the Bush Administration’s overruled EO 13422. As a result, H.R. 3010 ensures greater presidential control over rulemaking, which, in the wrong administration’s hands, could undermine important health, safety, consumer protection, financial and other regulations.

In recognition of the problematic consequences of the bill’s delegation of virtually unlimited control over the rulemaking process to OIRA, Representative Nadler offered an amendment deleting the requirement in the bill that agencies (including independent regulatory agencies) consult with OIRA before they may publish an Notice of Proposed Rule Making or issue final rules. His amendment, however, failed by a vote of 13 to 20.

#### *B. H.R. 3010 Undercuts Current Transparency Requirements*

Another problematic aspect of H.R. 3010 is section 3, which gives the President and OIRA the discretion as to what information must be made available to the public in connection with certain rulemaking processes. As a result, the bill would reduce—not strengthen—current requirements for OIRA transparency. For example, EO 12866 currently requires OIRA to “make available to the public all documents exchanged between OIRA and the agency during the review by OIRA” The bill, however, would allow the President and the OIRA Administrator to decide—*at their discretion*—what information that OIRA provides to the agency will be disclosed to the public. Also, section 3(1) of the bill would allow the President or the OIRA Administrator to prevent the inclusion of documents and information communicated by OIRA from the rulemaking record.

#### V. H.R. 3010 FURTHER TILTS THE REGULATORY PROCESS IN FAVOR OF BUSINESS INTERESTS AND OTHERS WHO WANT TO STOP REGULATIONS

#### *A. H.R. 3010 Reinstates a Long-Discredited, Cumbersome, and Time-Consuming Formal Rulemaking Process That Can Be Used To Thwart Needed Public Health and Safety Rules from Being Promulgated*

##### *1. There Is No Need for Formal Rulemaking*

While regulations provide a substantial net benefit for society, agencies must nonetheless comply with constitutional due process requirements when issuing them. The Constitution provides that the government may not deprive anyone of life, liberty, or property without “due process of law.”<sup>90</sup> This requirement of fair procedure

<sup>89</sup>H.R. 10, 112th Cong. (2011).

<sup>90</sup>U.S. CONST. amend. XIV, § 1.

applies to the federal regulatory rulemaking and adjudicatory processes, the impact of which can be extensive. As Justice Robert Jackson observed in 1952, “The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.”<sup>91</sup>

Though rarely used, agencies must sometimes follow the APA’s formal rulemaking procedures “when rules are required by statute to be made on the record after opportunity for an agency hearing.”<sup>92</sup> The Supreme Court, in an opinion authored by then-Justice William Rehnquist, interpreted this language to mean that unless Congress specifically states in a statute governing the substance of the rulemaking that agency “hearings” regarding proposed rules are to be “on the record,” an agency is not required to use formal rulemaking procedures.<sup>93</sup>

The formal rulemaking procedures, outlined in sections 556 and 557 of the APA, require the agency seeking to promulgate the rule to carry the burden of proof in a trial-like process.<sup>94</sup> Any interested party has the opportunity to present evidence and conduct cross-examination with an administrative law judge or other agency official presiding.<sup>95</sup> The presiding officer can administer oaths, issue subpoenas, exclude irrelevant evidence, and make other rulings concerning the conduct of the proceeding.<sup>96</sup> The rule must be supported by substantial evidence.<sup>97</sup> In contrast to an informal rulemaking, a court can review a rule subject to formal rulemaking to determine whether the “evidence” supporting the rule was “substantial.”<sup>98</sup>

Up until the 1970’s, the trial-type procedures involved in formal rulemaking were thought to be the best (though not the only) means of ensuring that agency rulemaking satisfied due process concerns and ensured fairness and accuracy in the rulemaking process. Over time, however, informal procedures (partly described in footnote 41 above) came to be seen as being sufficient to satisfy due process, while formal rulemaking procedures came to be seen as unnecessarily cumbersome and time-consuming and offering little advantage over informal rulemaking procedures.<sup>99</sup> For instance, in the 1960’s, of 16 formal rulemakings under the Food, Drug and Cosmetic Act, not one was completed in less than 2 years and the average time elapsed between first proposal and final order was 4 years.<sup>100</sup> Moreover, in two of the 16 cases, the formal rulemaking proceedings took more than a decade, including one proceeding to determine whether the Food and Drug Administration (FDA) should require that peanut butter contain at least 90% peanuts (as the FDA proposed) as opposed to 87% peanuts (as proposed by in-

<sup>91</sup> *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

<sup>92</sup> 5 U.S.C. § 553(c) (2011).

<sup>93</sup> *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 237–238 (1973).

<sup>94</sup> 5 U.S.C. § 556(d) (2011).

<sup>95</sup> 5 U.S.C. § 556(c), (d) (2011).

<sup>96</sup> 5 U.S.C. § 556(d) (2011).

<sup>97</sup> *Id.*

<sup>98</sup> *See* 5 U.S.C. § 706(2) (2011) (outlining various bases for judicial review).

<sup>99</sup> Stephen G. Breyer *et al.*, *Administrative Law and Regulatory Policy*, at 582 (4th ed. 1999).

<sup>100</sup> *Id.*

dustry).<sup>101</sup> In the peanut butter case, a government witness was examined and cross-examined for an entire day about a survey of cookbook and patented peanut butter formulas, missing recipes, and his personal preferences regarding peanut butter.<sup>102</sup>

Not surprisingly, the ABA's Administrative Law Section has observed that formal rulemaking has been "long-discredited" and that it has "passed almost completely into disuse, because experience has shown that it leads to substantial delays and unproductive confrontation and because courtroom methods are not generally suited to resolution of legislative-type issues."<sup>103</sup> The Section's views reflect a "virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete."<sup>104</sup> Indeed, the Administrative Conference of the United States recommended in 1993 that the APA's formal rulemaking procedure be repealed.<sup>105</sup> Studies conducted of formal rulemaking procedures "showed clearly" that such procedures "slowed proceedings considerably and undermined agencies' ability to fulfill their mandates" that, in turn, imposed "heavy social costs."<sup>106</sup>

Notwithstanding the obvious shortcomings with formal rulemaking, H.R. 3010 fully embraces this procedure for "high-impact" rules, defined in the bill as those with a \$1 billion cost to the economy. Proponents of formal rulemaking assert that it allows an opportunity for parties to cross-examine the agency, which is the best way to vet the agency's factual assertions and assure the public that only the best science underlies agency action.<sup>107</sup>

Such an assertion, however, is itself unsupported by evidence. H.R. 3010's proponents offer no study or other data indicating that cross-examination and other facets of the formal rulemaking process are the most effective tools for making scientific and policy judgments. Indeed, Professor Matthew Stephenson of Harvard Law School challenged this assertion in testimony before the CCAL Subcommittee.<sup>108</sup> Additionally, Professor Stephenson noted that informal notice-and-comment rulemaking is already heavily proceduralized, making formal rulemaking procedures unnecessary.

## *2. Formal Rulemaking Will Bring Agency Rulemaking To a Halt*

While formal rulemaking procedures will not improve the quality of agency rules, the costs and delays associated with formal rulemaking would effectively grind agency rulemaking to a halt.<sup>109</sup> As demonstrated by the peanut butter case described above, a formal rulemaking can take up to a decade to complete without any positive effect on the quality of the final decisions. Additionally, by im-

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> American Bar Ass'n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act, at 2 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>104</sup> *Id.* at 20.

<sup>105</sup> Administrative Conference of the United States Recommendation 93-4, 59 Fed. Reg. 4670, 4670 (1993).

<sup>106</sup> American Bar Ass'n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act, at 22 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>107</sup> APA 65 Hearing (statement of Jeffrey A. Rosen); Formal Rulemaking Hearing (statements of Noel J. Francisco and Edward W. Warren).

<sup>108</sup> Formal Rulemaking Hearing (statement of Matthew C. Stephenson).

<sup>109</sup> *Id.*

peding agency rulemaking through more formal procedural requirements, H.R. 3010 could: (1) impede desirable rule changes; (2) lead agencies to use other, less desirable forms of agency regulation such as ad hoc adjudication; (3) be forced to write cruder, blunter rules or use more vague statutory language, leaving the interpretation to courts; and (4) impede its own oversight of rulemaking by making it harder for agencies to change course in response to the views of the political branches, giving agencies a way to “run out the clock” on a President or a congressional majority, and shifting power within agencies away from political appointees to career staff.<sup>110</sup> At the legislative hearing on this bill, Minority witness Professor Sidney Shapiro observed, “Almost no serious administrative law expert regards formal rulemaking as reasonable, and it has been all but relegated to the dustbin of history.”<sup>111</sup> More than 50 other administrative law academics concur.<sup>112</sup>

By delaying the rulemaking process, H.R. 3010 presents serious public health and workplace safety concerns. As noted by the AFL-CIO:

These formal rulemaking procedures will make it more difficult for workers and members of the public to participate, and give greater access and influence to business groups that have the resources to hire lawyers and lobbyists to participate in this complex process. For agencies that already provide for public hearings, such as OSHA and MSHA, the bill would substitute formal rulemaking for the development of all new rules, overriding the effective public participation processes conducted by these agencies.<sup>113</sup>

### *3. Formal Rulemaking Will Give an Unfair Advantage to Well-Funded Special Interests to Influence Rulemaking*

We are also particularly concerned that H.R. 3010’s formal rulemaking requirements will favor those special interests that have the resources to fund the kind of protracted litigation this process entails. Under the current law, “corporate and business lobbying of agencies far exceeds that by groups representing the public,” as Professor Shapiro testified at the legislative hearing on the bill.<sup>114</sup> H.R. 3010, however, will facilitate greater influence of business interests on rulemaking and agencies.

In particular, we share the fears of the Union of Concerned Scientists, which notes, for example, that the legislation jeopardizes “the respect and deference to the role of science in rulemaking”

<sup>110</sup> *Id.*

<sup>111</sup> Hearing on H.R. 3010 (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).

<sup>112</sup> Letter from 52 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 2 (Oct. 24, 2011) (noting that formal rulemaking “runs directly contrary to the consensus of the administrative law community that the APA formal rulemaking procedure is unworkable and obsolete”) (on file with H. Committee on the Judiciary, Democratic Staff).

<sup>113</sup> Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from William Samuel, Director, the American Federation of Labor and Congress of Industrial Organizations, at 2 (Nov. 1, 2011) (on file with H. Committee on the Judiciary, Democratic Staff).

<sup>114</sup> H.R. 3010 Hearing (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).

that exists under current law.<sup>115</sup> Rather than facilitating “thoughtful consideration based on facts,” the bill would open “the floodgates to challenges that are not fact-based and that seek only to delay the rulemaking process, and to make it easier for special interests to contest rules in the courts.”<sup>116</sup> Aptly describing the bill as a “corporate lobbyist dream,” the Vice-Chair of the American Sustainable Business Council and President of the South Carolina Small Business Chamber of Commerce explains:

It appears to be written by corporate attorneys for corporate attorneys.

Every aspect of the RAA is geared toward encouraging special interests to legally challenge every regulation of an agency. Even frivolous lawsuits are protected under the bill because the RAA defines as “substantial evidence” for a lawsuit to be anything the special interest thinks is reasonable.<sup>117</sup>

Given all these shortcomings with formal rulemaking, Representative Melvin Watt (D–NC) offered an amendment to strike this provision from the bill at the Committee markup. The amendment, however, failed by a vote of 13 to 16.

*B. H.R. 3010’s Expanded and Less Deferential Judicial Review Risks Undermining Agency Rulemaking and Reducing Political Accountability for Policy Decisions Without Enhancing Due Process*

*1. Current Law Provides Adequate Opportunity for Judicial Review*

The APA provides for judicial review of final agency action when there is no other adequate judicial remedy available.<sup>118</sup> The APA requires a reviewing court to compel agency action when it is unlawfully withheld or unreasonably delayed and to set aside as unlawful agency action, findings, and conclusions when they are found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in [a formal rulemaking] or otherwise reviewed on the record of an agency hearing provided by statute; or

<sup>115</sup>Letter to to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Francesca T. Grifo, Senior Scientist and Director—Scientific Integrity Program, Union of Concerned Scientists (Nov. 3, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>116</sup>*Id.*

<sup>117</sup>Frank Knapp, Vice-Chair, American Sustainable Business Council, & President, South Carolina Small Business Chamber of Commerce, Regulatory Reform Good for Multinationals, Yet Bad for You, The Hill Blog, Nov. 1, 2011 (original emphasis), available at <http://thehill.com/blogs/congress-blog/judicial/191015-regulatory-reform-good-for-multinationals-yet-bad-for-you>

<sup>118</sup>5 U.S.C. §§ 702, 704 (2011).

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.<sup>119</sup>

The two exceptions to this presumption of judicial review under the APA are when “statutes preclude judicial review” and when “agency action is committed to agency discretion by law.”<sup>120</sup> A court, however, always has the authority to review the constitutionality of agency action, including those actions that are otherwise unreviewable.<sup>121</sup>

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court held that a reviewing court can invalidate an agency rule or formal adjudication only when it violates a constitutional provision or when the agency’s rule exceeds its statutory authority to issue the rule as clearly expressed by Congress.<sup>122</sup> Where the statute is ambiguous, courts must defer to an agency’s permissible interpretation of the statute.<sup>123</sup> The court cannot strike down a rule based on substantive policy grounds, out of deference to an agency’s substantive expertise in the matter being regulated.<sup>124</sup> Subsequent to the *Chevron* decision, the Supreme Court has limited the *Chevron* doctrine to legislative rules<sup>125</sup> (i.e., those having the effect of law), and the extent of judicial deference can be unclear in a given case.

Courts will also invalidate a rule that is arbitrary or capricious. Normally, this type of scrutiny applies to informal rulemaking.<sup>126</sup> Although originally an extremely deferential standard, the Supreme Court, in a series of decisions since the 1970’s, has left unclear precisely what level of deference is required, suggesting that the “arbitrary or capricious” standard may not be as deferential towards agency action as it is in other contexts.<sup>127</sup> The Court has suggested that, even under the arbitrary or capricious standard, a reviewing court must conduct a “searching and careful” review of agency action.<sup>128</sup> Heightened review under the arbitrary or capricious standard has been referred to as the “hard look” doctrine, under which a court examines “carefully the administrative record and the agency’s explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions.”<sup>129</sup>

The existence of the “hard look” review of informal rulemaking already provides arguably deferential, but still meaningful judicial

<sup>119</sup> 5 U.S.C. § 706(2) (2011).

<sup>120</sup> 5 U.S.C. § 701 (2011).

<sup>121</sup> See *Webster v. Doe*, 486 U.S. 592 (1988); *Oestereich v. Selective Service System*, 393 U.S. 233 (1968).

<sup>122</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>126</sup> Interim Report at 112.

<sup>127</sup> *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>128</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); Interim Report at 113.

<sup>129</sup> Interim Report at 113 (quoting Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 *Duke L.J.* 1385, 1410 (1992)).

review of agency rulemaking. H.R. 3010, however, threatens to upset that balance.<sup>130</sup>

2. *Judicial Review under H.R. 3010 Will Allow Courts to Substitute Their Judgment for That of Agency Experts and Give More Opportunities for Special Interests to Challenge Rules*

H.R. 3010 would subject to judicial review agency compliance with numerous APA requirements, including their application of H.R. 3010's cost-benefit analysis requirements. By greatly expanding opportunities for judicial review, H.R. 3010 would present many more instances when a court could overrule agency action as a result (e.g., a court could find that an agency failed to properly identify the costs and benefits of alternatives to a proposed rule).

Even assuming that courts had the resources to review these types of agency decisions, expanded and less deferential judicial review would be troublesome because it would make rulemaking more costly and time-consuming for agencies by forcing them to adopt more detailed factual records and explanations, effectively imposing more procedural requirements on agency rulemaking. Also, agencies may be dissuaded from pursuing regulations in the first place. Additionally, criticism of the existing "hard look" arbitrary or capricious review standard for informal rulemaking may apply to a much greater degree to H.R. 3010's more formal move to expand the scope of judicial review.

In particular, H.R. 3010 would require that a court give less deference to agency decisions under many circumstances, and such a less deferential judicial review standard runs the risk that judges effectively will be making policy by allowing personal policy preferences to intrude in their review of an agency rule, whether consciously or not. Public Citizen, a nonprofit consumer advocacy organization representing consumer interests, observes:

[B]y needless expanding the scope of judicial review, the legislation marks an unprecedented and dangerous move away from traditional judicial deference to a system where courts are encouraged to overturn highly technical, resource-intensive agency decisions and substitute their own policy preferences instead. This new and inappropriate role for the courts is a recipe for more activist judges, increased litigation, endless delays, and more rather than less uncertainty for regulated parties and the public.<sup>131</sup>

Much of H.R. 3010's judicial review standard appears to be old wine in new bottles. A similar legislative initiative was promoted during the 1980's by anti-regulatory interests in Congress. The view then, as now, among proponents of enhanced judicial review was that the existing standard of judicial review favored agency decisions too much whenever injured members of the public sought

<sup>130</sup> According to some critics, "hard look" review itself may be insufficiently deferential to agency decisions. *Id.* at 115. Whatever the merits of such criticism, H.R. 3010's judicial review provisions would tip the balance much further away from judicial deference than current law.

<sup>131</sup> Letter to to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from David Arkush, Director, & Amit Narang, Regulatory Policy Advocate, Public Citizen's Congress Watch, at 2 (on file with the H. Committee on the Judiciary, Democratic Staff).

to reverse those decisions on appeal.<sup>132</sup> The enhanced judicial review standard proposed in the legislation would have required courts to independently decide all relevant questions of law, review agency determinations of jurisdiction and authority to determine whether they were based on statutory language or other evidence of legislative intent, not accord any presumption in favor of agency determinations of questions of law other than its jurisdiction and authority, and apply what was in effect a “substantial evidence” test for informal rulemaking.<sup>133</sup>

CRS concluded that the effect of this enhanced judicial review proposal would be “to abolish the judicially developed doctrine of deference, which was developed by the courts as an aid to reviewing agency decisions and which recognizes agency expertise and involvement in the legislative process.”<sup>134</sup> CRS also noted that enhanced judicial review threatened to skew the agency factfinding process in favor of those with the resources to shape the agency record by making it more lengthy and costly.<sup>135</sup> Also, parties opposed to a rule could further add costs and delay to the rulemaking process by increasing appeals of agency determinations.<sup>136</sup> Finally, enhanced judicial review increases the risk of judicial activism, whereby judges would make policy from the bench by substituting their policy views for those of the agency.<sup>137</sup> In short, the same criticisms that applied to expanded judicial review a generation ago apply to H.R. 3010’s judicial review provision.

In response to the multiple problems presented by H.R. 3010’s judicial review provisions, Representative Cohen offered an amendment deleting section 7 of the bill, which expands the scope of judicial review to include compliance with the Information Quality Act and prohibits courts from deferring to agencies’ determinations under certain circumstances. The amendment, however, failed by a vote of 14 to 18.

*C. H.R. 3010’s Provisions of Opportunities to Challenge Agency Compliance With the Information Quality Act Is a Thinly Disguised Way to Regulate the Regulators and Give More Opportunities for Business Interests To Undermine Rulemaking*

New APA section 553(d)(4), as proposed by H.R. 3010, would permit any “member of the public”—that is, literally anyone, including an entity that has no legitimate interest in the rule at issue—to petition for a trial-type hearing for the purpose of determining whether a proposed rule complies with of the Information Quality Act (“IQA”).<sup>138</sup> In support of such petition, section 553(d)(4) only requires the proponent to present a “prima facie case that evidence or other information upon which the agency bases the proposed rule fails to comply” with the IQA. Moreover, the bill makes agency compliance with the IQA subject to judicial review, including the decision whether to hold an agency hearing.

<sup>132</sup> Morton Rosenberg, *The Future of Public Participation in Informal Agency Rulemaking Under Pending Regulatory Reform Proposals*, Congressional Research Service Report for Congress, Dec. 7, 1982, at 44.

<sup>133</sup> *Id.* at 45.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 46–47.

<sup>136</sup> *Id.* at 47–48.

<sup>137</sup> *Id.* at 48–51.

<sup>138</sup> Pub. L. No. 106–554, § 515 (2000).

The IQA, also known as the Data Quality Act, was a Republican initiative included in a 2000 appropriations bill that required OMB to issue data quality guidelines to federal agencies beginning in 2001.<sup>139</sup> No hearings or legislative process preceded the enactment of this measure. Under these guidelines, all agencies subject to the Paperwork Reduction Act—a law that requires OMB to develop and oversee the implementation of policies, principles, standards, and guidelines applicable to the dissemination of public information by federal agencies—are required to establish and follow data quality guidelines that: (1) ensure and maximize the quality, objectivity, utility and integrity of information, including statistical information prior to dissemination; and (2) allow affected individuals and/or organizations to seek and obtain correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines. In addition, an agency must report to OMB regarding the number and nature of complaints received by the agency regarding agency compliance with OMB guidelines.<sup>140</sup> More controversially, the IQA also requires federal agencies to have a process by which outside parties can “seek and obtain correction of information maintained and disseminated by the agency that does not comply with” the IQA’s requirements for information quality.<sup>141</sup>

Proponents of the IQA include the U.S. Chamber of Commerce and the Center for Regulatory Effectiveness, an industry-backed regulatory “watch dog” group. Critics of the law state, however, that it is a mechanism for “regulating the regulators.” These include CPR, OMB Watch, and Public Citizen.<sup>142</sup>

The expanded opportunities to challenge agency compliance with the IQA is troubling. In addition to offering yet another way to slow down rulemaking both by challenging agencies’ data and by challenging their compliance with the IQA, the IQA itself is problematic because it provides an opportunity for industry to challenge agencies’ scientific findings to the extent that those findings are contrary to the economic interests of industry.

In sum, H.R. 3010 would permit anyone to request an IQA hearing, even if that person suffers no injury, i.e., lacks any legal standing. In addition, the bill fails to clarify what constitutes a “*prima facie*” case of agency non-compliance with the IQA, which will force agencies to err on the side of caution and hold IQA hearings, especially in light of the bill’s provision making a decision not to hold a hearing subject to judicial review. Finally, judicial review would add an entirely new level of litigation to the rulemaking process.

#### *D. H.R. 3010 Encourages a Regulatory Race to the Bottom*

Section 2 of the bill defines a major rule, in pertinent part, as a rule that has “significant adverse effects on . . . the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”<sup>143</sup> The practical effect of this definition is that it will require agencies and the courts to

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Project on Scientific Knowledge and Public Policy, Information Quality Act, available at [DefendingScience.org](http://DefendingScience.org).

<sup>143</sup> H.R. 3010, 112th Cong. § 2 (2011).

consider the business and regulatory environments of other nations.

For example, a proposed rule that imposes heightened clean air requirements on American steel manufacturers would necessarily require consideration of whether this regulation—which could potentially result in higher compliance costs—could make American steel products less competitive in a country, such as China, that has a much less stringent regulatory regime. While the economic analysis under this requirement may be simple, its dangerous ramifications for public health cannot be underestimated. Chinese officials have only recently begun to acknowledge the health hazard risks presented by extensive air pollution that affects its cities, including its capital.<sup>144</sup> The end result of H.R. 3010 is that the public health of Americans and the safety of the environment will be compromised so that American manufacturers can better compete with their foreign counterparts. This is a shortsighted regulatory “race to the bottom” that prioritizes profits over saving lives.

#### DESCRIPTION AND BACKGROUND

The following section-by-section explanation of H.R. 3010, as amended, highlights the most problematic provisions in the bill.

*Sec. 2. Definitions.* Section 2 of the bill amends section 551 of title 5 of the U.S. Code, which defines various terms applicable to the Administrative Procedure Act (“APA”) to add new definitions. Rather than providing clear and concise definitions for these new terms, H.R. 3010 defines these terms in vague and subjective respects. For the definition of “major rule,” section 2 sets forth four alternative definitions, each of which is potentially vague and subject to interpretation:

- (1) an annual cost on the economy of \$100 million or more, adjusted annually for inflation;
- (2) a major increase in costs or prices for consumers, individual industries, federal, state, local or tribal government agencies, or geographic regions;
- (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets; or
- (4) significant impacts on multiple sectors of the economy.

This definition is plagued with uncertainty and wrong-headed policy objectives. To begin with, each alternative definition is qualified by the phrase “likely to impose,” which is inherently vague. Second, it fails to clarify what “a major increase in costs or prices” would mean in this context. Similarly, the definition does not specify what would constitute “significant adverse effects.” Third, the definition, as revised by the Manager’s Amendment, applies to regulations that have “significant impacts on multiple sectors of the

<sup>144</sup> See, e.g., Andrew Jacobs, *With Anger Over Dirty Air Rising, Beijing Tries Tours on Monitoring Center*, N.Y. Times, Nov. 9, 2011 (“Environmental officials who have resisted releasing sensitive data about air pollution here in the capital announced that they would take action to address increasing complaints that the government’s monitoring system fails to report on the most dangerous airborne particles emitted by the growing ranks of cars and trucks.”), available at <http://www.nytimes.com/2011/11/10/world/asia/with-anger-over-dirty-air-rising-beijing-tries-tours-on-monitoring-center.html?ref=world>.

economy.” The introduced version of the bill referred to “significant costs.” Whereas the term “costs” is susceptible of definition, “impacts” would capture a much broader category of rules, a subset of which would include costs. Costs, for example, is defined in *Black’s Law Dictionary*, while “impacts” is not. Unlike the Regulatory Flexibility Act which uses the term “significant economic impact,” the Manager’s Amendment use of the word “impact” would appear to be much broader.

Perhaps most importantly, the definition clearly signals that our Nation’s regulatory regime must now be compared to those of other nations. The definition requires analysis of the effect of a regulation on the “ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets,” which may be subject to little or no regulation. This provision will clearly facilitate the race to the bottom of deregulation and has the real potential to undo a broad range of public health, workplace safety and environmental protection regulations.

While most of the other definitions in section 2 do not appear to be problematic, the provision’s definition of “major guidance” is equally as vague and reflective of bad policy as its definition of “major rule” because it uses similar criteria.

*Sec. 3. Rulemaking.* Section 3 substantively amends APA section 553, which sets forth the requirements for informal notice-and-comment rulemaking under the APA, to vastly complicate and extend these requirements in ways that are unclear. To begin with, while new subsection (b) of section 553 requires an agency to make all preliminary and final factual determinations based on evidence, it is not clear what type of evidentiary standard would apply.

Second, the agency must, in addition to other applicable considerations, consider the following:

- (1) The legal authority under which the rule may be proposed, such as whether it is required by statute and if so, whether it is due by a specific date; and whether the agency has discretion to commence a rulemaking (new section 553(b)(1)).
- (2) Other statutory considerations applicable to whether the agency can or should propose a rule or undertake other agency action (new section 553(b)(2)). It is unclear what “other agency action” would encompass.
- (3) The specific nature and significance of the problem the agency may address with a rule, including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency’s jurisdiction, and whether the problem warrants new agency action and any countervailing risks posed by such new action (new section 553(b)(3)). Again, this is very vague.
- (4) Whether existing rules have created or contributed to the problem the agency may address with a rule and whether such rules “could” be amended or rescinded to address the problem in whole or in part (new section 553(b)(4)). The provision’s use of the word “could” encompasses a potentially extraordinary realm of possibilities.

(5) Any reasonable alternatives in lieu of a new rule or other response identified by the agency or “interested persons,” including not only responses that mandate particular conduct or manners of compliance, but also the alternative of no federal response; amending/rescinding existing rules; potential regional, state, local or tribal regulatory action or other responses that could be taken in lieu of agency action; and potential responses that specify performance objectives rather than conduct or manners of compliance, establish economic incentives to encourage desired behavior, provide information upon which choices can be made by the public, or incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance (new section 553(b)(5)). Essentially, this directs the agency to consider alternatives to promulgating a new rule. Note that “interested persons” can include literally anyone.

Third, new section 553(b)(6) overrides all existing law to require the agency to consider: (1) the “potential” costs and benefits associated with “potential” alternatives set forth above, including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness (new section 553(b)(6)(A)); (2) means to increase the cost-effectiveness of any federal response (new section 553(b)(6)(B)); and (3) incentives for innovation, consistency, predictability, lower costs of enforcement and compliance—for governmental and regulated entities, and the public—and flexibility (new section 553(b)(6)(C)).

As a result of this supermandate, H.R. 3010 overrides provisions in numerous other statutes that prohibit agencies from considering costs when promulgating rules. These statutes include the Clean Air Act,<sup>145</sup> the Clean Water Act,<sup>146</sup> the Occupational Safety and Health Act,<sup>147</sup> and the Federal Mine Safety and Health Act.<sup>148</sup> Various environmental groups warn that this provision is a “cynical attempt” to overturn these measures.<sup>149</sup>

Fourth, new section 553(c)(1) requires advance notice of proposed rulemaking (ANPRM) for certain types of rules. Whereas the bill, as introduced, only required an ANPRM for major and high-impact rules, the Manager’s Amendment extends this requirement to rules presenting a “novel legal or policy issue.” The effect of this revision is that this provision captures a potentially very broad and very indefinite category of rules, even if these rules do not have any major effect or economic impact. It is likely intended to capture regulations issued under the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>150</sup> and the Patient Protection and Affordable Care Act,<sup>151</sup> both of which potentially raise novel legal and policy

<sup>145</sup>Pub. L. No. 91–604, 84 Stat. 1676 (1970), as amended.

<sup>146</sup>Pub. L. No. 95–217, 86 Stat. 816 (1977), as amended.

<sup>147</sup>Pub. L. No. 91–596, 84 Stat. 1590, 84 Stat. 1590 (1970), as amended.

<sup>148</sup>Pub. L. 95–164, 91 Stat. 1290 (1977), as amended.

<sup>149</sup>Letter to House Members from American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Environment America, League of Conservation Voters & the Natural Resources Defense Council (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

<sup>150</sup>Pub. L. No. 111–203 (2010).

<sup>151</sup>Pub. L. No. 111–148 (2010).

issues arising out of these measures. As a result, this change will cause greater delay and uncertainty in the rulemaking process.

Not later than 90 days before a notice of proposed rulemaking (NPRM) is published in the Federal Register (the current starting point for notice-and-comment rulemaking), an agency must publish an ANPRM in the Federal Register. This notice must include all of the following:

- (1) A written statement identifying, at a minimum, the nature and significance of the problem the agency may address with a rule, including data and other evidence and information on which the agency expects to rely for the proposed rule (new section 553(c)(1)(A)(i)).
- (2) The legal authority under which a rule may be proposed, such as whether it is required by statute and if so, whether it is due by a specific date; and whether the agency has discretion to commence a rule making (new section 553(c)(1)(A)(ii)).
- (3) Preliminary information available to the agency concerning the other considerations specified in new section 553(b) (new section 553(c)(1)(A)(iii)).

In addition, the notice must solicit data, views and arguments from interested persons concerning the information and issues addressed in the ANPR and provide for a period of not less than 60 days for such persons to submit such feedback to the agency (new section 553(c)(1)(B)-(C)).

Fifth, new section 553(d) mandates that an agency must consult with OIRA *before* it determines to propose a rule. This provision essentially codifies OIRA's role as a gatekeeper of agency rulemaking, a role that this Committee severely criticized in the last Congress.<sup>152</sup> In particular, concern was expressed that the prior Administration's "greatly enhanced control over the rulemaking process has been to the detriment of the public interest and has served to circumvent legislative intent."<sup>153</sup> By mandating prior consultation with OIRA, this requirement could allow OIRA to have a potential choke hold on agency rulemaking and thereby be used to thwart Congressional intent.

New section 553(d) then itemizes an extensive list of information that must be included with a NPRM in addition to that already required under current law. These additional requirements include a reasoned preliminary determination of the need for the rule and whether the rule is required by statute. In addition, the NPRM must include a reasoned preliminary determination that the benefits of the rule meet the relevant statutory objectives and justify the costs of the rule, including all costs described in section 553(b)(6); whether those alternatives meet relevant statutory objectives; and why the agency did not propose any of those alternatives. This provision clearly prioritizes costs over benefits. Whereas an agency must merely determine that a rule's benefits meet the relevant statutory objectives, new section 553(d) man-

<sup>152</sup> See, e.g., H. Comm. on the Judiciary Majority Staff, *Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush*, Final Report to Chairman John Conyers Jr., at 186–87 (Mar. 2009).

<sup>153</sup> *Id.* at 186.

dates that the agency “justify the costs” of a proposed rule, which is potentially a much higher standard.

Further, the NPRM must include a discussion of: (a) the alternatives to the proposed rule, and other alternative responses, considered by the agency under new section 553(b); (b) the costs and benefits of those alternatives (including all costs to be considered under section 553(b)(6)); (c) whether those alternatives meet relevant statutory objectives; and (d) why the agency did not propose any of those alternatives. Where there are numerous alternatives to a proposed rule, this requirement will require an agency to conduct multiple hypothetical cost-benefit analyses, which will only delay action on the proposed rule and cause agencies to incur extensive compliance costs.

Finally, the NPRM must contain a statement of whether existing rules have created or contributed to the problem that the agency seeks to address with the rule, and, if so, whether or not the agency proposes to amend or rescind any of these rules.

Sixth, all information considered by the agency and “steps to obtain information by the agency” in connection with its determination to propose the rule must be placed in the docket for the proposed rule and made available to the public and “at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency.” By allowing the President and OIRA to control the dissemination of information to the public, this provision largely undermines the transparency of the rulemaking process.

Seventh, even when an agency decides against issuing a rule, it must still issue a notice of determination of other agency course of action that includes a description of the alternative response that the agency determined to adopt. The agency may only make such determination *after* consultation with OIRA. If in its determination of other agency course the agency determines to amend or rescind an existing rule, the agency is not required to undertake additional proceedings under new section 553(c) before it publishes a NPRM to amend or rescind the existing rule.

Eighth, all information considered by the agency and “steps to obtain information by the agency” in connection with its determination of other agency course must be placed in the docket for the proposed rule and made available to the public and “at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency.” Again, this provision largely undermines the transparency of the rulemaking process.

Ninth, after the NPRM has been sent, the agency must provide interested persons an opportunity to participate in the rulemaking through submissions of written data, views, or arguments with or without opportunity for oral presentation. An opportunity for oral presentation must be provided if a hearing is required under section 553(d)(4)(B) or 553(e). With regard to situations not covered by section 553(e), if rules are required to be made on the record after opportunity for agency hearing, formal rulemaking requirements of sections 556 and 557 apply.

Tenth, the agency must provide not less than 60 days for interested persons to submit written data, views or argument, or not

less than 120 days for a proposed major or high-impact rule (new section 553(d)(3)).

Eleventh, within 30 days of publication of a NPRM, a member of the public may petition for a hearing in accordance with section 556 to determine any evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act (IQA)<sup>154</sup> (new section 553(d)(4)(A). This means that anyone, even someone who would not qualify as an interested person, could demand this relief (new section 553(d)(4)(A)).

Upon its review of the petition, the agency may determine, without further process, to exclude from the rulemaking the evidence or information that is the subject of the petition and, if appropriate, withdraw the proposed rule. The agency must promptly publish any such determination (new section 553(d)(4)(B)(i)).

If the petition is not resolved per the above, then the agency must grant any such petition that presents a *prima facie* case that evidence or other information upon which the agency bases the proposed rule fails to comply with the IQA and hold the requested hearing not later than 30 days after receipt of the petition, provide a reasonable opportunity for cross-examination at the hearing, and decide the issues presented by the petition no later than 60 days after receipt of the petition. The agency may deny a petition that does not present a *prima facie* case (new section 553(d)(4)(B)(ii)).

Twelfth, judicial review of agency action pursuant to new section 553(d)(4)(B)(ii) is available when there is judicial review of the agency's final action. It is unclear what this means. No judicial review is permitted for an agency's determination to withdraw a proposed rule under new section 553(d)(4)(B)(ii) (new section 553(d)(3)(C)). The failure to petition for a hearing under new section 553(d)(4) does not preclude judicial review of any claim based on the IQA under section 7.

Thirteenth, the agency is required to hold a hearing in accordance with sections 556 and 557, following a NPRM, receipt of comments on the proposed rule, and any hearing held under section 553(d)(4), unless such hearing is waived by all participants in the rulemaking other than the agency (new section 553(e)). This requirement will also considerably increase delay and expense in the rulemaking process. The agency must provide a reasonable opportunity for cross-examination at the hearing. The hearing is limited to the following issues of fact, except that participants at the hearing other than the agency may waive determination of any such issue: (1) whether the agency's asserted factual predicate for the rule is supported by the evidence; (2) whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including all costs considered under section 553(b)(6)); (3) if there is more than one alternative, which would achieve the relevant statutory objectives at the lowest cost; (4) whether, if the agency proposes to adopt a rule that is more costly than the least costly alternative, the additional benefits of the more costly rule exceed the additional costs of the more costly rule; (5) whether the evidence and other information upon which the agency bases the proposed rule meets the requirements of the IQA, and (6) upon petition by an interested person who has partici-

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<sup>154</sup> Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153 (2000).

pated in the rulemaking other issues relevant to the rulemaking, unless the agency determines that consideration of the rule would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rulemaking. The agency must grant or deny this petition within 30 days of receipt (new section 553(e)).

Fourteenth, not later than 45 days before any hearing held under new section 553(e) or sections 556 and 557, the agency must publish in the Federal Register a notice specifying the proposed rule to be considered at such hearing, the issues to be considered at the hearing, time/place, except that such notice may be issued not later than 15 days before a hearing under section 553(d)(4)(B) (new section 553(d)(4)).

Fifteenth, an agency may only adopt a rule following consultation with OIRA to facilitate compliance with applicable rulemaking requirements (new section 553(f)(1)).

Sixteenth, an agency may adopt a rule only on the basis of best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule (new section 553(f)(2)).

Seventeenth, except as provided in new section 553(f)(3)(B), the agency must adopt the rule considered during the rulemaking, including all costs pursuant to section 553(b)(6) (new section 553(f)(3)(A)). The agency may adopt a more costly rule only if its additional benefits justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule (new section 553(f)(3)(B)).

Eighteenth, when the agency adopts a final rule, it must publish a NFRM that includes: (1) a concise, general statement of the rule's basis and purpose (new section 553(f)(4)(A)); (2) the agency's reasoned final determination of need for a rule, including whether it is required by statute as well as a summary of any final risk assessment or regulatory impact analysis performed by the agency (new section 553(f)(4)(B)); (3) the agency's reasoned final determination that the rule's benefits meet the relevant statutory objectives and justify the rule's costs (new section 553(f)(4)(C)); (4) the agency's reasoned final determination not to adopt any of the alternatives to the rule (new section 553(f)(4)(D)); (5) the agency's reasoned final determination that existing rules have not created or contributed to the problem that the agency seeks to address with the rule or that existing rules have created or contributed to the problem, and if so, why amendment or rescission of such existing rules is not alone sufficient to respond to the problem and whether and how the agency intends to amend or rescind the existing rule separate from adoption of the rule (new section 553(f)(4)(E)); (6) the agency's reasoned final determination that the evidence and other information upon which the agency bases the rule complies with IQA (new section 553(f)(4)(F)); and (7) for any major or high-impact rule, the agency's plan for review of the rule no less than every 10 years to determine whether, based on evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives (new section

553(f)(4)(G)). As required elsewhere, all information considered by the agency must be placed in the docket for the rule.

Unless notice or hearing is otherwise required by statute, certain specified requirements of new section 553 do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice (new section 553(g)(1)). When the agency for good cause, based on evidence, finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that compliance with subsection (c), (d) or (e) or requirements to render final determinations under subsection (f) before the issuance of an interim rule is impracticable or contrary to the public interest (including national security), such provisions/requirements do not apply to the agency's adoption of an interim rule new section 553(g)(2)(A)). If an agency, in compliance with subsection (A), adopts an interim rule, it must commence proceedings that comply fully with subsections (c) through (f) immediately upon publication of the interim rule and must complete compliance within 270 days from publication of the interim rule or 18 months for a major or high-impact rule and take final action to adopt a final rule or rescind the interim rule. If the agency fails to take timely final action, the interim rule will cease to have the effect of law (new section 553(g)(2)(B)). New section 553(g)(3), as added by the Manager's Amendment, includes a "good cause" exception to the notice and public procedure requirements if the agency finds such requirements to be "unnecessary." As examples, the Amendment mentions rules "undertaken only to correct a *de minimis* technical or clerical error in a previously issued rule or for other noncontroversial purposes." This amendment recognizes to some degree why the bill's additional procedural requirements may be unnecessary. A shortcoming of this change, however, is that it does not go far enough. For example, the additional requirements may still pertain to a new rule that makes only a *de minimis* technical change.

Other than in cases involving national security, the agency's publication of an interim rule not in compliance with subsection (c) through (e) or requirements to render final determinations under subsection (f), an interested party may seek immediate judiciary review under chapter 7 of the agency's determination to adopt such interim rule. This requirement provides yet another opportunity for well-funded opponents of regulation to slow or derail a rulemaking.

The record on review must include all documents and information considered by the agency and any additional information presented by a party that the court determines necessary to consider to assure justice (new section 553(g)(2)(C)). This provision could allow parties to overwhelm courts with submissions that would force them to sort through and determine whether they would assure justice ("justice" being a vague term in this context).

Nineteenth, when a hearing is required under subsection (e) or is otherwise required by statute or at the agency's discretion before the adoption of a rule, the agency must comply with the formal rulemaking requirements of sections 556 and 557 in addition to subsection (f) in adopting the rule and in providing notice of the rule's adoption (new section 553(h)). As explained in greater detail elsewhere in this dissent, formal rulemaking is a thoroughly discredited process that is hardly used anymore.

Twentieth, the required publication or service of a substantive final or interim rule must be made within 30 days before the rule's effective date, unless: (1) a substantive rule grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule (new section 553(i)).

Twenty-first, each agency must give an interested person the right to petition for the issuance, amendment, or repeal of a rule (new section 553(j)). This appears to be extremely broad and again presents another opportunity for opponents of regulations to slow the rulemaking process down further.

Twenty-second, new section 553(k) contains various provisions intended to strengthen OIRA's control over rulemaking. These include the provision requiring OIRA to establish guidelines for the assessment, including quantitative and qualitative, of the costs and benefits of potential, proposed, and final rules, other economic issues, or issues related to risk that are relevant to rulemaking under section 553 and other sections of this title (new section 553(k)(1)(A)). It is unclear, however, what "other economic issues" would include. OIRA must regularly update these guidelines to ensure that agencies use the best available techniques to quantify and evaluate anticipated present and future benefits, costs, other economic issues, and risks as accurately as possible (new section 553(k)(2)(B)). In addition, OIRA must issue guidelines to promote coordination, simplification, and harmonization of agency rules (new section 553(k)(2)). Moreover, OIRA, must ensure consistency in rulemaking by issuing guidelines and ensure that rulemakings conducted under procedures specified in provisions of law (new section 553(k)(3)(A)). H.R. 3010 also empowers OIRA to issue guidelines for the conduct of hearings under subsections 553(d)(4) and (e), including provisions that assure a reasonable opportunity for cross-examination. In turn, each agency must adopt regulations for conducting hearings consistent with these guidelines (new section 553(k)(3)(B)). With respect to the IQA, OIRA must issue guidelines with respect to how that Act applies in rulemaking proceedings under sections 553, 556, and 557. Such guidelines and OIRA's specific determinations regarding agency compliance with such guidelines are entitled to judicial deference (new section 553(k)(4)).

Twenty-three, the agency must include in the rulemaking record all documents and information considered by the agency during the proceeding, including *at the discretion* of the President or the OIRA documents and information communicated by OIRA during consultation with the agency (new section 553(l)). This is yet another example where the bill will undermine transparency of the rule-making process.

New section 553(m) recognizes an exception for certain provisions with respect to monetary policy rulemakings by the Federal Reserve or Federal Open Market Committee. Most regulations issued pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act, however, will still be subject to H.R. 3010's cumbersome rulemaking requirements.

*Sec. 4. Agency Guidance; Procedures to Issue Major Guidance; Presidential Authority To Issue Guidelines for Issuance of Guidance.* Section 4 imposes an extensive series of new obligations on an agency before it can issue major guidance and guidance per-

taining to a “novel legal or policy issue arising out of statutory mandates.” By applying these requirements to “novel legal or policy” issues, section 4 would capture a very broad and very indefinite category of guidance, even if they do not have any major effect or economic impact. Its requirements would apply to guidance issued pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act as well as the Patient Protection and Affordable Care Act, both of which potentially raise novel legal and policy issues arising out of these statutes. As a result, this change could cause greater uncertainty in the agency’s use of guidance process.

Among the new requirements that an agency must satisfy before it may issue major guidance are the following:

(1) Before an agency may issue any major guidance, it must make a reasonable determination that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions (new section 553a(a)(1)(A)).

(2) The agency must identify the costs and benefits (including all costs considered during the rulemaking under section 553(b)) of conduct conforming to such guidance and assure that such benefits justify such costs (new section 553a(a)(1)(B)).

(3) The agency must describe alternatives to such guidance and their costs and benefits (including all costs to be considered during the rulemaking under section 553(b)) and explain why the agency rejected those alternatives (new section 553a(a)(1)(C)). This would force an agency to potentially do countless cost-benefit analyses.

(4) The agency must confer with OIRA to assure that the guidance is reasonable, understandable, consistent with relevant statutory and regulatory provisions, and requirements or practices of other agencies, does not produce costs that are unjustified by the guidance’s benefits, and otherwise appropriate (new section 553a(a)(2)). This provision is yet another instance where the bill strengthens OIRA’s control over agency rulemaking.

(5) The agency guidance must state in a plain, prominent and permanent manner that it is not legally binding (new section 553a(b)(2)).

(6) The guidance must be made available by the issuing agency to interested persons and the public at the time it is issued (new section 553a(b)(3)).

Section 4 also includes a general proviso to agencies that they minimize the potential for litigation arising from uncertainty, which itself may create uncertainty by having a chilling effect on the agencies’ willingness to issue guidance. It also specifies that OIRA has authority to issue guidelines for use by agencies in the issuance of major guidance and other guidance that must assure each agency avoids issuing guidance documents that are inconsistent or incompatible with or duplicative of its other regulations and those of other agencies, and drafts its guidance documents to

be simple and easy to understand to minimize the potential for uncertainty and litigation.

*Sec. 5. Hearings; Presiding Employees; Powers and Duties; Burden of Proof; Evidence; Record as Basis of Decision.* Section 5 adds a comprehensive regime of new requirements for hearings. For example, new section 556(e)(2) specifies that the record for decision must include any information that is part of the record of proceedings under section 553. When an agency conducts formal rulemaking procedures under sections 556 and 557 directly after concluding proceedings on an ANPR under section 553(c), the matters to be considered and determinations to be made must include, among other factors, the matters and determinations described in subsections (b) and (f).

Upon receipt of a petition for a hearing under this section, an agency pursuant to new subsection 556(g) must grant the petition in the case of any major rule, unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rulemaking. The agency must publish its decision to grant or deny the petition when it renders the decision, including an explanation of the grounds for such decision. The information contained in the petition must be included in the administrative record. Subsection (g), however, does not apply to monetary policy rulemakings proposed or implemented by the Federal Reserve or Federal Open Market Committee.

*Sec. 6. Actions Reviewable.* Section 6 amends section 704 of the APA, which specifies what agency actions are reviewable by a court. Whereas section 6 substantially broadens the types of actions reviewable, the Manager's Amendment adds even more types of agency actions that would be subject to review: (1) denial by an agency of a correction request; (2) denial of an administrative appeal under section (b)(2)(B) of the IQA; and (3) the failure of an agency to grant or deny such request or appeal within 90 days. This will provide more opportunities for federal judges to second guess agency actions even though federal judges are generalists and agencies are experts. Also, the 90-day time frame may be unworkable under certain circumstances.

Except for cases involving national security, new section 704 permits an interested party to seek immediate judicial review of an agency's determination to adopt an interim rule on an interim basis upon the agency's publication of such rule without compliance with section 553(c), (d), or (e) or requirements to render final determinations under section 553(f). While this provision at least recognizes an exception for national security matters, one can easily conceive of other matters that should also warrant exception from new section 704, e.g., imminent public health or safety rules.

*Sec. 7. Scope of Review.* Section 7 amends section 706 of the APA, which sets forth the scope of judicial review. Current section 706(a)(2)(A) provides that a court, in appropriate circumstances, must "hold unlawful and set aside action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Section 7 broadens the matters subject to judicial review to include any agency action, findings or conclusions that allegedly violated the IQA. In addition, section 7 prohibits a court from deferring to an agency's interpretation of its

rule under various specified circumstances. Further, section 7 requires a court to review agency denials of petitions under section 553(e)(6) (pertaining to petitions by interested persons raising other issues) or any other petition for a hearing under sections 556 and 557 for abuse of agency discretion.

*Sec. 8. Added Definition.* Section 8 amends the definitions pertinent to judicial review of agency actions to add a definition of “substantial evidence,” which it defines as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied on by the agency to support its decision. This amendment to current law may actually be one of the very few provisions in H.R. 3010 that are beneficial.

#### CONCLUSION

H.R. 3010 troubles us for numerous reasons. First, it is based on the false and unsupported claims that regulations stifle economic growth and job creation and impose undue costs. Such claims also do not account for the overwhelming evidence that regulation results in net benefits to society, including spurring economic activity. Second, H.R. 3010’s numerous changes to the APA would have the cumulative effect of halting agency rulemaking in its tracks, undermining agencies’ ability to protect the American people from a wide range of harms and circumventing Congress’s intent in delegating rulemaking authority to agencies through various statutes. Third, H.R. 3010 privileges industry cost considerations over public health, workplace safety, environmental protection, and other values by overriding substantive law and imposing an unworkable cost-benefit analysis regime on agencies. Fourth, H.R. 3010 dangerously concentrates unaccountable power over rulemaking in OIRA’s hands. Fifth, H.R. 3010 tilts the rulemaking playing field in favor of business interests by resurrecting the long-discredited and time-consuming formal rulemaking process, providing for expanded and less deferential judicial review, increasing opportunities to challenge agency compliance with the IQA, and encouraging the United States to engage in a regulatory “race to the bottom” with China and other developing countries.

For these reasons, we respectfully dissent and urge strong opposition to H.R. 3010.

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