

PROVIDING ACCOUNTABILITY THROUGH TRANSPARENCY
ACT OF 2015

JUNE 25, 2015.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 690]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 690) to require each agency, in providing notice of a rule making, to include a link to a 100 word plain language summary of the proposed rule, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for the Legislation	2
Hearings	2
Committee Consideration	2
Committee Votes	2
Committee Oversight Findings	2
New Budget Authority and Tax Expenditures	2
Congressional Budget Office Cost Estimate	2
Duplication of Federal Programs	3
Disclosure of Directed Rule Makings	4
Performance Goals and Objectives	4
Advisory on Earmarks	4
Section-by-Section Analysis	4
Changes in Existing Law Made by the Bill, as Reported	4
Dissenting Views	6

Purpose and Summary

The “Providing Accountability Through Transparency Act of 2015” improves communication to the public about planned, new Federal regulations by requiring that general notices of proposed rulemaking include the Internet address of a plain-language summary, not exceeding 100 words, of the proposed rule. That summary must, in addition, be posted on the “regulations.gov” website.

Background and Need for the Legislation

A common complaint about Federal regulations and the explanatory agency notices published with them is that they are too difficult for ordinary citizens and business owners to understand without enlisting professional help. The bill seeks to rectify that through a common-sense requirement that agencies always publish online a 100-word summary of a proposed new regulation when the regulation is proposed. This requirement will facilitate public understanding of new proposed rules and help to inform public comments offered in response to notices of proposed rulemaking.

Hearings

The Committee on the Judiciary held no hearings on H.R. 690.

Committee Consideration

On March 24, 2015, the Committee met in open session and ordered the bill H.R. 690 favorably reported without amendment, by voice vote, 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 there were no recorded votes during the Committee’s consideration of H.R. 690.

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. 690, 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, April 6, 2015.

Hon. BOB GOODLATTE, 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. 690, the “Providing Accountability Through Transparency Act of 2015.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
 DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
 Ranking Member

H.R. 690—Providing Accountability Through Transparency Act of 2015.

As ordered reported by the House Committee on the Judiciary
 on April 6, 2015.

H.R. 690 would amend Federal law to require agencies to post on the regulations.gov website, the Internet address to a summary of every proposed rule. Under the bill, those summaries would have to be no more than 100 words in length. CBO estimates that implementing H.R. 690 would have no significant cost over the next five years. The bill would affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting H.R. 690 would not affect revenues.

Executive Orders 12866, 13563, and the June 1, 1998, Presidential Memorandum on Plain Language already require agencies to use plain language in all proposed and final rules. CBO expects that preparing the short summary of proposed rules under H.R. 690 would not significantly increase agencies’ administrative costs.

H.R. 690 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 690 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section

21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 690 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

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. 690 is intended to improve public understanding of proposed new regulations.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 690 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 sets forth the short title of the bill as the “Providing Accountability Through Transparency Act of 2015.”

Sec. 2. Requirement to Post a 100 Word Summary to regulations.gov. Section 2 amends the Administrative Procedure Act at 5 U.S.C. 553(b) to require that general notices of proposed rule-making issued by Federal agencies include the Internet address of a plain-language summary, not exceeding 100 words, of the proposed rule, and that the summary be posted on the regulations.gov website. That website is maintained by the Federal Government pursuant to the E-Government Act of 2002 (44 U.S.C. 3501 note).

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, and 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 II—ADMINISTRATIVE PROCEDURE

* * * * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(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[.]; and

(4) *the internet address of a summary of not more than 100 words in length of the proposed rule, in plain language, that shall be posted on the internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note) (commonly known as regulations.gov);*

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.

* * * * *

Dissenting Views

INTRODUCTION

No one disputes the need to make the Federal rulemaking process more transparent and readily accessible by the public. Fortunately, the Federal Government has made great strides in recent years with the implementation of Regulations.gov, a publicly accessible website that greatly facilitates both goals by tracking the Federal rulemaking process and posting comments received from the public. H.R. 690, the “Providing Accountability Through Transparency Act of 2015,” would require the general notice of proposed rulemaking by a Federal agency to include a link via the Internet of a plain-language summary of the proposed rule, not to exceed 100 words, which must be posted on the Regulations.gov website. While this measure appears to be generally modest in scope, it presents several potentially troubling concerns. First, there already are various requirements in effect that direct a notice of a proposed rulemaking to include a plain-language summary of the rule. Second, it is unclear whether an extremely complex rule that in its published form consumes more than 50 pages in the Federal Register can be adequately summarized in 100 words. Finally, H.R. 690 would subject an agency’s compliance with this new requirement to judicial review and thereby delay the finalization of a proposed rule. Accordingly, we feel compelled to note these concerns and hope they will be taken into consideration.

DESCRIPTION AND BACKGROUND

Section 206(d) of the E-Government Act of 2002¹ requires the Federal Government to maintain a publicly accessible website containing the electronic dockets for rulemakings under section 553 of the Administrative Procedure Act (APA).² The website, Regulations.gov, posts proposed and final regulations, notices, scientific and technical findings, guidance documents, and other materials.³ It also allows members of the public to comment on proposed rules and makes those comments available online.

In sum, H.R. 690 amends section 553(b) of the APA⁴ which sets forth various requirements pertaining to a notice of a proposed rulemaking. As amended by the bill, section 553 would require the general notice of proposed rulemaking by a Federal agency to include a link via the Internet of a plain-language summary of the proposed rule, not to exceed 100 words, which must be posted on the Regulations.gov website.

¹ 44 U.S.C. § 3501 note (2015).

² 5 U.S.C. § 553 (2015).

³ Regulations.gov: Frequently Asked Questions, General Information, What Can I Find on this Site, available at <http://www.regulations.gov/#faqs> (last visited Mar. 20, 2015).

⁴ 5 U.S.C. § 553(b) (2015).

CONCERNS

I. NOTICES OF PROPOSED RULEMAKINGS ALREADY REQUIRE
PLAIN-LANGUAGE SUMMARIES

Notices of proposed rulemakings are already required to include plain-language summaries pursuant to multiple legislative and executive directives. To begin with, section 553(b) of the APA specifies various requirements pertaining to such notices, including the directive to describe the “terms or substance of the proposed rule or a description of the subjects and issues involved.”⁵ Second, the Code of Federal Regulations requires a notice of a proposed rulemaking to include a preamble understandable by a person “who is not an expert in the subject area” that contains a summary consisting of “[b]rief statements, in simple language of: (i) the action being taken; (ii) the circumstances which created the need for the action; and (iii) the intended effect of the action.”⁶ Third, the Plain Writing Act of 2010 requires agencies to “use plain writing” for certain specified documents,⁷ which has been interpreted to apply to preambles for proposed rules.⁸ Fourth, the *Federal Register Document Drafting Handbook* requires such notice to include a summary of the rule as published in the Federal Register and directs agencies to “use language a non-expert will understand.”⁹

The Obama administration has reinforced these requirements by the issuance of Executive Order 13563, Improving Regulation and Regulatory Review, which requires regulations to be “accessible, consistent, written in plain language, and easy to understand.”¹⁰ Further, the Office of Management and Budget, on January 4, 2012, issued guidance to agencies directing them to include in the notice of rulemakings “straightforward executive summaries” in order “[t]o promote public understanding.”¹¹ The Guidance speci-

⁵ 5 U.S.C. § 553(b)(3) (2015).

⁶ 1 C.F.R. § 18.12 (2015).

⁷ Pub. L. No. 111-274, 124 Stat. 2861 (2010). The Act defines “plain writing” as “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience.” *Id.* at § 3(3).

⁸ See Executive Office of the President—Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies (Jan. 4, 2012).

⁹ NATIONAL ARCHIVES AND RECORD ADMINISTRATION, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, at 1–8 (Oct. 1998). The Handbook provides as follows:

Under the SUMMARY caption you explain the “what,” “why,” and “effect” of the document. In the SUMMARY, you must answer these three questions:

- What action is being taken?
- Why is this action necessary?
- What is the intended effect of this action?

Use the following guidelines in preparing a SUMMARY.

- Use language a non-expert will understand.
- Describe what the document does, not how it affects the CFR.
- Refer to an act of Congress by the popular name of the act.
- Do not use legal citations.
- State what your document does; do not include regulatory history or extensive background.
- Do not include qualifications, exceptions, or specific details.
- Be brief.

Id.

¹⁰ Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

¹¹ Executive Office of the President—Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies (Jan. 4, 2012).

fies that “[t]hese summaries should separately describe major provisions and policy choices.”¹²

The proponents of this legislation have not cited any instances where agencies have failed to comply with these directives, although a recent study appears to suggest that full compliance with them has not yet been achieved.¹³ Nevertheless, the authors of this study warn:

Simply adding more mandates to write comprehensible rulemaking documents (or at least comprehensible shorter versions of those documents) is clearly not the answer. Agencies are now, and have for some time been, subject to multiple directives from Congress, the White House, and the Federal Register to write preambles and summaries that can be understood by people who are not experts in the area.¹⁴

We therefore question whether yet another directive, as imposed by H.R. 690, will, in fact, accomplish the goal of making the current rulemaking process more transparent and understandable to the public.

II. H.R. 690’S 100-WORD LIMIT MAY PROVE TO BE UNWORKABLE

Proposed rules are published in the Federal Register. A printed page in the Federal Register consists of three columns of text in small print, containing about 1,000 words per page.¹⁵ The mean length of notices for complex rulemakings is approximately 50 Federal Register pages.¹⁶

As previously noted, H.R. 690 would require the general notice of proposed rulemaking issued by a Federal agency to include a link via the Internet of a plain-language summary of the proposed rule that may not exceed 100 words and which must be posted on the Regulations.gov website. An issue presented by the bill is with respect to its application to extremely complex rulemakings—which can be 50 pages or more in length when published in the Federal Register—and whether the measure’s 100-word summary limit is overly restrictive in such instances. For example, the first sentence of this paragraph—which attempts to summarize this two-page bill—is nearly 50 words in length.

Thus, we are concerned that an inflexible, one-size-fits-all word limit could cause a summary to give the public an incomplete or potentially misleading explanation of a proposed rule, which would appear to be the opposite of what H.R. 690’s proponents intend

III. H.R. 690 WOULD TRIGGER JUDICIAL REVIEW AND THEREBY FURTHER SLOWDOWN THE RULEMAKING PROCESS

Many in the administrative law community, as well as consumer advocacy and environmental protection organizations, are con-

¹²*Id.*

¹³Cynthia R. Farina *et al.*, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, Cornell L. School Legal Studies Research Paper Series No. 15–08, at 34 (to be published in forthcoming *Geo. Wash. L. Rev.* (2015)).

¹⁴*Id.*

¹⁵*Id.* at 20.

¹⁶*Id.*

cerned about the length of time it takes for a rulemaking to become finalized. As one leading administrative law academic explains:

Many scholars have long maintained that the process of issuing rules through the use of the notice and comment procedure described in § 553 of the Administrative Procedure Act has become “ossified.” By this they mean that it takes a long time and an extensive commitment of agency resources to use the notice and comment process to issue a rule. Proponents of the ossification hypothesis identify many adverse effects of this ossification of the rulemaking process. Most of these proponents attribute the ossification of the rulemaking process primarily to the courts, with secondary roles for Congress and the White House.¹⁷

The reference to “the courts” in the quoted material above underscores the fact that certain aspects of the rulemaking process are subject to judicial review pursuant to section 706 of the APA. Unless otherwise prohibited by law, section 706 authorizes a court “to hold unlawful and set aside agency action, findings, and conclusions,” pursuant to certain grounds set out in that provision.¹⁸ These grounds apply to agency action 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 case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.¹⁹

Our concern is that H.R. 690 would provide yet another way for opponents of a proposed rulemaking to delay or derail its finalization on the ground that a summary was somehow “not in accordance with law” or not in “observance of procedure,” for example.²⁰

CONCLUSION

We are concerned that H.R. 690 may have some unintended consequences. Instead of making the rulemaking process more transparent, accessible, and understandable to the public, the bill could result in the opposite. We ask that H.R. 690’s proponents work with us to help ameliorate these unintended consequences prior to floor consideration.

MR. CONYERS, JR.

¹⁷Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, Geo. Wash. L. Rev. 1493, 1493–94 (2012) (citations omitted).

¹⁸5 U.S.C. § 706 (2015).

¹⁹*Id.*

²⁰*Id.*

10

MR. NADLER.
MS. JACKSON LEE.
MR. COHEN.
MR. JOHNSON, JR.
MR. DEUTCH.
MR. GUTIERREZ.
MR. RICHMOND.
MR. CICILLINE.

