

REGULATORY INTEGRITY ACT OF 2017

FEBRUARY 21, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1004]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1004) to amend chapter 3 of title 5, United States Code, to require the publication of information relating to pending agency regulatory actions, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Committee Statement and Views .....	2
Section-by-Section .....	5
Explanation of Amendments .....	5
Committee Consideration .....	5
Roll Call Votes .....	5
Application of Law to the Legislative Branch .....	7
Statement of Oversight Findings and Recommendations of the Committee .....	7
Statement of General Performance Goals and Objectives .....	7
Duplication of Federal Programs .....	7
Disclosure of Directed Rule Makings .....	7
Federal Advisory Committee Act .....	7
Unfunded Mandate Statement .....	7
Earmark Identification .....	7
Committee Estimate .....	8
Budget Authority and Congressional Budget Office Cost Estimate .....	8
Changes in Existing Law Made by the Bill, as Reported .....	9
Minority Views .....	12

## COMMITTEE STATEMENT AND VIEWS

## PURPOSE AND SUMMARY

H.R. 1004, the Regulatory Integrity Act of 2017, seeks to provide transparency of the proposed rule process by requiring federal agencies to post in a central location all public comments the agency makes about a proposed rule during the proposed rule stage. The bill also prohibits agencies from actively soliciting support for a proposed rule during the phase that is meant to gather public input on possible regulatory action. Under H.R. 1004, federal agencies are required to tell the public whether they are considering alternatives or soliciting feedback during the proposed rule stage, and agencies are prohibited from making statements that directly advocate for or against any pending regulatory action or solicit support for the pending regulatory action.

## BACKGROUND AND NEED FOR LEGISLATION

Congress unanimously<sup>1</sup> enacted the Administrative Procedures Act (APA) in 1946 to ensure that the public had an opportunity to provide expertise, opinions, and other comments.<sup>2</sup> As then-Chairman of the Senate Judiciary Committee Pat McCarran explained, the APA “is a bill of rights for . . . Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guaranties of due process in administrative procedure.”<sup>3</sup> Former Attorney General Tom C. Clark described the purposes of the bill as to “require agencies to keep the public currently informed of their organization, procedures and rules,” and to “provide for public participation in the rule making process.”<sup>4</sup>

The broad language of the APA and the massive growth of Federal agency rulemaking<sup>5</sup> has caused many to perceive the rule-making process as dominated by special interest groups and largely beyond the reach of the average American.<sup>6</sup> This shift away from the intent of the APA has meant that most of the agency deliberations are carried out without a record or public review.<sup>7</sup> As Supreme Court Justice Elena Kagan noted during her academic career, “[t]he APA contains no prohibitions on ex parte contacts between agency personnel and outside persons in notice-and-comment rulemaking.”<sup>8</sup> H.R. 1004 addresses this concern by requiring agencies to increase transparency measures regarding communications to the public.

<sup>1</sup>S. Doc. 248, Administrative Procedure Act Legislative History, Sen. Doc. 248, 79th Cong. 2d Sess. (1946)

<sup>2</sup>5 U.S.C. § 551 et seq.

<sup>3</sup>79 Cong. Rec. 2148–67 (1946) (statement of Sen. McCarran).

<sup>4</sup>Attorney General’s Manual on the Administrative Procedure Act (1947), available at <https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947>.

<sup>5</sup>*The Administrative State: An Examination of Federal Rulemaking: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 114th Cong. 2 (2016) (written statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School) (hereinafter *Administrative State*). Currently there are approximately 2,840,000 federal workers in 15 departments, 69 agencies, and 383 nonmilitary sub-agencies. *Id.*

<sup>6</sup>See, e.g., Stuart M. Benjamin, EVALUATING E-RULEMAKING: PUBLIC PARTICIPATION AND POLITICAL INSTITUTIONS, 55 *Duke L. J.* 895 (2006); Cornelius M. Kerwin, RULE-MAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 113, 189 (3d ed. 2003).

<sup>7</sup>*Administrative State*.

<sup>8</sup>Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2280 n.142 (2001).

The demand for legislation of this type to ensure transparency and public participation in the informal rulemaking process has thus been widespread and consistent over a period of many years. *United States v. Texas* is an alarming example of how agencies operate independently from the public in promulgating regulations that affect our society and economy in fundamental ways.<sup>9</sup> Despite the APA’s notice-and-comment requirements being repeatedly enforced by the courts as a precondition for rules to have the force of law, the U.S. Department of Homeland Security (DHS) simply chose to forego this process and issue a November 20, 2014 directive setting forth the provisions of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).<sup>10</sup> In *United States v. Texas*, there was no advance notice or comment period—a violation found by the district court.<sup>11</sup> When challenged over the circumvention of the notice-and-comment requirements of the APA, the Administration “simply declared that the enormous program affecting the status of millions of undocumented persons fell within an exception for ‘general statements of policy.’”<sup>12</sup>

In addition to the issues surrounding transparency and public participation in agency rulemaking demonstrated by *United States v. Texas*, agencies have further undermined the purpose and spirit of the notice-and-comment process by actively campaigning for support of their proposals.<sup>13</sup> As an example, after issuing the Waters of the United States (WOTUS) notice of proposed rulemaking, the Environmental Protection Agency (EPA) undertook a public campaign utilizing certain social media platforms to solicit support for what, at the time, was a proposed rule.<sup>14</sup> During the public comment period, the EPA used social media platforms to communicate about the proposed rule and solicit support for their specific proposal.<sup>15</sup>

In response to concerns raised about possible misuse of federal funds, GAO issued a report finding that the EPA violated publicity or propaganda and anti-lobbying provisions concerning the use of its FY 2014 and FY 2015 appropriations. The report also found the EPA’s misuse of taxpayer dollars raised “a question about self-aggrandizement because certain posts described what EPA declared as benefits . . . and attributed such benefits to the agency’s new rule.”<sup>16</sup>

Specifically, GAO identified four problematic social media campaigns run by the EPA with regard to WOTUS rulemaking: (1)

<sup>9</sup>*Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015); see also *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

<sup>10</sup>See Memorandum from Jeh Johnson, Secretary, Dep’t of Homeland Security, to Leon Rodriguez, Director, U.S. Citizenship & Imm. Serv., Thomas A. Winkowski, Acting Director, U.S. Imm. & Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs & Border Protection, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), [www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred—action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred—action.pdf).

<sup>11</sup>*Texas*, 86 F. Supp. 3d at 591.

<sup>12</sup>Administrative State.

<sup>13</sup>GAO defines self-aggrandizement as publicity of a nature tending to emphasize the importance of the agency or activity in question, noting that one of the prohibition’s primary targets is communication with an obvious purpose of puffery. Letter from Susan A. Poling, Gen. Counsel, U.S. Gov’t Accountability Office, to the Hon. James M. Inhofe, Chairman, S. Comm. on Env. & Public Works (Dec. 14, 2015) (on file with author) (hereinafter GAO Letter).

<sup>14</sup>GAO Letter.

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

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

Thunderclap,<sup>17</sup> (2) the #DitchtheMyth Campaign, (3) the #CleanWaterRules Campaign, and (4) EPA’s Links to External Websites. Through each of these campaigns, the EPA “appealed to the public to contact Congress in opposition to pending legislation in violation of the grassroots lobbying prohibition.”<sup>18</sup> Of perhaps greater concern, through these campaigns the EPA oversimplified an immensely complicated rule in order to solicit support for its rule, leaving the public misinformed.<sup>19</sup>

Through its study, GAO found multiple instances where the EPA violated the spirit of the APA, as well as grassroots lobbying prohibitions, by engaging in self-aggrandizement without properly identifying EPA as the author.<sup>20</sup> In finding that the Thunderclap campaign “constituted covert propaganda,” GAO specifically noted that the “EPA created a Thunderclap message that did not identify EPA as the author,” leaving the estimated 1.8 million individuals the message reached entirely unaware “that the message was prepared and disseminated by EPA.”<sup>21</sup> Further, in linking “external websites belonging to environmental action groups to support statements made in [EPA’s] blog, the EPA made “clear appeals to the public to contact Congress at a time when legislation to prevent implementation of the WOTUS rule was pending.” In doing so, GAO found that “this association combined with the clear appeals actually contained in the webpages . . . form prohibited conduct.”<sup>22</sup>

The Regulatory Integrity Act of 2017 helps ensure transparency in the rulemaking process by prohibiting federal agencies from anonymously issuing statements for propaganda purposes. Specifically, H.R. 1004 requires agencies to make available online information about public communications on pending regulatory actions.<sup>23</sup> Further, H.R. 1004 requires that agencies “expressly disclose that the Executive agency is the source of the information to the intended recipients,” and prohibits agencies from “solicit[ing] support for or promot[ing] . . . pending agency regulatory action.” Finally, H.R. 1004 creates a heightened standard of self-aggrandizement.<sup>24</sup>

#### LEGISLATIVE HISTORY

Representative Tim Walberg (R–MI) introduced H.R. 1004 on February 13, 2017 and the bill was referred to the Committee on Oversight and Government Reform. On February 14, 2017, the Committee considered H.R. 1004 at a business meeting. The Committee ordered the bill reported favorably, without amendment, by a vote of 22 to 16.

The Committee reported an identical bill, the Regulatory Integrity Act of 2016 (H.R. 5226), favorably in the 114th Congress. H.R.

<sup>17</sup>Thunderclap is a “crowdspeaking platform” that allows a single message to be shared across multiple Facebook, Twitter, and Tumbler accounts at the same time. GAO Letter.

<sup>18</sup>GAO Letter at 18.

<sup>19</sup>See, e.g., GAO Letter at 20; *Waters of the United States: Stakeholder Perspectives on the Impacts of EPA’s Proposed Rule: Hearing Before the S. Comm. on Agric., Nutrition & Forestry*, 114th Cong. (2016) (statement of the Hon. Leslie Rutledge, Attorney Gen., Arkansas).

<sup>20</sup>GAO Letter.

<sup>21</sup>GAO Letter at 12.

<sup>22</sup>GAO Letter at 24.

<sup>23</sup>H.R. 5226, 114th Cong. § 307(a) (2016).

<sup>24</sup>H.R. 5226, 114th Cong. § 307(a)(2)(A)–(B) (2016) (defining aggrandizement as “any communication emphasizing the importance of the Executive agency or agency regulatory action that does not have the clear purpose of informing the public of the substance or status of the Executive agency or agency regulatory action; or any communication that is puffery”).

5226 passed the U.S. House of Representatives by a vote of 250 to 171 on September 14, 2016.

#### SECTION-BY-SECTION

##### *Section 1. Short title*

Section 1 establishes the short title as the “The Regulatory Integrity Act of 2017.”

##### *Section 2. Publication of information relating to pending regulatory actions*

Section 2 adds a new section 307 on information regarding pending agency regulatory action to chapter 3 of title 5, United States Code.

Subsection (a) of section 307 sets definitions for “agency regulatory action,” “aggrandizement,” “public communication,” and “rule making.”

Subsection (b) of section 307 requires agencies to make available online information about pending regulatory actions and the agency’s public communications regarding pending regulatory actions.

Subsection (c) of section 307 sets requirements for public communications about pending regulatory actions by requiring agencies to specify if they are considering alternatives or accepting comments. The agency must disclose if the agency is the source of the communication. This subsection also prohibits agencies from using any public communication issued by the agency to solicit support for the pending regulatory action and make statements of aggrandizement.

Subsection (d) of section 307 requires agencies to annually report about public communication activity regarding pending regulatory actions.

#### EXPLANATION OF AMENDMENTS

No amendments were offered.

#### COMMITTEE CONSIDERATION

On February 14, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 1004, by a recorded vote, a quorum being present.

#### ROLL CALL VOTES

There was one roll call vote during consideration of H.R. 1004:

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
115TH CONGRESS  
RATIO 24-18  
ROLL CALL

Vote on: H.R. 1004 – Report to House Favorably

Date: 2-14-17

Vote #: 6

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) <i>(Chairman)</i>	X			MR. CUMMINGS (MD) <i>(Ranking)</i>		X	
MR. DUNCAN (TN)				MRS. MALONEY (NY)		X	
MR. ISSA (CA)	X			MS. NORTON (DC)		X	
MR. JORDAN (OH)	X			MR. CLAY (MO)		X	
MR. SANFORD (SC)	X			MR. LYNCH (MA)		X	
MR. AMASH (MI)	X			MR. COOPER (TN)			
MR. GOSAR (AZ)	X			MR. CONNOLLY (VA)		X	
MR. DesJARLAIS (TN)	X			MS. KELLY (IL)		X	
MR. GOWDY (SC)				MS. LAWRENCE (MI)		X	
MR. FARENTHOLD (TX)	X			MS. WATSON-COLEMAN (NJ)		X	
MS. FOXX (NC)	X			MS. PLASKETT (VI)		X	
MR. MASSIE (KY)	X			MS. DEMINGS (FL)		X	
MR. MEADOWS (NC)	X			MR. KRISHNAMOORTHY (IL)		X	
MR. DeSANTIS (FL)	X			MR. RASKIN (MD)		X	
MR. ROSS (FL)	X			MR. WELCH		X	
MR. WALKER (NC)	X			MR. CARTWRIGHT		X	
MR. BLUM (IA)	X			MR. DeSAULNIER		X	
MR. HICE (GA)	X			<i>(Vacancy)</i>			
MR. RUSSELL (OK)	X						
MR. GROTHMAN (WI)	X						
MR. HURD (TX)	X						
MR. PALMER (AL)	X						
MR. COMER (KY)	X						
MR. MITCHELL (MI)	X						

Roll Call Totals: Ayes: 22 Noes: 16 Present:

Passed: X Failed:

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill requires publication of information relating to pending agency regulatory actions. As such this bill does not relate to employment or access to public services and accommodations.

#### STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to require the publication of information relating to pending agency regulatory actions.

#### DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill 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 enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

#### FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

#### UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

#### EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

## COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

## BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, February 21, 2017.*

Hon. JASON CHAFFETZ,  
*Chairman, Committee on Oversight and Government Reform,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1004, the Regulatory Integrity Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL, *Director.*

Enclosure.

*H.R. 1004—Regulatory Integrity Act of 2017*

H.R. 1004 would direct each federal agency to make information regarding their regulatory actions publicly available in a searchable format on a prominent website. That information would have to include the date a regulation was considered, its current status, an estimate of when the regulation would be final, and a brief description of the regulation. In addition, agencies would be required to track the details of all public communications about pending regulatory actions. Because this information is already collected by regulatory agencies, CBO estimates that the cost of making it available online would not be significant.

The bill could 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 be negligible. Enacting H.R. 1004 would not affect revenues.

CBO estimates that enacting H.R. 1004 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.



H.R. 1004 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. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### 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 (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

### TITLE 5, UNITED STATES CODE

\* \* \* \* \*

### PART I—THE AGENCIES GENERALLY

\* \* \* \* \*

### CHAPTER 3—POWERS

Sec.

301. Departmental regulations.

\* \* \* \* \*

307. *Information regarding pending agency regulatory action.*

\* \* \* \* \*

#### **§307. *Information regarding pending agency regulatory action***

(a) *DEFINITIONS.—In this section:*

(1) *AGENCY REGULATORY ACTION.—The term “agency regulatory action” means guidance, policy statement, directive, rule making, or adjudication issued by an Executive agency.*

(2) *PUBLIC COMMUNICATION.—The term “public communication”—*

*(A) means any method (including written, oral, or electronic) of disseminating information to the public, including an agency statement (written or verbal), blog, video, audio recording, or other social media message; and*

*(B) does not include a notice published in the Federal Register pursuant to section 553 or any requirement to publish pursuant to this section.*

(3) *RULE MAKING.—The term “rule making” has the meaning given that term under section 551.*

(b) *INFORMATION TO BE POSTED ONLINE.—*

(1) *REQUIREMENT.—The head of each Executive agency shall make publicly available in a searchable format in a prominent location either on the website of the Executive agency or in the rule making docket on Regulations.gov the following information:*

(A) *PENDING AGENCY REGULATORY ACTION.*—A list of each pending agency regulatory action and with regard to each such action—

- (i) the date on which the Executive agency first began to develop or consider the agency regulatory action;
- (ii) the status of the agency regulatory action;
- (iii) an estimate of the date of upon which the agency regulatory action will be final and in effect; and
- (iv) a brief description of the agency regulatory action.

(B) *PUBLIC COMMUNICATION.*—For each pending agency regulatory action, a list of each public communication about the pending agency regulatory action issued by the Executive agency and with regard to each such communication—

- (i) the date of the communication;
- (ii) the intended audience of the communication;
- (iii) the method of communication; and
- (iv) a copy of the original communication.

(2) *PERIOD.*—The head of each Executive agency shall publish the information required under paragraph (1)(A) not later than 24 hours after a public communication relating to a pending agency regulatory action is issued and shall maintain the public availability of such information not less than 5 years after the date on which the pending agency regulatory action is finalized.

(c) *REQUIREMENTS FOR PUBLIC COMMUNICATIONS.*—

(1) *IN GENERAL.*—Any public communication issued by an Executive agency that refers to a pending agency regulatory action—

- (A) shall specify whether the Executive agency is considering alternatives;
- (B) shall specify whether the Executive agency is accepting or will be accepting comments; and
- (C) shall expressly disclose that the Executive agency is the source of the information to the intended recipients.

(2) *RESTRICTION.*—Any public communication issued by an Executive agency that refers to a pending agency regulatory action, other than an impartial communication that requests comment on or provides information regarding the pending agency regulatory action, may not—

- (A) directly advocate, in support of or against the pending agency regulatory action, for the submission of information to form part of the record of review for the pending agency regulatory action;
- (B) appeal to the public, or solicit a third party, to undertake advocacy in support of or against the pending agency regulatory action; or
- (C) be directly or indirectly for publicity or propaganda purposes within the United States unless otherwise authorized by law.

(d) *REPORTING.*—

(1) *IN GENERAL.*—Not later than January 15 of each year, the head of an Executive agency that communicated about a pending agency regulatory action during the previous fiscal year

shall submit to each committee of Congress with jurisdiction over the activities of the Executive agency a report indicating—

(A) the number pending agency regulatory actions the Executive agency issued public communications about during that fiscal year;

(B) the average number of public communications issued by the Executive agency for each pending agency regulatory action during that fiscal year;

(C) the 5 pending agency regulatory actions with the highest number of public communications issued by the Executive agency in that fiscal year; and

(D) a copy of each public communication for the pending agency regulatory actions identified in subparagraph (C).

(2) AVAILABILITY OF REPORTS.—The head of an Executive agency that is required to submit a report under paragraph (1) shall make the report publicly available in a searchable format in a prominent location on the website of the Executive agency.

\* \* \* \* \*

## MINORITY VIEWS

Committee Democrats oppose H.R. 1004, the Regulatory Integrity Act, which would prohibit federal agencies from making any public communications about a pending agency regulatory action that could be interpreted as “propaganda,” seeking “publicity,” or direct advocacy. The bill would define public communication to include every oral, written, or electronic communication. Based on this expansive definition, virtually any action an agency might take to communicate the benefits of a rule could be viewed as advocating for the rule, publicity, or propaganda.

The bill lacks specificity as to what is and is not a prohibited public communication. This could leave the public less informed about agency activities because agencies would likely restrict communications with the public in order to avoid the possibility of violating the ambiguous prohibitions the bill contains.

For example, on February 13, 2017, the Department of Energy posted an entry on its blog about wind power stating that “wind represents a major opportunity to provide power to highly populated coastal cities,” “wind energy is affordable,” and that “by 2050, the United States has the potential to create 600,000 jobs, save consumers \$149 billion, and save 260 billion gallons of water by continuing to increase the amount of wind energy that powers our homes, schools and businesses.”<sup>1</sup> Under this bill, this blog entry could be prohibited as improper advocacy, propaganda, or publicity.

Such a chilling effect on public communications runs counter to open government and contravenes the spirit and intent of the Administrative Procedure Act which promotes communication between agencies and the public.

This bill is redundant in part, as it would prohibit agencies from encouraging public support of an agency action. Agency employees are already barred from engaging in “substantial ‘grass roots’ lobbying campaigns . . . designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals.”<sup>2</sup> The Appropriations Committee also typically includes language in appropriations bills that prevents agencies from using federal funds for “publicity or propaganda purposes.” GAO has identified three categories of agency communications that are restricted by these appropriations riders: (1) covert communications, (2) self-aggrandizement, and (3) purely partisan activities.<sup>3</sup>

<sup>1</sup> Department of Energy, *Top Ten Things You Didn't Know about Wind Power* (Feb. 13, 2017) (online at [www.energy.gov/articles/top-10-things-you-didnt-know-about-wind-power](http://www.energy.gov/articles/top-10-things-you-didnt-know-about-wind-power)).

<sup>2</sup> Office of Legal Counsel, Department of Justice, *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts* (1989) (online at [www.justice.gov/olc/opinion/constraints-imposed-18-usc-%C2%A7%C2%A01913-lobbying-efforts](http://www.justice.gov/olc/opinion/constraints-imposed-18-usc-%C2%A7%C2%A01913-lobbying-efforts)).

<sup>3</sup> Government Accountability Office, *Department of Health and Human Services—Use of Appropriated Funds for Technical Assistance and Television Advertisements* (Oct. 19, 2010) (B-320482) (online at [www.gao.gov/assets/400/390290.pdf](http://www.gao.gov/assets/400/390290.pdf)).

The bill would require agencies to report to Congress every communication to the public—including every oral communication from an agency official—about the five regulatory actions the agency issued the most communications on in the previous year. This would be unnecessarily burdensome and likely would not be workable for agencies.

Overall, the bill imposes unduly burdensome requirements on agencies that will distract from their core mission, result in reduced transparency, hinder the continued evolution of social media platforms used by agencies to reach the public, and duplicate requirements already imposed on agencies.

More transparency would be helpful in the regulatory process, but this bill is focused on restricting agency disclosures.

For example, the majority often refers to the promulgation of the Waters of the United States Rule (WOTUS) in support of this bill. However, after reviewing the entire WOTUS rulemaking process, GAO concluded: “Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.”<sup>4</sup>

ELIJAH E. CUMMINGS,  
*Ranking Member.*



---

<sup>4</sup>Letter from Roger J. Cramer, Managing Associate General Counsel, Government Accountability Office, to Chairman James Inhofe, Senate Committee on Environment and Public Works (July 16, 2015) (online at [www.gao.gov/assets/680/671628.pdf](http://www.gao.gov/assets/680/671628.pdf)).