

## **Calendar No. 312**

115TH CONGRESS 2d Session	}	SENATE	{	REPORT 115-208
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### **REGULATORY ACCOUNTABILITY ACT OF 2017**

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#### **R E P O R T**

OF THE

**COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE**

TOGETHER WITH

#### **MINORITY VIEWS**

TO ACCOMPANY

**S. 951**

To reform the process by which Federal agencies analyze and formulate new regulations and guidance documents, and for other purposes



FEBRUARY 14, 2018.—Ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE

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Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

#### R E P O R T

together with

#### MINORITY VIEWS

[To accompany S. 951]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 951) to reform the process by which Federal agencies analyze and formulate new regulations and guidance documents, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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#### I. PURPOSE AND SUMMARY

The Regulatory Accountability Act of 2017, S. 951, reforms the process by which Federal agencies analyze and formulate new regulations and guidance documents by codifying longstanding regulatory analytical principles within the agency rulemaking process.

It amends the Administrative Procedure Act (APA) and modernizes the regulatory process with an emphasis on regulatory impact analysis (including cost-benefit analysis). This bill promotes transparency and accountability in the Federal regulatory process, and provides safeguards to protect public safety and health.

## II. BACKGROUND AND THE NEED FOR LEGISLATION

### *Background and Existing Executive Orders*

In 1946, Congress enacted the APA in response to the substantial increase in Federal regulations driven by the New Deal.<sup>1</sup> The APA established guidelines for Federal agency rulemaking by incorporating public participation requirements in the rulemaking process.<sup>2</sup> Since its enactment, Congress has amended the statute sixteen times,<sup>3</sup> but none of these amendments substantially changed the process by which Federal agencies produce regulations. Congress has not amended the APA at all over the last two decades.<sup>4</sup>

Although the APA has not significantly changed over the last seventy years, the Executive Branch's role in governing all facets of American life has changed and grown tremendously. Each year Federal agencies add thousands of pages of rules to the Code of Federal Regulations.<sup>5</sup> As the administrative state has grown larger

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<sup>1</sup>See APA, Pub. L. No. 79–404 (codified as amended in scattered sections of Title 5 of the United States Code).

<sup>2</sup>George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw U. L. REV. 1557, 1560 (1996).

<sup>3</sup>Christopher Walker, *The Regulatory Accountability Act Is a Model of Bipartisan Reform*, REG. REV. (May 18, 2017), <https://www.theregreview.org/2017/05/18/walker-model-bipartisan-reform/> (“In the past seven decades, Congress has only amended the APA 16 times—arguably only four of which constituted significant changes: the Freedom of Information Act (FOIA) in 1966, the Privacy Act in 1974, the Government in the Sunshine Act in 1976, and amendments, also in 1976, waiving certain claims of sovereign immunity in suits against the government.”). See Act of Aug. 8, 1946, ch. 870, Title III, § 302, 60 Stat. 918 (amending 5 U.S.C. § 551(a) to exclude functions conferred by the Veterans’ Emergency Housing Act of 1946); Act of Aug. 10, 1946, ch. 951, Title VI, § 601, 60 Stat. 993 (also amending 5 U.S.C. § 551(a) to exclude functions conferred by the Veteran’s Emergency Housing Act of 1946); Act of Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37 (amending definition of agency in 5 U.S.C. § 551(a) to exclude functions conferred by the Surplus Control Extension Act of 1947); Act of June 30, 1947, ch. 163, Title II, § 210, 61 Stat. 201 (amending definition of agency in 5 U.S.C. § 551(a) to exclude functions conferred by the Housing Rent Act of 1947); Act of Mar. 30, 1948, ch. 161, Title III, § 301, 62 Stat. 99 (amending definition of agency in 5 U.S.C. § 551(a) to exclude functions conferred by the 1948 amendments to the Housing and Rent Act of 1947); Freedom of Information Act of 1966, Pub. L. No. 89–487, 80 Stat. 250 (amending 5 U.S.C. § 552); Act of Oct. 22, 1968, Pub. L. No. 90–623, § 1(1), 82 Stat. 1312 (amending 5 U.S.C. § 559 to insert “of this title”); Privacy Act of 1974, Pub. L. No. 93–579, 88 Stat. 1896 (codified at 5 U.S.C. § 552(a)); see also Act of Dec. 31, 1975, Pub. L. No. 94–183, § 2(2), 89 Stat. 1057 (amending 5 U.S.C. § 552a(g)(5) to replace “to the effective date of this section” with “to September 27, 1975”); Government in the Sunshine Act of 1976, Pub. L. No. 94–409, §§ 3(a), 4, 5(b), 90 Stat. 1241–1247 (adding 5 U.S.C. § 552b and § 557(d)(1) and conforming language in §§ 551, 552, and 556); Act of Oct. 21, 1976, Pub. L. No. 94–574, § 1, 90 Stat. 2721 (amending 5 U.S.C. §§ 702, 703); Act of Mar. 27, 1978, Pub. L. No. 95–251, §§ 2(a)(1), 2(b)(1), (2), 92 Stat. 183 (amending 5 U.S.C. §§ 554, 556 and 559); Act of Oct. 13, 1978, Pub. L. No. 95–454, § 801(a)(3)(B)(iii), 92 Stat. 1222 (amending 5 U.S.C. § 559 to replace “5362” with “5372”); Debt Collection Act of 1982, Pub. L. No. 97–365, § 2, 96 Stat. 1749 (amending 5 U.S.C. § 552a); Congressional Reports Elimination Act of 1982, Pub. L. No. 97–375, Title II, § 201(a), (b), 96 Stat. 1821 (amending § 552a(p)); Act of Jan. 12, 1983, Pub. L. No. 97–452, § 2(a)(1), 96 Stat. 2478 (amending §§ 552a(b), 552a(m)); Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, §§ 3–11, 110 Stat. 3049–3054 (amending 5 U.S.C. § 552).

<sup>4</sup>Walker, *supra* note 3.

<sup>5</sup>See Clyde Wayne Crews., *New Data: Code of Federal Regulations Expanding, Faster Pace Under Obama*, Competitive Enterprise Inst. (Mar. 17, 2014), <https://cei.org/blog/new-data-code-federal-regulations-expanding-faster-pace-under-obama>; see also Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Inst. 22 fig.14 (2016), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202016%20-%20May%204%202016.pdf>; Geo. Wash. Reg. Studies Ctr., *Total Pages; Code of Federal Regulations (1950–2016)*, Geo. Wash. Reg. Stud-

and more complicated, presidents of both parties have recognized the need for regulators to engage in thoughtful, transparent analysis before promulgating final regulations. For thirty-six years, Presidents have issued executive orders intended to make the regulatory process more transparent and accountable.

In 1981, President Reagan issued Executive Order (E.O.) 12291 “to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure [sic] well-reasoned regulations.”<sup>6</sup> E.O. 12291 required all agencies to meet five requirements when writing new rules, reviewing existing rules, and developing legislative proposals regarding legislation, including: (1) “adequate information concerning the need for and consequences of proposed government action”; (2) “benefits to society for the regulation outweigh the potential costs to society”; (3) “[r]egulatory objectives shall be chosen to maximize the net benefits to society”; (4) “the alternative involving the least net cost to society shall be chosen”; and (5) “maximizing the aggregate net benefits to society.”<sup>7</sup>

E.O. 12291 required agencies to prepare, and to the extent permitted by law, consider a Regulatory Impact Analysis (RIA) for every “major rule.” A major rule is defined as a regulation likely to result in “(1) an annual effect on the economy of \$100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) 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>8</sup>

This E.O. also authorized the Director of the Office of Management and Budget (OMB) to review any preliminary or final RIA, notice of proposed rulemaking (NPRM), and final rule and required an agency to consult with the Director about that review. It also required agencies to review and perform RIAs of currently effective major rules and authorized the Director to designate rules for review.<sup>9</sup>

Before approving any major regulation, E.O. 12291 required agencies to determine whether the regulation is “clearly within the authority delegated by law and consistent with congressional intent.”<sup>10</sup> Agencies also have to ensure that the “factual conclusions upon which the rule is based have substantial support in the agency record.”<sup>11</sup>

On September 30, 1993, President Clinton issued E.O. 12866,<sup>12</sup> which built on the foundations of E.O. 12291 to establish the current cost-benefit analysis requirements for Executive Branch agen-

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ies Ctr., [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/CFR\\_pages.JPG](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/CFR_pages.JPG) (last visited Oct. 11, 2017).

<sup>6</sup> Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Exec. Order No. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993).

cies.<sup>13</sup> In the introduction to E.O. 12866, President Clinton remarked:

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.<sup>14</sup>

He explained the goals of E.O. 12866 were to “enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.” E.O. 12866 announced the nation’s “regulatory philosophy,” similar to that in President Reagan’s Executive Order, stating that “Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.”<sup>15</sup>

E.O. 12866 expressed the principle that “[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.” Thus, the agencies are to choose the approach that maximizes net benefits unless a statute requires otherwise.<sup>16</sup>

It also directs OMB to review all Executive Branch agency rulemaking to ensure the regulations are consistent with applicable law and do not conflict with another agency’s actions, and instructs the Office of Information and Regulatory Affairs (OIRA) to provide guidance to agencies regarding regulatory planning and to review individual regulations.<sup>17</sup>

Finally, E.O. 12866 requires agencies to periodically review its existing significant regulations<sup>18</sup> and provides that each agency should “provide the public with meaningful participation in the regulatory process,” including seeking stakeholder opinions before issuing an NPRM and providing a comment period of at least 60

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<sup>13</sup> Note that E.O. 12866 revoked and replaced E.O. 12291; E.O. 12866 requirements are currently the effective requirements.

<sup>14</sup> Exec. Order No. 12866, *supra* note 12.

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

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

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

<sup>18</sup> *Id.* (defining “significant regulatory action” as “any 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 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.”).

days after proposing a regulation.<sup>19</sup> It provides that for each significant regulatory action, each agency shall provide the draft to OIRA with a description of the need for the regulation and how the regulation meets that need and an assessment of the action's potential costs and benefits and potential alternatives' costs and benefits.<sup>20</sup> OIRA is then to provide "meaningful guidance and oversight" to the agencies and has authority to return a regulation to an agency for further consideration with a written explanation.<sup>21</sup> Agencies may not publish significant regulatory actions until OIRA notifies the agency that OIRA has waived or completed its review without requests for further consideration, or until 90 days have passed since agency submission to OIRA without OIRA taking action.<sup>22</sup>

Presidents George W. Bush, Barack Obama, and Donald Trump have left President Clinton's E.O. 12866 in place. In 2011, President Obama supplemented E.O. 12866 with E.O. 13563, *Improving Regulation and Regulatory Review*.<sup>23</sup> E.O. 13563 provides that in applying the principles of E.O. 12866, agencies should use the "best available techniques to quantify present and future benefits and costs as accurately as possible, and where appropriate and permitted by law, agencies may consider "values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."<sup>24</sup> E.O. 13563 also brought the public participation elements of E.O. 12866 online, providing that each agency must afford the public an opportunity to comment on proposed regulations via the Internet and "timely online access to the rulemaking docket on regulations.gov."<sup>25</sup> It also instructed agencies to consider how best to promote retrospective review of rules and to release retrospective analyses online when possible.<sup>26</sup>

On July 11, 2011, President Obama released E.O. 13579, *Regulation and Independent Regulatory Agencies*,<sup>27</sup> which built on E.O. 13563, providing that independent agencies<sup>28</sup> should also comply, to the extent permitted by law, with provisions set forth in E.O. 13563. It states that independent agencies should meet the same general requirements regarding "public participation, integration and innovation, flexible approaches, and science."<sup>29</sup> It also directed agencies to consider "how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."<sup>30</sup> Independent agencies are to release the data and evaluations underlying those reviews whenever possible.<sup>31</sup>

OIRA Administrators from both parties have recognized the importance of the principles underlying these Executive Orders and

<sup>19</sup>Id.

<sup>20</sup>Id.

<sup>21</sup>Id.

<sup>22</sup>Id.

<sup>23</sup>Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>24</sup>Id.

<sup>25</sup>Id.

<sup>26</sup>Id.

<sup>27</sup>Exec. Order No. 13579, 76 Fed. Reg. 41585 (July 14, 2011).

<sup>28</sup>Defined in Exec. Order No. 13579 as "having] the meaning set forth in 44 U.S.C. 3502(5)."

<sup>29</sup>Exec. Order No. 13579, *supra* note 27.

<sup>30</sup>Id.

<sup>31</sup>Id.

of maintaining them across administrations.<sup>32</sup> The current OIRA Administrator, Neomi Rao, observed during her confirmation hearing: “[r]eading through OIRA’s statutory authorities as well as EO<sup>s</sup> and OMB guidance, I have been struck by the consistency of the principles guiding the work of the office across administrations.”<sup>33</sup> Similarly, Susan Dudley, Administrator of OIRA from 2007 to 2009 under President George W. Bush, testified during her nomination hearing: “I think there are a lot of things that we do right. I think that the analytical framework that President Clinton put in place with Executive Order 12866, which has been continued, I think that shows that it is not partisan. There is a nonpartisan approach to understand regulations to make sure that they are having the intended effects.”<sup>34</sup>

#### *Need for codifying the principles outlined in the Executive Orders*

Former OIRA Administrators have expressed support for the regulatory review mandates included in EO<sup>s</sup> 12291, 12866, 13563, and 13579. On the need for cost-benefit analysis, Sally Katzen, Administrator of OIRA from 1993 to 1998 during the Clinton Administration, has stated, “[e]conomic analysis is useful and clearly instructive; indeed, I cannot imagine making regulatory choices (or legislative choices for that matter) without a systematic consideration of the intended (and unintended) consequences of a proposed action.”<sup>35</sup> Ms. Dudley has testified that while the EO<sup>s</sup> “have done little to slow the growth in new regulation, they have focused attention on understanding the effects of regulations, and some argue that they have resulted in ‘smarter regulation’ that produces more benefits than costs.”<sup>36</sup>

However, Ms. Dudley has also observed that mandates contained in an executive order, by themselves, are constrained in their enforceability, noting: “statements of principles from the President are not enforceable in court and will accomplish little unless the President is willing and able to enforce them in practice.”<sup>37</sup>

Over the last thirty years, these EO<sup>s</sup> have required agencies to conduct cost-benefit analyses to support new regulations; ensure consistency between agencies’ regulations; and review existing regulations. The process established by the EO<sup>s</sup> works reasonably well, but without codification, any President may change the process at any time through a new executive order, which inherently creates uncertainty in the current process.

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<sup>32</sup> *Infra*, notes 33–34.

<sup>33</sup> *Nominations of Brock Long to be Administrator, Federal Emergency Management Agency, U.S. Department of Homeland Security; Russell Vought to be Deputy Director, Office of Management and Budget; and Neomi Rao to be Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget Before the S. Comm. on Homeland Sec. & Governmental Aff.*, 115th Cong. 2 (2017) (statement of Neomi Rao, to be Admin., Off. of Info. & Reg. Aff.).

<sup>34</sup> *Nomination of Susan E. Dudley to be Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget Before the S. Comm. On Homeland Sec. & Governmental Aff.*, 109th Cong. 15–16 (2006).

<sup>35</sup> *Federal Regulation: A Review of Legislative Proposals, Part II Before the S. Comm. On Homeland Sec. & Governmental Aff.*, 112th Cong. 7 (2011) (statement of Sally Katzen, Former Admin., Off. of Info. & Reg. Aff.).

<sup>36</sup> *Reducing Unnecessary and Costly Red Tape Through Smarter Regulations Before the U.S. Cong. Joint Econ. Comm.*, 113th Cong. 14–15 (2013) (statement of Susan E. Dudley, Former Admin., Off. of Info. & Reg. Aff.).

<sup>37</sup> *Id.* (citing John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 Fordham Urb. L. J. 953 (2005), and Cass Sunstein, *Smarter Regulation: Remarks from Cass Sunstein*, Admin. L. Rev. 63 (2011)).

The Committee has previously expressed several additional reasons to codify the principles outlined in the EO:s:<sup>38</sup>

Despite the longstanding nature of the rulemaking principles outlined in the aforementioned executive orders, there are two structural limitations to relying solely on executive orders to guide agency rulemaking.

The first is that despite a “usual presumption of reviewability”<sup>39</sup> for executive orders, both executive orders [12866 and 13563] include (nearly identical) language specifically precluding judicial review.<sup>40</sup> This creates a situation in which agencies cannot be challenged in court when failing to comply with provisions of prevailing executive orders.

The second limitation is that these executive orders have been considered to have only limited application to independent regulatory agencies. For example, President Obama’s Executive Order 13579—a companion to Executive Order 13563—notes that “[i]ndependent regulatory agencies . . . should promote” the same principles and aims of the earlier order, and that they “should comply with these provisions as well.”<sup>41</sup> The language notably avoids the more prescriptive language of “must” or “shall” in applying the order to independent agencies . . . . This means that despite the fact that regulations promulgated by independent regulatory agencies carry the same weight and force of law as those by Executive Branch agencies, they are nonetheless not subject to the same requirements. Therefore it should come as no surprise that independent agencies include “the key elements of cost-benefit analysis” (as outlined in the current executive order) in their published analysis less often than Executive Branch agencies.<sup>42</sup> A different study using a different sample of rulemakings indicated that no major rule issued by an independent agency in 2012 contained a complete cost-benefit analysis.<sup>43</sup>

#### *S. 951, the Regulatory Accountability Act of 2017*

S. 951 builds on the success of the previous EO:s by: (1) increasing stability in the regulatory process by codifying the longstanding rulemaking principles established under these executive orders; (2) increasing transparency by enhancing comment periods and requiring the underlying data the agency relied upon in its rulemaking to be posted to an online docket; (3) providing accountability through a public hearing process for major and high-impact rules, judicial review, and retrospective review; and (4) improving agen-

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<sup>38</sup> S. Rep. No. 114–342, at 2–3 (2016).

<sup>39</sup> Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 Duke L. Rev. 285, 330 (1982).

<sup>40</sup> Exec. Order No. 12866, *supra* note 12 (In President Clinton’s 1993 executive order, this language reads, in part: the order “does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States. . . .”).

<sup>41</sup> Exec. Order No. 13579, *supra* note 22.

<sup>42</sup> Exec. Order No. 12866, *supra* note 12.

<sup>43</sup> Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies*, Draft Rep. for the Admin. Conf. of the U.S. 87–88 (April 30, 2013), <https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>.

cies' use of guidance documents.<sup>44</sup> Moreover, S. 951 makes the application of these requirements uniform across agencies.

For major and high impact rules, S. 951 would require agencies to consider a reasonable number of alternatives for a new rule (with the consideration of three such alternatives presumed to be reasonable) and provide a cost-benefit analysis of both the quantitative and qualitative costs and benefits of those alternatives. Once the agency proposes a rule, if the proposed rule relies on scientific, technical, or economic information, the agency would have to ensure that the information is the best reasonably available information. S. 951 would then set a minimum public comment period of 30 days for most rules and 60 days for major and high-impact rules, with a good-cause exception for public health and safety risks. Agencies would then have to adopt the most cost-effective of the alternatives considered, unless the agency explains why it took a different course of action.

To ensure the public can easily access the information an agency relied upon in its rulemaking, S. 951 would require all of this information—including analytical information, cost-benefit analyses, and public comments—to be posted to an online docket. Nothing in this title is intended to alter or divest copyright owners of their lawfully vested rights, or require copyright owners to provide access at no cost.

S. 951 would increase accountability in the rulemaking process in three ways: (a) allowing public hearings to resolve disputed facts underlying high-impact and major rules; (b) providing for judicial review of agency compliance with the rulemaking requirements; and (c) requiring agencies to develop a plan for periodic review of major and high-impact rules at the time the agency promulgates those rules.

Judicial review will incentivize agencies to better support their rules on the front-end and allow for correction of error after promulgation of the rules.<sup>45</sup> Recognizing the economic significance of high-impact rules, S. 951 requires courts to review the factual findings supporting those rules under the substantial evidence standard. S. 951 also replaces the more deferential Auer deference<sup>46</sup> with Skidmore deference,<sup>47</sup> providing that when agencies interpret their own rules, the weight a reviewing court should give to that interpretation depends on the thoroughness evident in the agency's consideration of the rule, the validity of the agency's reasoning, and the consistency of the interpretation with earlier and later pronouncements. This provision will reduce agency incentive to write

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<sup>44</sup> The American Bar Association has called for nine significant reforms, at least six of which are addressed by S. 951, including (1) codify of the requirement that an agency fully disclose data and studies it relies on during the rulemaking process; (2) provide for the systematic development of a rulemaking record for agency factual determinations and judicial review that is made available to the public online; (3) establish a minimum comment period of 60 days for major rules; (4) authorize new presidential administrations to delay the effective date of rules finalized by not yet effective at the end of the prior administration while the new administration reviews the merits of the rule; (5) promote retrospective review; and (5) allow the public to submit post-promulgation comments and allow for ongoing review of rules by the agencies. See Am. Bar Ass'n, *House of Delegates Resolution 106B*, Am. Bar. Ass'n (Feb. 8, 2016), <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/106b.pdf>.

<sup>45</sup> Jerry Ellig, *Improvements in SEC Economic Analysis Since Business Roundtable: A Structured Assessment*, (Mercatus Ctr., Working Paper, 2016) (showing that following decisions by the DC Circuit requiring more robust economic analysis of proposed regulations, the quality of economic analysis at the Securities and Exchange Commission "improved substantially.").

<sup>46</sup> See *Auer v. Robbins*, 519 U.S. 452 (1997).

<sup>47</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

unclear regulations knowing that they later can interpret the regulation as they see fit.

Finally, reflecting occasional judicial practice,<sup>48</sup> S. 951 will grant courts the discretion to remand rules for further consideration while allowing the decision to stay in place whenever it is appropriate. Current law provides that reviewing courts shall “hold unlawful and set aside” deficient agency actions, findings, and conclusions.<sup>49</sup> This amendment will clarify that courts may remand rules to agencies while keeping them in effect if undoing the rule entirely is unnecessary.

As President Obama recognized in E.O.s 13563 and 13579, over time, rules can become outdated and ineffective or may no longer be the most efficient way to accomplish their purpose. S. 951 expands and strengthens retrospective review requirements by requiring agencies to build in a plan for review when writing major or high-impact rules so that agencies will regularly assess whether rules are meeting their objectives.

In 2007, OMB (under then-Director Rob Portman) issued the final bulletin for *Agency Good Guidance Practices*, which established “policies and procedure for the development, issuance, and use of significant guidance.”<sup>50</sup> S. 951 would codify many of those practices to ensure agencies do not use guidance to avoid public participation and analysis requirements involved in writing new legislative rules.

While S. 951 primarily focuses on improving the analysis underlying the rules with the biggest impact on the economy, it also promotes measures that will improve the entire rulemaking process. Ultimately, S. 951 will modernize the regulatory process by putting in place well-established rulemaking principles that have contributed to better regulations over the past decades, such as requiring agencies to engage in meaningful cost-benefit analysis, consider reasonable alternatives, and continuously engage with the public. These processes will reduce unnecessary regulatory burdens while taking public health, safety, and environmental concerns into consideration. This legislation represents a long-overdue effort to make the regulatory process more accountable and effective by improving analysis, transparency, and accountability through commonsense reforms.

### III. LEGISLATIVE HISTORY

Senator Rob Portman (R-OH) introduced S. 951 on April 26, 2017, with Senators Heidi Heitkamp (D-ND), Orrin Hatch (R-UT), and Joe Manchin (D-WV). Senators Rand Paul (R-KY), Ron Johnson (R-WI), Luther Strange (R-AL), James Lankford (R-OK), and Deb Fischer (R-NE) later joined as cosponsors. The bill was referred to the Committee on Homeland Security and Governmental Affairs. The Committee considered S. 951 at a May 17, 2017 business meeting.

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<sup>48</sup> Stephanie J. Tatham, *The Unusual Remedy of Remand Without Vacatur*, Final Rep. for the Admin. Conf. of the U.S. 1 (January 30, 2014) (“This remedial approach appears to have arisen relatively recently and as a matter of judicial instigation. Empirically, it is uncommon . . . . Remand without vacatur has been used to avoid severely disruptive consequences of vacatur.”).

<sup>49</sup> 5 U.S.C. § 706(2).

<sup>50</sup> Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

During the business meeting, Senator Portman offered a substitute amendment with clarifying language. The substitute amendment was adopted without objection by unanimous consent with Senators Johnson, McCain, Portman, Paul, Lankford, Enzi, Hoeven, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present.

The Committee ordered S. 951, as amended, reported favorably on May 17, 2017, by a roll call vote of 9 yeas to 5 nays. Senators voting in the affirmative were Johnson, McCain, Portman, Paul, Lankford, Enzi, Hoeven, Daines, and Heitkamp. Senators voting in the negative were McCaskill, Tester, Peters, Hassan, and Harris. For the record only, Senator Carper voted nay by proxy.

#### IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

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

This section provides the bill's short title, the "Regulatory Accountability Act of 2017."

##### *Section 2. Definitions*

This section defines the terms "Guidance", "High-impact Rule", "Major Guidance", "Major Rule", "Office of Information and Regulatory Affairs," and "Administrator".

##### *Section 3. Rulemaking*

This section describes changes to the agency rulemaking process. It strikes the existing subsections (b) through (e) of Title 5 Section 553, United States Code, and replaces them with new subsections (b) through (m).

The new subsection (b) adds new "rulemaking considerations" which an agency must undertake before issuing a rule. These include: the rule's legal basis; identification of the problem to be solved by the rule; whether existing Federal policy contributes to that problem and if changes to existing Federal policy could partially solve the problem; identifying a reasonable number of alternatives to the rule as a means of addressing the problem (with the consideration of three such alternatives presumed to be reasonable). This also includes, for major or high-impact rules, a requirement to analyze quantitative and qualitative costs and benefits of the alternatives identified. In conducting this analysis, the agency must consider "direct costs and benefits," risks that may be both attended to and created by the rule, and, "cumulative and indirect costs and benefits," unless prohibited by law.

The new subsection (c) ("Notice of Proposed Rulemaking") outlines the requirements for providing notice of the proposed rule to both the public and the OIRA Administrator.

Paragraph (1) itemizes the content required to be included in an NPRM published in the *Federal Register*: information about rulemaking proceedings, legal authority, the proposed rule text, and "summary of information . . . [about] considerations described in subsection (b)." For major or high-impact rules, the notice must also include: "reasoned preliminary explanation" of the rule's satisfaction of statutory objectives and whether benefits "justify the costs." It must also include discussion of considered alternatives including their costs and benefits, whether they achieve statutory ob-

jectives, and why they were not pursued instead of the proposed rule.

Paragraph (2) requires, by the date of publication of the NPRM, the agency to publish in the publicly available rulemaking docket, all relevant information (e.g., “studies, models, and scientific literature”) relied upon by the agency in developing the proposed rule, unless exempted under 5 U.S.C. 552(b).

Paragraph (3) requires that the agency use the “best reasonably available scientific, technical, or economic information” in justifying the proposed rule.

Paragraph (4) requires the agency to allow an opportunity for public input about the proposal, except where a hearing procedure is required under subsection (e) or otherwise required under statute. This input period must be at least 90 days for major and high-impact proposed rules, or 60 days otherwise.

Paragraph (5) requires an additional 30-day public comment period and additional notice in the *Federal Register* if the proposed rule is reclassified as a major or high-impact rule after publication of the initial notice.

Paragraph (6) prohibits, after public notice or initiation of rulemaking under subsection (d)(1)(B), the agency and agency officials from engaging in advocacy “in support of or against” the rule, appeals to others for such advocacy, or “publicity or propaganda.” This prohibition also applies to the use of Federal funds from that agency by an outside party. The prohibition does not apply to communicating impartial information or requests for comment about the rule.

The new subsection (d) describes the requirements on agencies when “initiat[ing] a rulemaking that may result in a major rule or a high-impact rule.”

Paragraph (1) describes requirements for notice, including creating an electronic rulemaking docket; publishing a “notice of initiation of rulemaking” in the *Federal Register* which will include description of the rule’s objectives, reference to legal authority, invitation for suggestion of alternatives and potentially better approaches to achieve desired outcomes, and instructions for submitting such suggestions.

Paragraph (2) states that all information collected under paragraph (1) must be made available in the rulemaking docket.

Paragraph (3) clarifies that the suggestions collected under paragraph (1) are for the benefit of both the agency and the public and that the agency may respond to those suggestions.

Paragraph (4) describes requirements concerning establishing a timetable in the electronic docket for completion dates for certain agency tasks. This timetable must include the date of completion of the comment period in paragraph (1). If the agency proceeds to a rulemaking, it must include: the dates on which the agency plans to publish an NPRM, the length of that comment period, and “final completion date” for agency actions. Factors the agency must consider in establishing the timeline include: “size and complexity of the rulemaking,” available resources, the rulemaking’s national significance, and statutory requirements governing timing. If an agency fails to meet a final completion date, the agency must submit to Congress and the OMB Director, and publish in the *Federal Register* and the docket, a report explaining the reason for failure to

meet the deadline and an updated timeline. For other established completion dates the agency changes, the agency must update the timeline in the docket and include an explanation for the change.

Paragraph (5) outlines requirements should the agency choose to not pursue a major or high-impact rule after publishing a notice of initiation of rulemaking. After consulting with the Administrator of OIRA, the agency must “publish a notice of determination of other agency course” which describes the alternative agency course. If the new agency course is to propose a rule (other than a major or high-impact rule), the agency must proceed with the requirements in subsection (c).

The new subsection (e) describes the use of a “public hearing for high-impact rules and certain major rules.”

Subparagraph (1)(A) describes the petition process for such hearings. During the comment period for proposed major or high-impact rules, a party can petition the agency for a public hearing.

Subparagraph (1)(B) applies to high-impact rules. The agency must grant the petition within 30 days if the petition: raises a “genuinely disputed” factual issue(s) on which the rule is based and shows that those issues are likely to affect the rule’s benefits and costs or achievement of purpose. For a rule that an agency must reissue not less frequently than once every three years, a petition also must show that the petitioner could not have raised the disputed factual issues during the preceding five years. An agency can deny a petition if the agency finds that: (1) the petition does not demonstrate a genuine dispute of fact; (2) for rules that must be re-written at least every three years, the petitioner could have raised the same issues within the past five years; or (3) the factual issues raised will not have an effect on benefits and costs or achievement of purpose. If the agency denies the petition, it must include the petition as well as an explanation of why it denied the petition in the rulemaking record.

Under subparagraph (1)(C), a petition for a public hearing on a major rule must occur in the same timeframe and include the same criteria as that for high-impact rules. The agency may deny the petition if it would lead to “unreasonable delay” or otherwise not “advance consideration” of the rule, or, for rules that must be issued not less frequently than once every three years, the petitioner had the opportunity to raise the same issue within the previous five years. The petition will be included in the rulemaking record.

Paragraph (2) requires the agency to provide notice of the hearing, the rule at issue, and issues to be considered in the *Federal Register* at least 45 days in advance.

Paragraph (3) describes required elements of the hearing, which must be limited to the resolution of issues raised and any other issues the agency believes will further development of the rule. With respect to such a hearing, the burden of proof falls on the rule’s proponent; “any documentary or oral evidence may be received” except where immaterial or repetitious; the agency adopts the rules concerning who presides over the hearing proceedings, and the manner in which parties present evidence and cross-examine opposing parties, and whether it is appropriate to combine multiple hearings.

Paragraph (4) stipulates that judicial review is not precluded for issues that were not raised in a petition under this subsection. Ad-

ditionally there is not judicial review regarding agency disposition of a petition until review of the final agency action.

The new subsection (f) establishes new analytical requirements for issuing final rules.

Paragraph (1) requires that for major or high-impact rules, the agency adopt the most “cost-effective” rule from among the alternatives considered that achieves “relevant statutory objectives.” A more costly rule may be adopted only where the higher cost is justified by additional benefits, these benefits and associated additional costs are made explicit, and the agency explains the decision to adopt a more costly rule.

Under paragraph (2), final rules must be accompanied by the publication of a notice in the *Federal Register*, which contains a short explanation of the rule, reasoning for determinations required under subsection (b), and responses to significant issues raised in comments. For major or high-impact rules, the notice must also include justification for: the rule’s costs and achievement of objectives; why no considered alternative would have been more cost-effective; or adoption of a more costly rule.

Under paragraph (3), a final rule dependent on scientific, technical, or economic information shall be based on “the based reasonably available” information.

Under paragraph (4), by the time the agency issues the final rule, it must make available through the docket any technical information used as the basis of its determination in the rulemaking, except where exempted from disclosure under section 552(b).

Paragraph (5) allows an incoming administration to postpone the effective date for up to 90 days for any final rules that have not yet become effective by inauguration day. An agency can choose such a delay to gather additional public comment, for at least 30 days, on whether to amend, rescind, or further postpone the effective date of the rule.

The new subsection (g) stipulates that when an agency is required to follow or comply with specific procedural or analytical requirements under another law other than those required under S. 951, the specific requirements of the other law apply and the requirements under S. 951 do not.

Paragraph (1) states that, with respect to rulemaking considerations, if the requirements under section 553 are inconsistent or conflict with another Federal law, the other Federal law will apply to the agency. Similarly, if the rulemaking procedures required under section 553 are duplicative or conflicting with another Federal law, the other Federal law will apply to the agency.

Paragraph (2) states that section 553 does not apply to agency guidance or internal agency rules.

Paragraph (3) permits agencies to proceed to a final rule without meeting the requirements of subsections (c) through (e) or (f)(2)(B) if they make a finding of good cause, which they must include along with a justification, in the final rule. If the agency makes such a finding for a direct final rule, it must provide a minimum 30-day comment period, and publish the rule in the *Federal Register* along with the effective date. If the agency receives “significant adverse comments,” the agency must then withdraw the rule and proceed under the requirements in subsections (c) through (f). The agency may avoid these requirements if it determines compli-

ance would not expedite the rulemaking. If an agency finds good cause that compliance with subsections (c) through (e) and (f)(2)(B) “is impracticable or contrary to the public interest” with respect to an interim final rule, it must publish the rule in the *Federal Register* with a request for comment. Within six months, the agency must withdraw the rule, proceed with rulemaking under subsections (c) through (f), or adopt a final rule. Failure to undertake one of those actions results in nullifying the rule. This section does not apply to monetary policy rules or guidance.

New subsection (h) requires a direct or interim final as described in subsection (g)(3) to have an effective date at least 30 days after publication, or 60 days for major or high-impact rules. This delay does not apply to guidance or where an agency finds “good cause.”

New subsection (i) requires agencies to provide an opportunity for the public to request “issuance, amendment, or repeal of a rule” and make suggestions for retrospective review of rules.

New subsection (j) requires the OIRA Administrator to issue guidelines to aid in the development of rules.

Paragraph (1) describes the guidelines for assessing regulations’ quantitative and qualitative costs, benefits, economic impacts, and risks. The Administrator will update these guidelines within every 10 years to reflect “best available techniques.”

Paragraph (2) describes the “guidelines to promote coordination, simplification, and harmonization” of rules.

Paragraph (3) describes the guidelines “[t]o promote consistency.” Additionally, agencies must adopt policies governing rulemaking hearings consistent with these guidelines.

New subsection (k) describes requirements around agencies’ use and issuance of guidance.

Paragraph (1) stipulates that guidance cannot “foreclose consideration of issues,” is explicitly not legally binding, and must be publicly available.

To issue major guidance, paragraph (2) requires an agency to make the guidance understandable and compliant with relevant statute, and determine at least those benefits and costs required to be considered in a rulemaking under subsection (b). Additionally, the OIRA Administrator must determine that the guidance is reasonable, understandable, and consistent with the statute, and that the costs are justified by the benefits.

Paragraph (3) requires the OIRA Administrator to issue new guidelines to agencies on the development of guidance such that it is simple, consistent, and not duplicative.

New subsection (l) describes a retrospective review requirement for major and high-impact rules.

Paragraph (1) requires agencies, starting six months after S. 951’s enactment, to include in proposed or final rules a framework for future assessment of the rule’s effectiveness, including the intended objectives of the rule, methodology to determine effectiveness, process to collect data, and a timeframe for the assessment of no more than ten years after the rule’s effective date.

Paragraph (2) stipulates that the agency will use the data collected and the methodology it included in the rule framework to determine whether the major rule “is accomplishing its regulatory objective,” “has been rendered unnecessary,” “needs to be modified,” or otherwise modified to “better achieve the regulatory objective

while imposing a smaller burden.” This paragraph also provides a procedure whereby an agency can use a different methodology than that outlined in the prior framework. It describes the requirements for subsequent reassessments for rules the agency determines should remain in effect. This includes the authority of the OIRA Administrator to exempt certain rules from these requirements. It also requires that the agency publish the results of the assessment, including the time frame for subsequent assessment, in the *Federal Register* within 180 days.

Paragraph (3) delineates required oversight by the OIRA Administrator, including issuing guidance to agencies, overseeing timely compliance (including publication online and in the *Federal Register*), providing assistance in streamlining of major rule assessments, issuing exemptions for rules where assessment would be “unnecessary, impractical, or contrary to the public interest,” or issuing an extension of requirement deadlines in response to sufficient agency justification.

Paragraph (4) clarifies that this subsection does not limit an agency’s authority to “assess or modify” major or high-impact rules ahead of the specified time frame.

Paragraph (5) clarifies that this subsection does not apply to major or high-impact rules reviewed by the Administrator of OIRA prior to the bill’s date of enactment, to agencies with existing retrospective review requirements that meet or exceed those in the bill, or to agencies subject to periodic reauthorization within ten years. It also does not apply to: interpretative rules; statements of policy; rules of agency procedure; administrative rules; or rules subject to review under section 12 U.S.C. § 3311. For direct and interim final rules, the agency will publish the framework within 180 days of the rule’s publication date.

Paragraph (6) permits agencies to make recommendations to Congress for legislation to facilitate changes in a rule based on the assessment.

Paragraph (7) describes the scope for judicial review of compliance with this subsection, which includes “whether an agency published the framework for assessment” or “whether an agency completed” the required assessment. The reviewing court may remand the rule to the agency to comply with the framework established for assessment or the requirement for the assessment itself. Notwithstanding a court order, the rule under review will take effect. The decisions and actions of the Administrator of OIRA will not be subject to review.

#### *Section 4. Scope of review*

This section amends 5 U.S.C. § 706 which prescribes the basis on which courts may review agency actions. Section 4 allows courts the ability to remand a rule back to the agency without vacating it, “when appropriate.” It also adds that when reviewing a high-impact rule the court must determine whether the agency’s factual findings “are supported by substantial evidence.”

New subsection 706(b) requires courts to consider the entirety of the rulemaking record or those parts cited by a party and “take due account . . . of the rule of prejudicial error.”

New subsection 706(c) precludes review of the rule’s determination as a major rule if the determination that a rule is a major rule

was made on the basis of its increase in costs or prices to consumers, industries, governments or geographic regions, or based on its significant adverse effects on competition, employment, investment, productivity, innovation, public health and safety, or the country's ability to compete internationally.

New subsection 706(d) limits review of guidance that is not a statutory or rule interpretation to whether the agency complied with required procedure.

New subsection 706(e) states that when reviewing an agency interpretation of its own rule, a court will give weight to that interpretation according to factors such as the thoroughness of the rule's consideration, the agency's reasoning, and degree of interpretive consistency.

#### *Section 5. Added definitions*

This section cross-references the definition of "guidance" and defines "substantial evidence."

#### *Section 6. Application*

This section clarifies that this bill does not apply to rules in process or completed by date of enactment.

#### *Section 7. Technical and conforming amendments*

This section contains changes to other laws in order to conform to changes in this bill.

### V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

### VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, February 8, 2018.*

Hon. RON JOHNSON

*Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 951, the Regulatory Accountability Act of 2017.

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

Sincerely,

KEITH HALL,  
*Director.*

Enclosure.

*S. 951—Regulatory Accountability Act of 2017*

**Summary:** S. 951 would amend the Administrative Procedures Act (APA), which governs the way that government agencies propose and establish federal regulations. Enacting the bill would codify some current practices under executive orders that aim at increasing transparency. However, S. 951 also would impose new requirements concerning agencies' issuance of rules that have an estimated economic effect of \$100 million or more annually. S. 951 also would make some existing requirements under executive orders apply to independent regulatory agencies that currently are exempt from those orders.

CBO estimates that implementing S. 951 would have a net cost of about \$55 million over the 2018–2022 period, assuming appropriation of the necessary funds. That amount would pay for the work of additional agency personnel and contractors and would cover other administrative expenses.

CBO expects that enacting S. 951 could delay the issuance and change the content of some final rules each year. As a result, CBO and the staff of the Joint Committee on Taxation (JCT) expect that enacting S. 951 could affect both direct spending and revenues. In addition, enacting the bill would affect direct spending of agencies that are not funded by annual appropriations (such as the Consumer Financial Protection Bureau, or CFPB). Therefore, pay-as-you-go procedures apply. However, given the large number of rules issued each year and the variations in their nature and scope, CBO cannot estimate whether delaying some rules or changing their content would result in costs or savings.

CBO cannot determine whether enacting S. 951 would increase net direct spending or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2028.

S. 951 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

**Estimated Cost to the Federal Government:** The estimated budgetary effect of S. 951 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 <sup>a</sup> —					
	2018	2019	2020	2021	2022	2018–2022
<b>INCREASES IN SPENDING SUBJECT TO APPROPRIATION</b>						
Estimated Authorization Level .....	0	15	15	15	15	60
Estimated Outlays .....	0	10	15	15	15	55

<sup>a</sup> Enacting S. 951 also would affect direct spending and revenues, but CBO and staff of the Joint Committee on Taxation cannot determine the magnitude of those costs or savings.

**Basis of Estimate:** For this estimate, CBO assumes that the legislation will be enacted before the end of 2018 and that the necessary amounts will be appropriated near the start of each fiscal year. Estimated spending is based on historical patterns for similar activities.

*Background*

CBO is unaware of any comprehensive information on the current governmentwide cost of rulemaking. However, according to the Congressional Research Service, federal agencies issue between

2,500 and 4,500 final rules each year. Over the past five years, the Department of Health and Human Services, the Department of the Interior, and the Securities and Exchange Commission have issued the largest numbers of major rules (those with an estimated economic impact of \$100 million or more per year).

S. 951 would amend the APA to codify certain practices currently required under Executive Orders 12866 and 13563, among others. Those instructions require executive branch agencies to analyze the economic effects of proposed rules (including costs and benefits), to coordinate with the Office of Information and Regulatory Affairs (OIRA) during the rulemaking process, and to perform other activities and analyses related to the process. The legislation would define several terms, including *major rule*, *major guidance*, and *high-impact rule*.

The bill defines major rule as any rule that OIRA determines is likely to impose:

- An annual effect on the economy of \$100 million or more, adjusted for inflation;
- A major increase in costs or prices for consumers, individual industries, federal, state, local, or tribal government agencies or geographic regions; or
- Significant adverse effects on competition, employment, investment, or productivity innovation or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic and export markets.

The bill defines major guidance to incorporate the same criteria used for a major rule, but as applied to agency guidance documents. A high-impact rule would be any rule that OIRA determines is likely to impose an annual effect on the economy of \$1 billion or more. That threshold would be adjusted every five years for inflation.

Enacting S. 951 also would add several new requirements that would broadly change the rulemaking process under the APA. For all major and high-impact rules, agencies would be required to:

- Publish a notice of the initiation of a rulemaking;
- Establish and continuously update a timetable for the rulemaking;
- Evaluate the costs and benefits of three alternatives;
- Conduct risk assessments;
- Accept public comments on the proposed rule for 90 days (rather than 60 days, as typically is the case under executive orders and current law);
- Permit members of the public to petition the rulemaking agency for a hearing on certain major and high-impact rules;
- Place all information used in the adoption of a final rule in a docket that is accessible to the public; and
- In the notice of final rulemaking, respond to significant issues raised during the public comment period.

After adoption of a final rule, agencies would be required to conduct ongoing assessments to determine whether a rule accomplishes its regulatory objectives.

#### *Spending Subject to Appropriation*

CBO contacted several agencies to determine whether or how the legislation would affect rulemaking procedures and costs. The ex-

tent to which S. 951 would impose new requirements on individual agencies depends in part on whether an agency's rulemaking process is governed by laws beyond the APA. (For example, the Toxic Substances Control Act requires the Environmental Protection Agency to consider the costs and benefits of each proposed rule and to present at least one alternative.) Although some agencies may already be conducting the activities that would be required by the bill, others would face a larger increase in workload and higher administrative costs. Those costs also would depend on the number of major and high-impact rules an agency issues each year. CBO estimates that the administrative costs to comply with S. 951 would vary by agency. In total, CBO estimates that implementing S. 951 would cost \$15 million annually, assuming appropriation of the necessary funds. CBO estimates that level of effort would be reached in about two years.

CBO anticipates that additional federal employees and contractors would be needed to undertake cost-benefit analyses, complete risk assessments, respond to public comments, conduct post-rulemaking assessments, and perform other administrative tasks required by the bill. Using information from several agencies, CBO estimates that the government would spend about \$13 million annually to meet the bill's requirements. Of the 22 agencies that have issued major rules over the last 5 years, CBO expects that half of them would need an average of 5 to 10 additional people at an average annual cost of \$150,000—or about \$1 million annually to implement the bill. CBO estimates that the remaining agencies would spend less than \$500,000 a year to implement the bill.

By subjecting independent regulatory agencies to the requirements followed by executive branch agencies, the bill also would expand OIRA's consultation and oversight duties, thus requiring additional staff. Using information from OIRA, CBO estimates that the resulting cost to the agency would be \$2 million per year for 10 to 15 new staff.

#### *Direct spending*

CBO expects independent regulatory agencies would face an increased workload associated with rulemaking. Enacting S. 951 would affect the direct spending of several agencies not funded through annual appropriations; including the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, and the Office of Financial Research. Those agencies collect premiums and fees to support administrative expenses; therefore, CBO estimates that the net effect on spending for those agencies would be negligible. However, CBO estimates that implementing S. 951 could increase direct spending by the CFPB; that spending would not be offset by any premiums or fees.

CBO expects that enacting S. 951 could delay some major and high-impact rules from taking effect each year. Therefore, in assessing the budgetary effects of S. 951, CBO considered the costs or savings that might be realized if anticipated rules were delayed or modified. Delaying issuance of some major or high-impact rules, which would delay when they take effect, could result in costs; delaying others could result in savings.

CBO expects that the rules with the largest effects on federal spending would be related to federal health programs, particularly Medicare. Such budgetary effects would largely be driven by delaying annual updates to payment schedules for providing Medicare services and other routine revisions to other government programs. Thus, enacting S. 951 could significantly affect Medicare spending relative to current law. However, CBO cannot estimate the magnitude of any costs or savings in direct spending over the 2018–2027 period from enacting S. 951. If delaying a Medicare rule increased or decreased costs by 1 percent a year, the total budgetary effects could be tens of billions of dollars over the 2018–2027 period.

#### *Revenues*

CBO expects that under S. 951, the Federal Reserve could incur additional administrative costs to conduct some types of rulemaking, although any rulemaking by the Federal Reserve concerning monetary policy would be exempt. Such costs are treated as reductions in remittances to the Treasury, which are recorded in the budget as reductions in revenues.

CBO expects that enacting the bill also would affect revenues by changing the way that the Internal Revenue Service issues guidance and by slowing rulemaking generally. JCT expects that those delays would reduce revenue collections in some cases and increase them in others. However, JCT cannot estimate the magnitude of any costs or savings from 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 S. 951 because enacting the legislation would affect direct spending and revenues. However, CBO and JCT cannot determine the size of the costs or savings associated with those effects.

**Increase in long-term direct spending and deficits:** CBO cannot determine whether enacting S. 951 would increase net direct spending or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2028.

**Mandates:** CBO expects that S. 951 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 other ways, for example, by slowing reimbursements or delaying the implementation of regulatory requirements. The costs and savings associated with such effects could be significant, but CBO has no basis for estimating them because CBO cannot predict the number or nature of regulations that could be delayed.

**Estimate prepared by:** Federal Costs: Janani Shankaran (for federal agencies) and Nathaniel Frentz (for the Federal Reserve); Mandates: Zachary Byrum.

**Estimate approved by:** H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

## VII. MINORITY VIEWS

### MINORITY VIEWS OF SENATORS CLAIRE McCASKILL, THOMAS CARPER, AND GARY C. PETERS

While the regulatory process is complicated and some reforms could improve the efficacy of the process, we do not believe the Regulatory Accountability Act (S. 951, RAA) would lead to an improved regulatory process. Instead, this bill is likely to open the process to questionable science, lead to more court challenges, and slow down agency rulemaking—which can already take a decade or longer for major rules—creating greater uncertainty in regulated communities and undermining public health and safety standards.

#### *S. 951 Would Lead to a Significant Increase in Litigation and Delay*

Ensuring stakeholder input and thorough, in-depth analysis to improve regulatory outcomes are shared goals. However, we are concerned that this bill does not actually meet those goals. Proponents of RAA argue that the bill would actually reduce the amount of litigation over federal regulations and the time it takes to issue final rules by allowing for more collaboration with stakeholders earlier in the process. We disagree with that assessment. This bill would lead to additional litigation and delay the implementation of important regulations, many of which are intended to protect the health and safety of our citizens.

The RAA would establish new regulatory requirements and codify and expand many of the principles found in existing, widely-supported executive orders that guide executive agency rulemaking.<sup>1</sup> In doing so, this bill goes well beyond the intent of these executive actions. Since Executive Order (E.O.) 12291 was issued by President Reagan, each subsequent executive order related to the regulatory process has specifically precluded judicial review of agency compliance with the principles laid out in the executive orders, stating or upholding the view that the executive order was “intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.”<sup>2</sup>

The committee report correctly points out that without codification, any future president “may change the process at any time through a new executive order.”<sup>3</sup> However, administrations from both parties have continued these requirements, and have not felt the need to advocate for codifying them since they were first adopt-

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<sup>1</sup> Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 19, 1981); Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

<sup>2</sup> Exec. Order. No. 12291, Sec. 9 (See also E.O. 12866, Sec. 10; E.O. 13563, Sec. 7(d)).

<sup>3</sup> See *supra*.

ed by the Reagan Administration in the 1980s.<sup>4</sup> Howard Shelanski, the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget at the end of President Obama's second term, testified in 2015 that he does not believe codification is necessary, saying “[w]e at OIRA think that we have the tools that we need under the Executive Orders to achieve what we need to achieve.”<sup>5</sup> He further stated that, “the Executive Orders are on very solid ground having stayed firm and really only been reaffirmed across Administrations of both parties.”<sup>6</sup> Should a future president repeal E.O. 12866 and forbid any agency of the Executive Branch from conducting cost benefit analysis, then legislation would be the appropriate remedy. However, barring such a drastic move, which no president has suggested doing, the drawbacks of codification outweigh their potential benefits.

While, as the committee report notes, former OIRA Administrator Sally Katzen supports the use of cost benefit analysis as one public policy making tool, it should be noted that she is not in support of codifying regulatory procedural requirements. In fact, she specifically testified against codification before this committee in February 2015, in part due to the concern that courts would struggle to determine the sufficiency of agencies' efforts to meet the requirements, saying, “casting [the executive orders] in statute only compounds the problems” because of a lack of agency resources and because these requirements would be hard to review, “. . . like qualifying costs, what does that mean and how would somebody say that is sufficient?”<sup>7</sup>

The committee has previously considered codifying these executive orders<sup>8</sup> and many of the same concerns raised in the additional views<sup>9</sup> of that report remain our primary concerns with codifying these regulatory requirements:

“While there has been strong bipartisan support for the principles in the Executive Orders that guide agency rulemakings through multiple administrations since at least the 1980s, codifying these principles raises a number of significant concerns and could significantly slow down the already slow regulatory process. First, this bill would make these principles legal requirements, subjecting each step of the process to judicial review, taking away agency flexibility, and overriding provisions of certain health, safety, and environmental laws that exempt regulations authorized by those laws from some of these requirements. In addition, this bill would extend these requirements to the

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<sup>4</sup>Id.

<sup>5</sup>Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, Testimony of Howard Shelanski, hearing on *Reviewing the Office of Information and Regulatory Affairs' Role in the Regulatory Process*, 114th Cong. (July 16, 2015) (S. Hrg. 114–84).

<sup>6</sup>Id.

<sup>7</sup>Senate Committee on Homeland Security and Government Affairs Committee, Testimony of Sally Katzen, *Towards a 21st Century Regulatory System*, 114th Cong. (February 25, 2015) (S. Hrg. 114–418).

<sup>8</sup>S.1818, 114th Cong. (2015).

<sup>9</sup>S. Rep. No. 114–342, at 8–12 (2016).

independent agencies that often have their own statutory requirements.”<sup>10</sup>

This additional opportunity for judicial review is problematic for a number of reasons, and we believe it would have significant consequences. The regulatory process is designed to produce regulations backed by sound, evidence-based science and allow for robust stakeholder input. When regulated industries disagree with the result, the current process also allows stakeholders to challenge the rules in court. The system is not intended to give the largest corporations with the most highly-paid lawyers an opportunity to endlessly delay the finalization of federal rules. However, the current regulatory process is already stagnating to the point that some rules are taking multiple administrations.

A 2012 GAO review of significant health and safety standards found that the average time it took to finalize rules increased from six years and ten months in the 1980s to nine years and ten months in the 1990s.<sup>11</sup> That timing fell back to seven years and seven months in the 2000s, but to do so, agencies reduced the number of standards issued by more than half.<sup>12</sup>

While some of the requirements in S. 951 could arguably improve transparency and public participation in the rulemaking process, other requirements, in the name of greater public participation and agency analysis, would certainly result in a far slower rulemaking process and would have the practical effect of deterring agencies from pursuing justifiable and necessary rulemakings due to resource constraints.

One of the more concerning aspects of the bill is the creation of quasi-judicial, adversarial hearings to resolve “complex factual issues that are genuinely disputed.”<sup>13</sup> These hearings would significantly slow the regulatory process and tilt it in favor of large special interests with the resources to petition and participate in such an open-ended process. It would allow corporations to endlessly dispute agency findings with no minimum standards or burdens to demonstrate a genuine factual dispute. This process alone could add years to the finalization of every major regulation, diluting the input of the general public at large.

The bill also opens the door to putting established science on trial. The term “factual issues that are genuinely disputed” is left undefined in the bill,<sup>14</sup> potentially opening the door to attack virtually every agency determination. Widely-held accepted scientific principles, such as evolution, for example, could come under attack simply because, according to one survey, 34% of Americans reject evolution entirely.<sup>15</sup> Regulations related to vaccines could be dis-

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<sup>10</sup>Id.

<sup>11</sup>Marc Allen Eisner, *Regulatory Politics in an Age of Polarization and Drift: Beyond Deregulation* (2017).

<sup>12</sup>Id.

<sup>13</sup>S. 951, Section 2, new 5 § U.S.C. 553(e).

<sup>14</sup>Id.

<sup>15</sup>*Religious Landscape Study*, Pew Research Center (2015) ([www.pewforum.org/2015/11/03/chapter-4-social-and-political-attitudes/](http://www.pewforum.org/2015/11/03/chapter-4-social-and-political-attitudes/)).

puted because, according to one survey, 12% of Americans believes that the benefits of vaccinations are not outweighed by the risks.<sup>16</sup>

Such arguments could then be litigated as part of the judicial review of the final rule and those who wish to disagree with widely accepted facts could use evidence of those disagreements to delay or even stop a regulation from going into effect. Chemical manufacturers could endlessly fight the toxicity of new chemicals, and pharmaceutical manufacturers could use this language to endlessly delay additional regulations of opioids.

In addition, this bill would turn back the standard of deference given to agency decision-making, shifting from the more deferential *Seminole Rock/Auer* deference<sup>17</sup> to *Skidmore* deference.<sup>18</sup> Instead of giving agencies deference absent “plainly erroneous or inconsistent” action by the agency,<sup>19</sup> as was the holding in *Auer*, *Skidmore*, deference applies a more subjective standard based on “the thoroughness evident in [the agency’s] consideration, the validity of its reason, and its consistency with earlier and later pronouncements.”<sup>20</sup> This shift to a less deferential standard of review will allow generalist judges to intervene and use their judgement over that of agency technical experts.

Creating a less deferential standard for courts to apply to agency rulemaking incentivizes additional lawsuits against agencies because there is a higher likelihood of success. It is therefore likely that this change will increase litigation over federal rules, further delaying their implementation and raising the likelihood that agency decisions will be overturned. When agency rules are delayed for years, businesses are left with significant uncertainty knowing that a new regulation has been written, but unsure when and if it will be implemented. If more and more of these rules are eventually overturned, that is time and money wasted by these companies waiting and preparing for a rule that is never implemented. In other words, increased second-guessing of agency decision-making that is based on technical expertise would result in more uncertainty and instability, not less.

We are also concerned that the language in the bill requiring an agency to choose the most “cost-effective” alternative when issuing a final “major” or “high-impact” rule will paralyze agencies and prevent implementation of final rules.<sup>21</sup> The appropriate balance between costs and effectiveness is inherently subjective. For example, requiring hard hats at construction sites is more costly than posting “warning” signs about the dangers of the site, but it likely saves more lives.

Although requirements like “most cost-effective” and “least burdensome” may sound practical, when statutes utilize absolutist language like that, courts are required to interpret the requirement literally, resulting in endless litigation and an inability to issue final rules protecting Americans’ health and safety. That is what

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<sup>16</sup> Pew Research Center, *Vast Majority of Americans Say Benefits of Childhood Vaccines Outweigh Risks* (Feb. 2, 2017) ([www.pewinternet.org/2017/02/02/vast-majority-of-americans-say-benefits-of-childhood-vaccines-outweigh-risks/](http://www.pewinternet.org/2017/02/02/vast-majority-of-americans-say-benefits-of-childhood-vaccines-outweigh-risks/)).

<sup>17</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997).

<sup>18</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>19</sup> *Auer* at 461.

<sup>20</sup> *Skidmore* at 140.

<sup>21</sup> S. 951, Section 2, new 5 U.S.C. § 553(f).

happened with the “least burdensome” standard in the Toxic Substances Control Act, which prevented the regulation of toxic chemicals and known carcinogens like asbestos under the Toxic Substances Control Act for decades, finally forcing broad bipartisan majorities to recognize the futility of this requirement and act to change the law in a rare bipartisan moment.<sup>22</sup>

Agencies already face considerable pressure to select the least expensive and most effective option that meets the goals of the law and the administration when issuing regulations. Including such rigid requirements in statute makes their regulatory function virtually impossible to accomplish.

As we have noted, the principle of using cost-benefit analysis to inform the development of public policy is both commonsense and has been shown by administrations of both parties to be beneficial over the last 40 years. However not all public policy and regulation can be reduced to dollars and cents and weighed against each other. Public policy and the statutes and regulations that implement those policies are also an expression of the values of the American people as reflected by government action.

For example, in 2012, the Department of Justice (DOJ) completed cost-benefit analyses as it wrote rules to implement the Prison Rape Elimination Act.<sup>23</sup> The absurdity of the DOJ developing monetary values for avoiding 17 different types of sexual assault is clear in hindsight. However, it was apparently not clear to DOJ when as they went through the long process to implement rules, which at its core, was about human dignity and not monetary concerns. As noted by Georgetown Law Professor Lisa Heinzerling in her analysis of this rulemaking, “[i]n its 168-page Regulatory Impact Analysis, DOJ treats the reader to a labored, distasteful, and gratuitous essay on the economics of rape and sexual abuse.”<sup>24</sup>

While the current system does provide some flexibility to forgo cost-benefit analysis when warranted, agencies are already hesitant to use that flexibility. In the case of DOJ’s Prison Rape Elimination Act regulations, even though the Administration likely had the flexibility to determine that a cost-benefit analysis was not appropriate, it chose not to use it. One can only imagine the number of equally ridiculous and inappropriate cost-benefit analyses that would take place if agencies are further constrained from exercising discretionary judgement.

As much as we would like the government to function like a machine, we must recognize that reasonable human judgement must be part of the rulemaking process. This means that there are limits to when the use of cost-benefit analysis is appropriate and codifying and expanding these principles, turning them into judicially reviewable requirements with no flexibility would result in actions that do not pass the commonsense test that is needed for regulatory actions.

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<sup>22</sup> *Corrosion Proof Fittings v. EPA*, 947 F. 2d 1201 (1991).

<sup>23</sup> Prison Rape Elimination Act, Pub. L. No. 108-79 (2003).

<sup>24</sup> Lisa Heinzerling, *Cost-Benefit Jumps the Shark*, Georgetown Law Faculty (blog) (June 13, 2012) ([www.gulcfa.typepad.com/georgetown\\_university\\_law/2012/06/cost-benefit-jumps-the-shark.html](http://www.gulcfa.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html)).

*S. 951 Would Override Current Statutes and Impose a Supermandate on Agencies*

A number of health, safety and environmental statutes specifically bar agencies from undertaking certain considerations or specifically provide the decision-making criteria that the agency should use in rulemakings. However, this bill seems to require agencies to adhere to its requirements for all regulations, regardless of the original intent of the authorizing statutes, overturning the clear congressional intent of many statutes.

Instead of Congress taking up and amending how the Clean Air Act, the Packers and Stockyards Act or the Telecommunications Act work, for example, S. 951 would effectively change how all of those statutes function. This point is highlighted by the fact that S. 951 amends at least 16 existing statutes to ensure they conform with the changes made by this bill, including the Consumer Product Safety Act, the Endangered Species Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Homeless Assistance Act, the Native American Programs Act, the Poison Prevention Packaging Act, the Poultry Products Inspection Act, the Rural Electrification Act, the Social Security Act, and the Toxic Substance Control Act.

Therefore, while courts have found that the provisions of certain existing statutes specifically bar the use of cost-benefit analysis for regulations authorized by those statutes,<sup>25</sup> agencies would no longer be able to rely on the agency-specific requirements in their authorizing statutes and would instead be required to follow the mandatory requirements of this bill. The American Bar Association has criticized similar “supermandates” saying that “[much], perhaps most, of the safety and health legislation now on the books would seemingly be displaced.”<sup>26</sup> Imposing these requirements onto these statutes goes against the original intent of the legislation that created the statutes and will have a significant impact on agencies’ ability to carry out their missions.

*S. 951 Would Politicize Independent Regulatory Agency Rulemaking*

A major reason that Congress establishes independent agencies is to safeguard against political interference in their rulemaking process. S. 951 would extend the bill’s regulatory requirements to the independent regulatory agencies that, while they may have their own statutory requirements, are not currently subject to the executive orders relating to the promulgation of regulations. It would require independent regulatory agencies to submit their regulatory analyses to the Office of Information and Regulatory Affairs (OIRA), unquestionably giving the White House control over the shape, content and timing of regulations issued by independent agencies. We appreciate the need to ensure thoughtful analysis and understand the desire for independent review of the impacts of a proposed rule during the regulatory process. However, we are con-

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<sup>25</sup> See, *Whitman v Am. Trucking Assn’s., Inc.*, 531 U.S. 457, 471 (2001).

<sup>26</sup> Amer. Bar Assoc. Section of Admin. L. and Reg. Practice, Comments on H.R. 3010, The Regulatory Accountability Act of 2011 12-13 (2011), citing Sidney A. Shapiro & Robert L. Glicksman, *Risk Regulation at Risk: restoring a Pragmatic Approach* 32 (2003) (which surveyed 22 health, safety, and environmental laws and found that only two contain a substantive cost-benefit mandate).

cerned with the impact this would have on the regulatory process of independent agencies, which is intended to be insulated from political considerations.

In the past, members of both parties have expressed concern over a president's ability to influence rulemakings at independent regulatory agencies. For example, in February 2016, the majority staff of this committee released a report alleging that President Obama improperly interfered with open internet rulemaking promulgated by the Federal Communications Commission (FCC). Their report concluded that, “[p]olitics should never trump policy, especially not when an agency, like the FCC, was created for the expressed purpose of being independent and above the political fray.”<sup>27</sup>

It is important that we do not further politicize the regulatory process at these independent regulatory agencies by giving any president of either party the ability to interfere with these independent rulemakings. This bill would give Congress' approval to political interference in the rulemaking at these independent regulatory agencies and provide a president with the ability to exert more influence on independent regulatory agencies, which Congress intended to be independent and above the political fray.

#### *Conclusion*

The work we do here in Congress and in this committee to reform the regulatory process should encourage reducing burdens and increasing transparency, while achieving the greatest public benefit. It should be our goal to have the most efficient, effective, and transparent regulatory process possible, and to ensure that process results in common-sense regulations. We do not believe this bill would improve the regulatory process, and in fact, would make the process far less efficient and insert additional political considerations into the process. For these reasons, we oppose S. 951 and urge our colleagues to join us in opposition.

#### VIII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 951 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

## UNITED STATES CODE

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<sup>27</sup> Staff Report of the Majority Office of the Senate Committee on Homeland Security and Governmental Affairs, *Regulating the Internet: How the White House Bowled over FCC Independence*, 114th Cong. (February 29, 2016).

## **TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES**

### **PART I—THE AGENCIES GENERALLY**

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#### **CHAPTER 5—ADMINISTRATIVE PROCEDURE**

\* \* \* \* \*

##### **Subchapter II—Administrative Procedure**

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###### **SEC. 551. DEFINITIONS**

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(1) \* \* \*

\* \* \* \* \*

(5) **["rule making"]** “rulemaking” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than **["rule making"]** rulemaking but including licensing;

\* \* \* \* \*

(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) “guidance” means an agency statement of general applicability, other than a rule, that—

(A) is not intended to have the force and effect of law;  
and

(B) sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue;

(16) “high-impact rule” means any rule that the Administrator determines is likely to cause an annual effect on the economy of \$1,000,000,000 or more, adjusted once every 5 years to reflect increases in the Consumer Price Index for All Urban Consumers, as published by the Bureau of Labor Statistics of the Department of Labor;

(17) “major guidance” means guidance that the Administrator finds is likely to lead to—

(A) an annual effect on the economy of \$100,000,000 or more, adjusted once every 5 years to reflect increases in the Consumer Price Index for All Urban Consumer, as pub-

*lished by the Bureau of Labor Statistics of the Department of Labor;*

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

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

*(18) "major rule" means any rule that the Administrator determines is likely to cause—*

*(A) an annual effect on the economy of \$100,000,000 or more, adjusted once every 5 years to reflect increases in the Consumer Price Index for All Urban Consumer, as published by the Bureau of Labor Statistics of the Department of Labor;*

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

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

*(19) "Office of Information and Regulatory Affairs" means the office established under section 3503 of title 44 and any successor to that office; and*

*(20) "Administrator" means the Administrator of the Office of Information and Regulatory Affairs.*

**SEC. 552. \* \* \***

**SEC. 553. [RULE MAKING] RULEMAKING.**

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

*(1) \* \* \**

*(2) \* \* \**

**[(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 there-**

for 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) *RULEMAKING CONSIDERATIONS.—In a rulemaking, an agency shall consider, in addition to other applicable considerations, the following:*

(1) *The legal authority under which a rule may be proposed, including whether rulemaking is required by statute or is within the discretion of the agency.*

(2) *The nature and significance of the problem the agency intends to address with a rule.*

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

(4) *A reasonable number of alternatives for a new rule that meet the statutory objective, including substantial alternatives or other responses identified by interested persons, with the consideration of 3 alternatives presumed to be reasonable.*

(5) *For any major rule or high-impact rule, unless prohibited by law, the potential costs and benefits associated with potential alternative rules and other responses considered under paragraph (4), including quantitative and qualitative analyses of—*

*(A) the direct costs and benefits;*

*(B) the nature and degree of risks addressed by the rule and the countervailing risks that might be posed by agency actions; and*

*(C) to the extent practicable, the cumulative and indirect costs and benefits.*

(c) *NOTICE OF PROPOSED RULEMAKING.—*

(1) *IN GENERAL.—If an agency determines that the objectives of the agency require the agency to issue a rule, the agency shall notify the Administrator and publish a notice of proposed rulemaking in the Federal Register, which shall include—*

(A) a statement of the time, place, and nature of any public rulemaking proceedings;

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

(C) the text of the proposed rule;

(D) a summary of information known to the agency concerning the considerations described in subsection (b); and

(E) where otherwise consistent with applicable law, for any major rule or high-impact rule—

(i) a reasoned preliminary explanation regarding how—

(I) the proposed rule meets the statutory objectives; and

(II) the benefits of the proposed rule justify the costs; and

(ii) a discussion of—

(I) the costs and benefits of alternatives considered by the agency under subsection (b)(4);

(II) whether the alternatives considered by the agency under subsection (b)(4) meet relevant statutory objectives; and

(III) the reasons why the agency did not propose an alternative considered by the agency under subsection (b)(4).

(2) ACCESSIBILITY.—

(A) IN GENERAL.—Except as provided in subparagraph (B), not later than the date on which an agency publishes a notice of proposed rulemaking under paragraph (1), all studies, models, scientific literature, and other information developed or relied upon by the agency, and actions taken by the agency to obtain that information, in connection with the determination of the agency to propose the rule that is the subject of the rulemaking shall be placed in the docket for the proposed rule and made accessible to the public.

(B) EXCEPTION.—Subparagraph (A) shall not apply with respect to information that is exempt from disclosure under section 552(b).

(3) INFORMATION QUALITY.—If an agency proposes a rule that rests upon scientific, technical, or economic information, the agency shall propose the rule on the basis of the best reasonably available scientific, technical, or economic information.

(4) PUBLIC COMMENT.—If an agency proposes a rule that rests upon scientific, technical, or economic information, the agency shall propose the rule on the basis of the best reasonably available scientific, technical, or economic information.

(A) IN GENERAL.—After publishing a notice of proposed rulemaking under paragraph (1), an agency shall provide interested persons an opportunity to participate in the rulemaking through submission of written material, data, views, or arguments with or without opportunity for oral presentation, except that—

(i) if a public hearing is convened under subsection (e), reasonable opportunity for oral presentation shall

*be provided at the public hearing as provided in subsection (e); and*

*(ii) when, other than as provided in subsection (e), a rule is required by statute to be made on the record after opportunity for an agency hearing—*

- (I) sections 556 and 557 shall apply; and*
- (II) the petition procedures of subsection (e) shall not apply.*

*(B) TIMELINE.—An agency shall provide not less than 60 days, or, with respect to a proposed major rule or a proposed high-impact rule, not less than 90 days, for interested persons to submit written material, data, views, or arguments under subparagraph (A).*

**(5) CHANGE OF CLASSIFICATION AFTER PUBLICATION OF NOTICE.**—*If, after an agency submits notification and publishes the notice of proposed rulemaking required under paragraph (1), a proposed rule is determined to be a major rule or a high-impact rule, the agency shall—*

*(A) publish a notice in the Federal Register with respect to the change of the classification of the rule; and*

*(B) allow interested persons an additional opportunity of not less than 30 days to comment on—*

- (i) the rule; and*
- (ii) the change of the classification of the rule.*

**(6) PROHIBITION ON CERTAIN COMMUNICATIONS.**—

*(A) IN GENERAL.—Except as provided in subparagraph (B), after an agency publishes a notice of proposed rulemaking required under paragraph (1), or after an agency publishes a notice of initiation of rulemaking under subsection (d)(1)(B), the agency, and any individual acting in an official capacity on behalf of the agency, may not communicate, and a person who receives Federal funds from the agency may not use those funds to communicate, through written, oral, electronic, or other means, to the public with respect to the proposed rule in a manner than—*

*(i) directly advocates, in support of or against the proposed rule, for the submission of information that will form part of the record for the proposed rule;*

*(ii) appeals to the public, or solicits a third party, to undertake advocacy in support of or against the proposed rule; or*

*(iii) is directly or indirectly for the purpose of publicity or propaganda within the United States in a manner that Congress has not authorized.*

*(B) EXCEPTION.—The prohibition under subparagraph (A) shall not apply to a communication that requests comments on, or provides information regarding, a proposed rule in an impartial manner.*

**(d) INITIATION OF RULEMAKING FOR MAJOR AND HIGH-IMPACT RULES.**—

**(1) NOTICE FOR MAJOR AND HIGH-IMPACT RULES.**—*When an agency determines to initiate a rulemaking that may result in a major rule or high-impact rule, the agency shall—*

(A) establish an electronic docket for that rulemaking, which may have a physical counterpart; and

(B) publish a notice of initiation of rulemaking in the Federal Register, which shall—

(i) briefly describe the subject and objectives of, and the problem to be solved by, the rule;

(ii) reference the legal authority under which the rule would be proposed;

(iii) invite interested persons to propose alternatives and other ideas regarding how best to accomplish the objectives of the agency in the most effective manner; and

(iv) indicate how interested persons may submit written material for the docket.

(2) ACCESSIBILITY.—All information provided to the agency under paragraph (1) shall be promptly placed in the docket and made accessible to the public.

(3) APPLICABILITY.—With respect to the alternatives and other ideas proposed under paragraph (1)(B)(iii)—

(A) the alternatives and other ideas are for the benefit of—

(i) the agency receiving the alternatives and other ideas; and

(ii) the public; and

(B) the agency receiving the alternatives and other ideas may respond to the alternatives and other ideas.

(4) TIMETABLE.—

(A) IN GENERAL.—With respect to a rulemaking for a major rule or a high-impact rule, the agency proposing the rule shall establish a timetable for the rulemaking that—

(i) includes intermediate and final completion dates for actions of the agency; and

(ii) shall be published in the electronic docket established under paragraph (1)(A) with respect to the rulemaking.

(B) CONSIDERATION OF FACTORS.—In establishing the timetable required under subparagraph (A), an agency shall consider relevant factors, including—

(i) the size and complexity of the rulemaking;

(ii) the resources available to the agency;

(iii) the national significance of the rulemaking; and

(iv) all statutory requirements that govern the timing of the rulemaking.

(C) REPORT REQUIRED.—

(i) IN GENERAL.—An agency that fails to meet an intermediate or final completion date for an action established under subparagraph (A) shall submit to Congress and the Director of the Office of Management and Budget a report regarding why the agency failed to meet the completion date.

(ii) CONTENTS; PUBLICATION IN FEDERAL REGISTER.—A report submitted under clause (i) shall—

(I) include an amended timetable for the rulemaking; and

- (II) be published—  
 (aa) in the Federal Register; and  
 (bb) in the electronic docket established under paragraph (1)(A) with respect to the rulemaking.
- (5) NOTICE OF DETERMINATION OF OTHER AGENCY COURSE.—  
 (A) IN GENERAL.—If after publishing the notice required under paragraph (1), an agency determines not to issue a major rule or a high-impact rule, the agency shall, after consulting with the Administrator—  
 (i) publish a notice of determination of other agency course; and  
 (ii) if the agency intends to issue a rule, comply with the procedures required under subsection (c).  
 (B) CONTENTS.—A notice of determination of other agency course published under subparagraph (A)(i) shall include—  
 (i) a description of the alternative response the agency has determined to adopt; and  
 (ii) if the agency intends to issue a rule, any information required under subsection (c).
- (e) PUBLIC HEARING FOR HIGH-IMPACT RULES AND CERTAIN MAJOR RULES.—  
 (1) PETITION FOR PUBLIC HEARING.—  
 (A) IN GENERAL.—Before the date on which the comment period closes with respect to a proposed high-impact rule or a proposed major rule described in section 551(18)(A), an interested person may petition the agency that proposed the rule to hold a public hearing in accordance with this subsection.  
 (B) PETITION FOR PUBLIC HEARING FOR HIGH-IMPACT RULES.—  
 (i) GRANTING OF PETITION.—Not later than 30 days after the date on which an agency receives a petition submitted under subparagraph (A) with respect to a high-impact rule, the agency shall grant the petition if the petition shows that—  
 (I) the proposed rule is based on conclusions with respect to 1 or more specific scientific, technical, economic, or other complex factual issues that are genuinely disputed;  
 (II) with respect to a rule that the agency is required to reissue not less frequently than once every 3 years, the interested person submitting the petition could not have raised the disputed factual issues described in subclause (I) during the 5-year period preceding the date on which the petition is submitted; and  
 (III) the resolution of the disputed factual issues described in subclause (I) would likely have an effect on—  
 (aa) the costs and benefits of the proposed rule; or

(bb) whether the proposed rule achieves the statutory purpose.

(ii) **DENIAL OF PETITION.**—If an agency denies a petition submitted under clause (i) in whole or in part, the agency shall include in the rulemaking record an explanation for the denial sufficient for judicial review, including—

(I) findings by the agency that—

(aa) there is no genuine dispute as to factual issues raised by the petition; or

(bb) with respect to a rule that the agency is required to reissue not less frequently than once every 3 years, the interested person submitting the petition could have raised the disputed factual issues in the petition during the 5-year period preceding the date on which the petition is submitted; and

(II) a reasoned determination by the agency that the factual issues raised by the petition, even if subject to genuine dispute and not subject to sub-clause (I)(bb), will not have an effect on—

(aa) the costs and benefits of the proposed rule; or

(bb) whether the proposed rule achieves the statutory purpose.

(iii) **INCLUSION IN THE RECORD.**—A petition submitted under subparagraph (A) with respect to a high-impact rule and the decision of an agency with respect to the petition shall be included in the rulemaking record.

(C) **PETITION FOR PUBLIC HEARING FOR CERTAIN MAJOR RULES.**—

(i) **IN GENERAL.**—In the case of a major rule described in section 551(18)(A), any interested person may petition for a hearing under this subsection on the grounds and within the time limitation described in subparagraph (B)(i).

(ii) **AGENCY AUTHORITY TO DENY PETITION.**—An agency may deny a petition submitted to the agency under clause (i) if the agency reasonably determines that—

(I) a hearing—

(aa) would not advance the consideration of the proposed rule by the agency; or

(bb) would, in light of the need for agency action, unreasonably delay completion of the rulemaking; or

(II) with respect to a rule that the agency is required to reissue not less frequently than once every 3 years, the interested person submitting the petition could have raised the disputed factual issues in the petition during the 5-year period preceding the date on which the petition is submitted.

- (iii) *INCLUSION IN THE RECORD.*—A petition submitted under clause (i) and the decision of an agency with respect to the petition shall be included in the rulemaking record.
- (2) *NOTICE OF HEARING.*—Not later than 45 days before the date on which a hearing is held under this subsection, agency shall publish in the *Federal Register* a notice specifying—
- (A) the proposed rule to be considered at the hearing; and
  - (B) the factual issues to be considered at the hearing.
- (3) *HEARING REQUIREMENTS.*—
- (A) *LIMITED NATURE OF HEARING.*—A hearing held under this subsection shall be limited to—
    - (i) the specific factual issues raised in a petition granted in whole or in part under paragraph (1); and
    - (ii) any other factual issues the resolution of which an agency, in the discretion of the agency, determines will advance consideration by the agency of the proposed rule.
  - (B) *PROCEDURES.*—
    - (i) *BURDEN OF PROOF.*—Except as otherwise provided by statute, a proponent of a rule has the burden of proof in a hearing held under this subsection.
    - (ii) *ADMISSION OF EVIDENCE.*—In a hearing held under this subsection, any documentary or oral evidence may be received, except that an agency, as a matter of policy, shall provide for the exclusion of immaterial or unduly repetitious evidence.
    - (iii) *ADOPTION OF RULE GOVERNING HEARINGS.*—To govern a hearing held under this subsection, each agency shall adopt rules that provide for—
      - (I) the appointment of an agency official or administrative law judge to preside at the hearing;
      - (II) the presentation by interested parties of relevant documentary or oral evidence, unless the evidence is immaterial or unduly repetitious;
      - (III) a reasonable and adequate opportunity for cross-examination by interested parties concerning genuinely disputed factual issues raised by the petition, provided that, in the case of multiple interested parties with the same or similar interests, the agency may require the use of common counsel where common counsel may adequately represent the interests that will be significantly affected by the proposed rule; and
      - (IV) when appropriate, and to the extent practicable, the consolidation of proceedings with respect to multiple petitions submitted under this subsection into a single hearing.
    - (C) *RECORD OF HEARING.*—A transcript of testimony and exhibits, together with all papers and requests filed in the hearing, shall constitute the exclusive record for decision of the factual issues addressed in a hearing held under this subsection.
  - (3) *JUDICIAL REVIEW.*—

(A) *IN GENERAL.*—Failure to petition for a hearing under this subsection shall not preclude review of any claim that could have been raised in the hearing petition or at the hearing.

(B) *TIMING OF JUDICIAL REVIEW.*—There shall be no judicial review of the disposition of a petition by an agency under this subsection until judicial review of the final agency action.

(f) *FINAL RULES.*—

(1) *EFFECTIVENESS OF MAJOR OR HIGH-IMPACT RULE.*—

(A) *IN GENERAL.*—Except as provided in subparagraph (B), in a rulemaking for a major rule or a high-impact rule, an agency shall adopt the most cost-effective rule that—

- (i) is considered under subsection (b)(4); and
- (ii) meets relevant statutory objectives.

(B) *EXCEPTION.*—In a rulemaking for a major rule or a high-impact rule, an agency may adopt a rule that is more costly than the most cost-effective alternative that would achieve the relevant statutory objectives only if—

- (i) the additional benefits of the more costly rule justify the additional costs of that rule;
- (ii) the agency specifically identifies each additional benefit described in clause (i) and the cost of each such additional benefit; and
- (iii) the agency explains why the agency adopted a rule that is more costly than the most cost-effective alternative.

(2) *PUBLICATION OF NOTICE OF FINAL RULEMAKING.*—When an agency adopts a final rule, the agency shall publish a notice of final rulemaking in the *Federal Register*, which shall include—

- (A) a concise, general statement of the basis and purpose of the rule;
- (B) a reasoned determination by the agency regarding the considerations described in subsection (b);
- (C) a response to each significant issue raised in the comments on the proposed rule; and
- (D) with respect to a major rule or a high-impact rule, a reasoned determination by the agency that—

- (i) the benefits of the rule advance the relevant statutory objectives and justify the costs of the rule; and
  - (ii) \* \* \*
- (I) no alternative considered would achieve the relevant statutory objectives in a more cost-effective manner than the rule; or
  - (II) the adoption by the agency of a more costly rule complies with paragraph (1)(B).

(3) *INFORMATION QUALITY.*—If an agency rulemaking rests upon scientific, technical, or economic information, the agency shall adopt a final rule on the basis of the best reasonably available scientific, technical, or economic information.

(4) *ACCESSIBILITY.*—

(A) *IN GENERAL.*—Except as provided in subparagraph (B), not later than the date on which an agency publishes a notice of final rulemaking under paragraph (2), all stud-

*ies, models, scientific literature, and other information developed or relied upon by the agency, and actions taken by the agency to obtain that information, in connection with the determination of the agency to finalize the rule that is the subject of the rulemaking shall be placed in the docket for the rule and made accessible to the public.*

*(B) EXCEPTION.—Subparagraph (A) shall not apply with respect to information that is exempt from disclosure under section 552(b).*

**(5) RULES ADOPTED AT THE END OF A PRESIDENTIAL ADMINISTRATION.—**

*(A) IN GENERAL.—During the 60-day period beginning on a transitional inauguration day (as defined in section 3349a), with respect to any final rule that had been placed on file for public inspection by the Office of the Federal Register or published in the Federal Register as of the date of the inauguration, but which had not become effective by the date of the inauguration, the agency issuing the rule may, by order, delay the effective date of the rule for not more than 90 days for the purpose of obtaining public comment on whether—*

- (i) the rule should be amended or rescinded; or*
- (ii) the effective date of the rule should be further delayed.*

*(B) OPPORTUNITY FOR COMMENT.—If an agency delays the effective date of a rule under subparagraph (A), the agency shall give the public not less than 30 days to submit comments.*

**(g) APPLICABILITY.—**

**(1) PRIMACY OF CERTAIN RULEMAKING CONSIDERATIONS AND PROCEDURES IN OTHER FEDERAL LAWS.—**

*(A) CONSIDERATIONS.—If a rulemaking is authorized under a Federal law that requires an agency to consider, or prohibits an agency from considering, a factor in a manner that is inconsistent with, or that conflicts with, the requirements under this section, for the purposes of this section, the requirement or prohibition, as applicable, in that other Federal law shall apply to the agency in the rulemaking.*

*(B) PROCEDURAL REQUIREMENTS.—If a rulemaking is authorized under a Federal law that requires an agency to follow or use, or prohibits an agency from following or using, a procedure in a manner that is duplicative of, or that conflicts with, a procedural requirement under this section, for the purposes of this section, the requirement or prohibition, as applicable, in that other Federal law shall apply to the agency in the rulemaking.*

**(2) GUIDANCE AND RULES OF ORGANIZATION.—Except as otherwise provided by law, this section shall not apply to guidance or rules of agency organization, procedure, or practice.**

**(3) EXCEPTIONS FOR GOOD CAUSE.—**

**(A) FINDING OF GOOD CAUSE.—**

- (i) IN GENERAL.—If an agency for good cause finds that compliance with subsection (c), (d), (e), or (f)(2)(B)*

*before issuing a final rule is unnecessary, impracticable, or contrary to the public interest, that subsection shall not apply and the agency may issue the final rule or an interim final rule, as applicable, under subparagraph (B) or (C).*

*(ii) INCORPORATION OF GOOD CAUSE FINDING.—If an agency makes a finding under clause (i), the agency shall include that finding and a brief statement with respect to the reasons for that finding in the final rule or interim final rule, as applicable, issued by the agency.*

**(B) DIRECT FINAL RULES.—**

*(i) IN GENERAL.—Except as provided in clause (ii), if an agency makes a finding under subparagraph (A)(i) that compliance with subsection (c), (d), (e), or (f)(2)(B) before issuing a final rule is unnecessary, the agency shall, before issuing the final rule—*

*(I) publish in the Federal Register the text of the final rule, the brief statement required under subparagraph (A)(ii), and a notice of opportunity for public comment;*

*(II) establish a comment period of not less than 30 days for any interested person to submit written material, data, views, or arguments with respect to the final rule; and*

*(III) provide notice of the date on which the rule will take effect.*

*(ii) EXCEPTION.—An agency that made a finding described in clause (i) may choose not to follow the requirements under that clause if the agency determines that following the requirements would not expedite the issuance of the final rule.*

*(iii) ADVERSE COMMENTS.—If an agency receives significant adverse comments with respect to a rule during the comment period established under clause (i)(II), the agency shall—*

*(I) withdraw the notice of final rulemaking published by the agency with respect to the rule; and*

*(II) complete rulemaking in accordance with subsections (c), (d), (e), and (f), as applicable.*

**(C) INTERIM FINAL RULES.—**

*(i) IN GENERAL.—If an agency for good cause finds that compliance with subsection (c), (d), (e), or (f)(2)(B) before issuing a final rule is impracticable or contrary to the public interest, the agency shall issue an interim final rule by—*

*(I) publishing the interim final rule and a request for public comment in the portion of the Federal Register relating to final rules; and*

*(II) providing a cross-reference in the portion of the Federal Register relating to proposed rules that requests public comment with respect to the rule not later than 60 days after the rule is published under subclause (I).*

(ii) *INTERIM PERIOD.*—

- (I) *IN GENERAL.*—Not later than 180 days after the date on which an agency issues an interim final rule under clause (i), the agency shall—
  - (aa) rescind the interim rule;
  - (bb) initiate rulemaking in accordance with subsections (c) through (f); or
  - (cc) take final action to adopt a final rule.

(II) *NO FORCE OR EFFECT.*—If, as of the end of the 180-day period described in subclause (I), an agency fails to take an action described in item (aa), (bb), or (cc) of that subclause, the interim final rule issued by the agency shall have no force or effect.

(4) *EXEMPTION FOR MONETARY POLICY.*—This section shall not apply to a rulemaking or to guidance that concerns monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

(h) *DATE OF PUBLICATION.*—A final rule, a direct final rule described in subsection (g)(3)(B), or an interim final rule described in subsection (g)(3)(C) shall be published not later than 30 days (or, in the case of a major rule or a high-impact rule, not later than 60 days) before the effective date of the rule, except—

- (1) for guidance; or
- (2) as otherwise provided by an agency for good cause and as published with the rule.

(i) *RIGHT TO PETITION AND REVIEW OF RULES.*—Each agency shall—

- (1) give interested persons the right to petition for the issuance, amendment, or repeal of a rule; and
- (2) on a continuing basis, invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal.

(j) *RULEMAKING GUIDELINES.*—

(1) *ASSESSMENT OF RULES.*—

- (A) *IN GENERAL.*—The Administrator shall establish guidelines for the assessment, including the quantitative and qualitative assessment, of—
  - (i) the costs and benefits of proposed and final rules;
  - (ii) the cost-effectiveness of proposed and final rules;
  - (iii) other economic issues that are relevant to rulemaking under this section or other sections of this part; and
  - (iv) risk assessments that are relevant to rulemaking under this section and other sections of this part.

(B) *AGENCY ANALYSIS OF RULES.*—

- (i) *IN GENERAL.*—The rigor of the cost-benefit analysis required by the guidelines established under subparagraph (A) shall be commensurate, as determined by the Administrator, with the economic impact of a rule.

(ii) *RISK ASSESSMENT GUIDELINES.*—*Guidelines for a risk assessment described in subparagraph (A)(iv) shall include criteria for—*

- (I) *selecting studies and models;*
- (II) *evaluating and weighing evidence; and*
- (III) *conducting peer reviews.*

(C) *UPDATING GUIDELINES.*—*Not less frequently than once every 10 years, the Administrator shall update the guidelines established under subparagraph (A) to enable each agency to use the best available techniques to quantify and evaluate present and future benefits, costs, other economic issues, and risks as objectively and accurately as practicable.*

(2) *SIMPLIFICATION OF RULES.*—

(A) *ISSUANCE OF GUIDELINES.*—*The Administrator shall issue guidelines to promote coordination, simplification, and harmonization of agency rules during the rulemaking process.*

(B) *REQUIREMENTS.*—*The guidelines issued by the Administrator under subparagraph (A) shall advise each agency to—*

(i) *avoid rules that are inconsistent or incompatible with, or duplicative of, other regulations of the agency and those of other agencies; and*

(ii) *draft the rules of the agency to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from the uncertainty.*

(3) *CONSISTENCY IN RULEMAKING.*—

(A) *IN GENERAL.*—*To promote consistency in rulemaking, the Administrator shall—*

(i) *issue guidelines to ensure that rulemaking conducted in whole or in part under procedures specified in provisions of law other than those under this section conform with the procedures set forth in this section to the fullest extent allowed by law; and*

(ii) *issue guidelines for the conduct of hearings under subsection (e), which shall provide a reasonable opportunity for cross-examination.*

(B) *AGENCY ADOPTION OF REGULATIONS.*—*Each agency shall adopt regulations for the conduct of hearings consistent with the guidelines issued under this paragraph.*

(k) *AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR GUIDANCE; AUTHORITY TO ISSUE GUIDELINES FOR ISSUANCE OF GUIDANCE.*—

(1) *IN GENERAL.*—*Agency guidance shall—*

(A) *not be used by an agency to foreclose consideration of issues as to which the guidance expresses a conclusion;*

(B) *state that the guidance is not legally binding; and*

(C) *at the time the guidance is issued, or upon request, be made available by the issuing agency to interested persons and the public.*

(2) *PROCEDURES TO ISSUE MAJOR GUIDANCE.*—*Before issuing any major guidance, an agency shall—*

(A) *make and document a reasoned determination that—*

(i) such guidance is understandable and complies with relevant statutory objectives and regulatory provisions; and

(ii) identifies the costs and benefits, including all costs and benefits to be considered during a rule-making under subsection (b), of requiring conduct conforming to such guidance and assures that such benefits justify such costs; and

(B) confer with the Administrator on the issuance of the major guidance to ensure that the guidance—

(i) is reasonable;

(ii) is understandable;

(iii) is consistent with relevant statutory and regulatory provisions and requirements or practices of other agencies;

(iv) does not produce costs that are unjustified by the benefits of the major guidance; and

(v) is otherwise appropriate.

(3) *ISSUANCE OF UPDATED GUIDANCE.*—

(A) *IN GENERAL.*—The Administrator shall issue updated guidelines for use by agencies in the issuance of guidance documents.

(B) *REQUIREMENTS.*—The guidelines issued by the Administrator under subparagraph (A) shall advise each agency—

(i) not to issue guidance documents that are inconsistent or incompatible with, or duplicative of, other rules of the agency and those of other agencies;

(ii) to draft the guidance documents of the agency to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from the uncertainty; and

(iii) how to develop and implement a strategy to ensure the proper use of guidance by the agency.

(l) *MAJOR RULE AND HIGH-IMPACT RULE FRAMEWORKS.*—

(1) *IN GENERAL.*—Beginning on the date that is 180 days after the date of enactment of this subsection, when an agency publishes in the Federal Register—

(A) a proposed major rule or a proposed high-impact rule, the agency shall include a potential framework for assessing the rule, which shall include a general statement of how the agency intends to measure the effectiveness of the rule; or

(B) a final major rule or a final high-impact rule, the agency shall include a framework for assessing the rule under paragraph (2), which shall include—

(i) a clear statement of the regulatory objectives of the rule, including a summary of the benefit and cost of the rule;

(ii) the methodology by which the agency plans to analyze the rule, including metrics by which the agency can measure—

(I) the effectiveness and benefits of the rule in producing the regulatory objectives of the rule; and

(II) the impacts, including any costs, of the rule on regulated and other impacted entities;

(iii) a plan for gathering data regarding the metrics described in clause (ii) on an ongoing basis, or at periodic times, including a method by which the agency will invite the public to participate in the review process and seek input from other agencies; and

(iv) a specific timeframe, as appropriate to the rule and not more than 10 years after the effective date of the rule, under which the agency shall conduct the assessment of the rule in accordance with paragraph (2)(A).

(2) ASSESSMENT.—

(A) IN GENERAL.—Each agency shall assess the data collected under paragraph (1)(B)(iii), using the methodology set forth in paragraph (1)(B)(ii) or any other appropriate methodology developed after the issuance of a final major rule or a final high-impact rule to better determine whether the regulatory objective was achieved, with respect to the rule—

(i) to analyze how the actual benefits and costs of the rule may have varied from those anticipated at the time the rule was issued; and

(ii) to determine whether—

(I) the rule is accomplishing the regulatory objective of the rule;

(II) the rule has been rendered unnecessary, taking into consideration—

(aa) changes in the subject area affected by the rule; and

(bb) whether the rule overlaps, duplicates, or conflicts with—

(AA) other rules; or

(BB) to the extent feasible, State and local government regulations;

(III) the rule needs to be modified in order to accomplish the regulatory objective; and

(IV) other alternatives to the rule or modification of the rule could better achieve the regulatory objective while imposing a smaller burden on society or increase cost-effectiveness, taking into consideration any cost already incurred.

(B) DIFFERENT METHODOLOGY.—If an agency uses a methodology other than the methodology under paragraph (1)(B)(ii) to assess data under subparagraph (A), the agency shall include as part of the notice required to be published under subparagraph (D) an explanation of the changes in circumstances that necessitated the use of that other methodology.

(C) SUBSEQUENT ASSESSMENTS.—

(i) IN GENERAL.—Except as provided in clause (ii), if, after an assessment of a major rule or a high-impact rule under subparagraph (A), an agency determines

*that the rule will remain in effect with or without modification, the agency shall—*

*(I) determine a specific time, as appropriate to the rule and not more than 10 years after the date on which the agency completes the assessment, under which the agency shall conduct another assessment of the rule in accordance with subparagraph (A); and*

*(II) if the assessment conducted under subclause (I) does not result in a repeal of the rule, periodically assess the rule in accordance with subparagraph (A) to ensure that the rule continues to meet the regulatory objective.*

*(ii) EXEMPTION.—The Administrator may exempt an agency from conducting a subsequent assessment of a rule under clause (i) if the Administrator determines that there is a foreseeable and apparent need for the rule beyond the timeframe required under clause (i)(I).*

*(D) PUBLICATION.—Not later than 180 days after the date on which an agency completes an assessment of a major rule or a high-impact rule under subparagraph (A), the agency shall publish a notice of availability of the results of the assessment in the Federal Register, including the specific time for any subsequent assessment of the rule under subparagraph (C)(i), if applicable.*

*(3) OIRA OVERSIGHT.—The Administrator shall—*

*(A) issue guidance for agencies regarding the development of the framework under paragraph (1) and the conduct of the assessments under paragraph (2)(A);*

*(B) oversee the timely compliance of agencies with this subsection;*

*(C) ensure that the results of each assessment conducted under paragraph (2)(A) are—*

*(i) published promptly on a centralized Federal website; and*

*(ii) noticed in the Federal Register in accordance with paragraph (2)(D);*

*(D) encourage and assist agencies to streamline and coordinate the assessment of major rules or high-impact rules with similar or related regulatory objectives;*

*(E) exempt an agency from including the framework required under paragraph (1)(B) when publishing a final major rule or a final high-impact rule if the Administrator determines that compliance with paragraph (1)(B) is unnecessary, impracticable, or contrary to the public interest, as described in subsection (g)(3)(A)(i); and*

*(F) extend the deadline specified by an agency for an assessment of a major rule or a high-impact rule under paragraph (1)(B)(iv) or paragraph (2)(C)(i)(I) for a period of not more than 90 days if the agency justifies why the agency is unable to complete the assessment by that deadline.*

*(4) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to affect—*

(A) the authority of an agency to assess or modify a major rule or a high-impact rule of the agency earlier than the end of the timeframe specified for the rule under paragraph (1)(B)(iv); or

(B) any other provision of law that requires an agency to conduct retrospective reviews of rules issued by the agency.

(5) APPLICABILITY.—

(A) IN GENERAL.—This subsection shall not apply to—

(i) a major rule or a high-impact rule of an agency—  
 (I) that the Administrator reviewed before the date of enactment of this subsection;

(II) for which the agency is required to conduct a retrospective review under any other provision of law that meets or exceeds the requirements of this subsection, as determined by the Administrator; or

(III) for which the authorizing statute is subject to periodic reauthorization by Congress not less frequently than once every 10 years;

(ii) interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice;

(iii) routine and administrative rules; or

(iv) a rule that is reviewed under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (12 U.S.C. 3311).

(B) DIRECT AND INTERIM FINAL MAJOR RULE OR HIGH-IMPACT RULE.—In the case of a major rule or a high-impact rule of an agency for which the agency is not required to issue a notice of proposed rulemaking in response to an emergency or a statutorily imposed deadline, the agency shall publish the framework required under paragraph (1)(B) in the Federal Register not later than 180 days after the date on which the agency publishes the rule.

(6) RECOMMENDATIONS TO CONGRESS.—If, under an assessment conducted under paragraph (2), an agency determines that a major rule or a high-impact rule should be modified or repealed, the agency may submit to Congress recommendations for legislation to amend applicable provisions of law if the agency is prohibited from modifying or repealing the rule under another provision of law.

(7) JUDICIAL REVIEW.—

(A) IN GENERAL.—Judicial review of agency compliance with this subsection is limited to whether an agency—

(i) published the framework for assessment of a major rule or a high-impact rule in accordance with paragraph (1); or

(ii) completed and published the required assessment of a major rule or a high-impact rule in accordance with subparagraphs (A) and (D) of paragraph (2).

(B) REMEDY AVAILABLE.—In granting relief in an action brought under subparagraph (A), a court may only issue an order remanding the major rule or the high-impact rule, as applicable, to the agency to comply with paragraph (1) or subparagraph (A) or (D) of paragraph (2), as applicable.

(C) *EFFECTIVE DATE OF MAJOR RULE.*—If, in an action brought under subparagraph (A)(i), a court determines that the agency did not comply, the major rule or the high-impact rule, as applicable, shall take effect notwithstanding any order issued by the court.

(D) *ADMINISTRATOR.*—Any determination, action, or inaction of the Administrator under this subsection shall not be subject to judicial review.

\* \* \* \* \*

**SEC. 556. \* \* \***

(a) \* \* \*

\* \* \* \* \*

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In ~~rule making~~ rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

\* \* \* \* \*

**SEC. 557. \* \* \***

(a) \* \* \*

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except

that in [rule making] *rulermaking* or determining applications for initial licenses—

\* \* \* \* \*

### **Subchapter III—Negotiated Rulemaking Procedure**

\* \* \* \* \*

**SEC. 562.** \* \* \*

\* \* \* \* \*

(1) \* \* \*

\* \* \* \* \*

(11) “rulermaking” [means “rule making” as that term is defined in section 551(5) of this title] has the meaning given the term in section 551.

\* \* \* \* \*

## **CHAPTER 6—ANALYSIS OF REGULATORY FUNCTIONS**

**SEC. 601.** \* \* \*

(1) \* \* \*

(2) the term “rule” means any rule for which the agency publishes a general notice of proposed rulermaking pursuant to [section 553(b)] section 553(c) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term “rule” does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

\* \* \* \* \*

## **CHAPTER 7—JUDICIAL REVIEW**

**SEC. 701. APPLICATION; DEFINITIONS.**

(a) \* \* \*

(b) \* \* \*

(1) \* \* \*

(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; 1 [and]

(2) “guidance” has the meaning given the term in section 551;

([2]3) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by section 551 of this title[.]; and

(4) "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.

\* \* \* \* \*

#### **SEC. 706. SCOPE OF REVIEW.**

**[To the extent necessary]** (a) *IN GENERAL.*—*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) compel agency action unlawfully withheld or unreasonably delayed; **[and]**

(2) hold unlawful and set aside, *or, when appropriate, remand a matter to an agency without setting aside*, agency action, findings, and conclusions found to be—

(A) \* \* \*

\* \* \* \* \*

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court**[.]**; and

(3) *with respect to the review of a high-impact rule, as defined in section 551(16), determine whether the factual findings of the agency issuing the rule are supported by substantial evidence.*

(b) *REVIEW OF ENTIRE RECORD; PREJUDICIAL ERROR.*—*In making a determination under subsection (a), the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.*

(c) *PRECLUSION OF REVIEW.*—*The determination of whether a rule is a major rule within the meaning of subparagraphs (B) and (C) of section 551(18) shall not be subject to judicial review.*

(d) *REVIEW OF CERTAIN GUIDANCE.*—*Agency guidance that does not interpret a statute or rule may be reviewed only under subsection (a)(2)(D).*

(e) *AGENCY INTERPRETATION OF RULES.*—*The weight that a reviewing court gives an interpretation by an agency of a rule of that agency shall depend on the thoroughness evident in the consideration of the rule by the agency, the validity of the reasoning of the agency, and the consistency of the interpretation with earlier and later pronouncements.*

\* \* \* \* \*

## **PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES**

\* \* \* \* \*

### **CHAPTER 11—OFFICE OF PERSONNEL MANAGEMENT**

\* \* \* \* \*

#### **SEC. 1103. \* \* \***

(a) \* \* \*

(b) \* \* \*

(1) The Director shall publish in the Federal Register general notice of any rule or regulation which is proposed by the Office and the application of which does not apply solely to the Office or its employees. Any such notice shall include the matter required under [section 553(b)(1), (2), and (3)] section 553(c) of this title.

**SEC. 1104 \* \* \***

**SEC. 1105. ADMINISTRATIVE PROCEDURE.**

Subject to section 1103(b) of this title, in the exercise of the functions assigned under this chapter, the Director shall be subject to [subsections (b), (c), and (d)] subsections (b) through (h) and (j) of section 553 of this title, notwithstanding subsection (a) of such section 553.

\* \* \* \* \*

## **TITLE 7—AGRICULTURE**

\* \* \* \* \*

### **CHAPTER 31—RURAL ELECTRIFICATION AND TELEPHONE SERVICE**

\* \* \* \* \*

#### **Subchapter II—Rural Telephone Service**

**SEC. 927. \* \* \***

(a) DUTIES.—The Secretary and the Governor of the telephone bank shall—

(1) notwithstanding section 553(a)(2) of title 5, cause to be published in the Federal Register, in accordance with [subsections (b) through (e)] subsections (b) through (k) of section 553 of such title, all rules, regulations, bulletins, and other written policy standards governing the operations of the telephone loan and loan guarantee programs administered under this chapter other than those relating to agency management and personnel;

\* \* \* \* \*

## **TITLE 15—COMMERCE AND TRADE**

\* \* \* \* \*

### **CHAPTER 25—FLAMMABLE FABRICS**

**SEC. 1193. \* \* \***

(a) \* \* \*

\* \* \* \* \*

(k) PETITION TO INITIATE RULEMAKING.—The Commission shall grant, in whole or in part, or deny any petition under [section 553(e)] section 553(i) of title 5 requesting the Commission to initiate a rulemaking, within a reasonable time after the date on

which such petition is filed. The Commission shall state the reasons for granting or denying such petition. The Commission may not deny any such petition on the basis of a voluntary standard unless the voluntary standard is in existence at the time of the denial of the petition, the Commission has determined that the voluntary standard is likely to result in the elimination or adequate reduction of the risk of injury identified in the petition, and it is likely that there will be substantial compliance with the standard.

\* \* \* \* \*

**SEC. 1203. \* \* \***

- (a) \* \* \*
- (b) \* \* \*
- (c) \* \* \*

(1) \* \* \*

(2) A regulation under paragraph (1) granting an exemption for a flammability standard or other regulation of a State or political subdivision of a State may be promulgated by the Commission only after it has provided, in accordance with [section 553(b)] section 553(c) of title 5, notice with respect to the promulgation of the regulation and has provided opportunity for the oral presentation of views respecting its promulgation.

\* \* \* \* \*

## **CHAPTER 30—HAZARDOUS SUBSTANCES**

\* \* \* \* \*

**SEC. 1262. \* \* \***

- (a) \* \* \*

\* \* \* \* \*

(e) REGULATION OF TOYS AND ARTICLES INTENDED FOR USE BY CHILDREN.—

(1) A determination by the Commission that a toy or other article intended for use by children presents an electrical, mechanical, or thermal hazard shall be made by regulation in accordance with the procedures prescribed by section 553 [(other than clause (B) of the last sentence of subsection (b) of such section) of title 5] of title 5, *United States Code, other than subsection (g)(3) of such section* unless the Commission elects the procedures prescribed by subsection (e) of section 371 of title 21, in which event such subsection and subsections (f) and (g) of such section 371 of title 21 shall apply to the making of such determination. If the Commission makes such election, it shall publish that fact with the proposal required to be published under paragraph (1) of such subsection (e).

\* \* \* \* \*

(j) PETITION TO INITIATE RULEMAKING.—The Commission shall grant, in whole or in part, or deny any petition under [section 553(e)] section 553(i) of title 5 requesting the Commission to initiate a rulemaking, within a reasonable time after the date on which such petition is filed. The Commission shall state the reasons for granting or denying such petition. The Commission may

not deny any such petition on the basis of a voluntary standard unless the voluntary standard is in existence at the time of the denial of the petition, the Commission has determined that the voluntary standard is likely to result in the elimination or adequate reduction of the risk of injury identified in the petition, and it is likely that there will be substantial compliance with the standard.

\* \* \* \* \*

### **CHAPTER 39A—SPECIAL PACKAGING OF HOUSEHOLD SUBSTANCES FOR PROTECTION OF CHILDREN**

\* \* \* \* \*

#### **SEC. 1474. \* \* \***

(a) RULE MAKING PROCEDURE; ELECTION AND APPLICATION OF PROCEDURE UNDER SECTION 371 OF TITLE 21; PUBLICATION OF ELECTION AND PROPOSAL.—Proceedings to issue, amend, or repeal a regulation prescribing a standard under section 1472 of this title shall be conducted in accordance with the procedures prescribed by section 553 (*[other than paragraph (3)(B) of the last sentence of subsection (b) of such section]* *other than subsection (g)(3) of such section*) of title 5 unless the Commission elects the procedures prescribed by subsection (e) of section 371 of title 21, in which event such subsection and subsections (f) and (g) of such section 371 shall apply to such proceedings. If the Commission makes such election, it shall publish that fact with the proposal required to be published under paragraph (1) of such subsection (e).

\* \* \* \* \*

#### **SEC. 1476. \* \* \***

- (a) \* \* \*
- (b) \* \* \*
- (c) \* \* \*

(1) \* \* \*

(2) A regulation under paragraph (1) granting an exemption for a standard or requirement of a State or political subdivision of a State may be promulgated by the Commission only after it has provided, in accordance with *[section 553(b)]* *section 553(c)* of title 5 notice with respect to the promulgation of the regulation and has provided opportunity for the oral presentation of views respecting its promulgation.

\* \* \* \* \*

### **CHAPTER 47—CONSUMER PRODUCT SAFETY**

\* \* \* \* \*

#### **SEC. 2058. \* \* \***

- (a) \* \* \*

\* \* \* \* \*

(i) PETITION TO INITIATE RULEMAKING.—The Commission shall grant, in whole or in part, or deny any petition under *[section 553(e)]* *section 553(i)* of title 5 requesting the Commission to initiate a rulemaking, within a reasonable time after the date on which such petition is filed. The Commission shall state the rea-

sons for granting or denying such petition. The Commission may not deny any such petition on the basis of a voluntary standard unless the voluntary standard is in existence at the time of the denial of the petition, the Commission has determined that the voluntary standard is likely to result in the elimination or adequate reduction of the risk of injury identified in the petition, and it is likely that there will be substantial compliance with the standard.

\* \* \* \* \*

## **CHAPTER 53—TOXIC SUBSTANCES CONTROL**

\* \* \* \* \*

### **SUBCHAPTER I—CONTROL OF TOXIC SUBSTANCES**

\* \* \* \* \*

#### **SEC. 2618. \* \* \***

(a) \* \* \*

(b) \* \* \*

(c) STANDARD OF REVIEW.—

(1) \* \* \*

(A) Upon the filing of a petition under subsection (a)(1) for judicial review of a rule or order, the court shall have jurisdiction (i) to grant appropriate relief, including interim relief, as provided in chapter 7 of title 5, and (ii) except as otherwise provided in subparagraph (B), to review such rule or order in accordance with chapter 7 of title 5.

(B) \* \* \*

(i) \* \* \*

(ii) the court may not review the contents and adequacy of any statement of basis and purpose required by section [553(c) of title 5] *section 553(f)(2)* to be incorporated in the rule or order, except as part of the record, taken as a whole.

\* \* \* \* \*

## **CHAPTER 60—NATURAL GAS POLICY**

\* \* \* \* \*

#### **SEC. 3412. \* \* \***

(a) \* \* \*

(b) OPPORTUNITY FOR ORAL PRESENTATIONS.—To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a) (other than an order under section 3361, 3362, or 3363 of this title). To the maximum extent practicable, such opportunity shall be afforded before the effective date of such rule or order. Such opportunity shall be afforded no later than 30 days after such date in the case of a waiver of the entire comment period under [section 553(d)(3)] *section 553(h)(2)* of title 5, and no later than 45 days after such date in all other cases. A transcript shall be made of any such oral presentation.

\* \* \* \* \*

## TITLE 16—CONSERVATION

\* \* \* \* \*

### CHAPTER 31—MARINE MAMMAL PROTECTION

\* \* \* \* \*

#### **SEC. 1379. \* \* \***

(a) \* \* \*

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(2) If the State agency requests the Secretary to regulate the taking of a species to which paragraph (1) applies within the zone described in section 1362(14)(B) 1 of this title for subsistence uses or for hunting, or both, in a manner consistent with the regulation by the State agency of such taking within the State, the Secretary shall adopt, and enforce within such zone, such of the State agency's regulatory provisions as the Secretary considers to be consistent with his administration of section 1371(a) of this title within such zone. The Secretary shall adopt such provisions through the issuance of regulations under section 553 of title 5, and with respect to such issuance the Regulatory Flexibility Act [5 U.S.C. 601 et seq.], the Paperwork Reduction Act, Executive Order Numbered 12291, dated February 17, 1981, and the thirty-day notice requirement in [subsection (d) of such section 553] subsection (h) of such section 553 shall not apply. For purposes of sections 1375, 1376, and 1377 of this title, such regulations shall be treated as having been issued under this subchapter.

\* \* \* \* \*

### CHAPTER 35—ENDANGERED SPECIES

#### **SEC. 1533. \* \* \***

(a) \* \* \*

(b) \* \* \*

(1) \* \* \*

(2) \* \* \*

(3) \* \* \*

(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553(e)] section 553(i) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

\* \* \* \* \*

(D) \* \* \*

(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553(e)] *section 553(i)* of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

\* \* \* \* \*

**TITLE 20—EDUCATION**

\* \* \* \* \*

**CHAPTER 31—GENERAL PROVISIONS CONCERNING EDUCATION**

\* \* \* \* \*

**SEC. 1221e-4. EDUCATIONAL IMPACT STATEMENT.**

Notwithstanding any other provision of law, no regulation affecting any institution of higher education in the United States, promulgated on or after October 3, 1980, shall become effective unless such agency causes to be published in the Federal Register a copy of such proposed regulation together with an educational impact assessment statement which shall determine whether any information required to be transmitted under such regulation is already being gathered by or is available from any other agency or authority of the United States. [Notwithstanding the exception provided under section 553(b) of title 5, such] *Such* statement shall be based upon the record established under the provisions of section 553 of title 5, compiled during the rulemaking proceeding regarding such regulation.

\* \* \* \* \*

**TITLE 21—FOOD AND DRUGS**

\* \* \* \* \*

**CHAPTER 10—POULTRY AND POULTRY PRODUCTS INSPECTION**

\* \* \* \* \*

**SEC. 463. \* \* \***

- (a) \* \* \*
- (b) \* \* \*

(c) ORAL PRESENTATION OF VIEWS.—In applying the provisions of [section 553(c) of title 5] *section 553(c)(4) of title 5, United States Code*, to proposed rule making under this chapter, an opportunity for the oral presentation of views shall be accorded all interested persons.

\* \* \* \* \*

## TITLE 42—THE PUBLIC HEALTH AND WELFARE

\* \* \* \* \*

### CHAPTER 7—SOCIAL SECURITY

\* \* \* \* \*

#### Subchapter II—Federal Old-Age, Survivors, and Disability Insurance Benefits

\* \* \* \* \*

##### **SEC. 421. \* \* \***

(a) \* \* \*

\* \* \* \* \*

(j) \* \* \*

(1) \* \* \*

(2) \* \* \*

(3) procedures by which the Commissioner of Social Security will monitor both the referral processes used and the product of professionals to whom cases are referred.

Nothing in this subsection shall be construed to preclude the issuance, [in accordance with section 553(b)(A) of title 5, of interpretive rules, general statements of policy, and rules of agency organization relating to consultative examinations if such rules and statements] *in accordance with section 553(g)(2) of title 5, United States Code, of guidance or rules of agency organization, procedure, or practice relating to consultative examinations if such guidance and rules* are consistent with such regulations.

\* \* \* \* \*

#### Subchapter XVIII—Health Insurance for Aged and Disabled

\* \* \* \* \*

### PART E—MISCELLANEOUS PROVISIONS

\* \* \* \* \*

##### **SEC. 1395hh. \* \* \***

(a) \* \* \*

(b) \* \* \*

(1) \* \* \*

(2) \* \* \*

(A) \* \* \*

(B) \* \* \*

[(C) subsection (b) of section 553 of title 5 does not apply pursuant to subparagraph (B) of such subsection.] *(C) subsection (c) of section 553 of title 5, United States Code, does not apply pursuant to subsection (g)(3) of such section.*

\* \* \* \* \*

### CHAPTER 119—HOMELESS ASSISTANCE

\* \* \* \* \*

## Subchapter IV—Housing Assistance

\* \* \* \* \*

### PART C—CONTINUUM OF CARE PROGRAM

\* \* \* \* \*

#### **SEC. 11387. REGULATIONS.**

Not later than the expiration of the 90-day period beginning on October 28, 1992, the Secretary shall issue interim regulations to carry out this part, which shall take effect upon issuance. The Secretary shall issue final regulations to carry out this part after notice and opportunity for public comment regarding the interim regulations, pursuant to the provisions of section 553 of title 5 [(notwithstanding subsections (a)(2), (b)(B), and (d)(3) of such section)] (*notwithstanding subsections (a)(2), (g)(3), and (h)(2) of such section*). The duration of the period for public comment shall not be less than 60 days, and the final regulations shall be issued not later than the expiration of the 60-day period beginning upon the conclusion of the comment period and shall take effect upon issuance.

\* \* \* \* \*

## CHAPTER 34—ECONOMIC OPPORTUNITY PROGRAM

\* \* \* \* \*

#### **SEC. 2992b-1. \* \* \***

- (a) \* \* \*
- (b) \* \* \*

(1) [(Subparagraph (A) of the last sentence of section 553(b) of title 5 shall not apply with respect to any interpretative rule or general statement of policy)] *Section 553(c) of title 5, United States Code, shall apply with respect to guidance*—

- (A) \* \* \*
- (B) \* \* \*

(2) [(Subparagraph (B) of the last sentence of section 553(b)] *Section 553(g)(3) of title 5, shall not apply with respect to any rule (other than [an interpretative rule or a general statement of policy]) guidance*)—

- (A) \* \* \*
- (B) \* \* \*

(3) [(The first 2 sentences of section 553(b)] *Section 553(c) of title 5 shall apply with respect to any rule (other than [an interpretative rule, a general statement of policy,] guidance or a rule of agency organization, procedure, or practice) that is*—

- (A) \* \* \*
- (B) \* \* \*

(c) **EFFECTIVE DATE OF RULE OR GENERAL STATEMENT OF POLICY.**—Notwithstanding [section 553(d)] *section 553(h) of title 5, no rule (including [an interpretative rule]) guidance or general statement of policy that*—

- (1) \* \* \*

(2) applies exclusively to any program, project, or activity authorized by, or carried out under, this subchapter;

may take effect until 30 days after the publication required under [the first 2 sentences of section 553(b)] section 553(c) of title 5.

(d) STATUTORY CITATION REQUIRED.—Each rule (including [an interpretative rule] and each general statement of policy] guidance to which this section applies shall contain after each of its sections, paragraphs, or similar textual units a citation to the particular provision of statutory or other law that is the legal authority for such section, paragraph, or unit.

(e) RULE OR GENERAL STATEMENT OF POLICY NECESSARY AS RESULT OF LEGISLATION; TIME FOR ISSUANCE.—Except as provided in subsection (c), if as a result of the enactment of any law affecting the administration of this subchapter it is necessary or appropriate for the Secretary to issue any rule (including [any interpretative rule] or a general statement of policy] guidance), the Secretary shall issue such rule [or such general statement of policy] not later than 180 days after the date of the enactment of such law.

(f) COPY OF RULE OR GENERAL STATEMENT OF POLICY TO CONGRESSIONAL LEADERS.—Whenever an agency publishes in the Federal Register a rule (including [an interpretative rule] or a general statement of policy] guidance) to which subsection (c) applies, such agency shall transmit a copy of such rule [or such general statement of policy] to the Speaker of the House of Representatives and the President pro tempore of the Senate.

(g) In this section, the term ‘guidance’ has the meaning given the term in section 551 of title 5, United States Code.

\* \* \* \* \*

## **CHAPTER 65—NOISE CONTROL**

\* \* \* \* \*

### **SEC. 4905. \* \* \***

- (a) \* \* \*
- (b) \* \* \*
- (c) \* \* \*

(2) After publication of any proposed regulations under this section, the Administrator shall allow interested persons an opportunity to participate in rulemaking in accordance with [the first sentence of section 553(c) of title 5] section 553(c)(4)(A) of title 5.

\* \* \* \* \*

## **CHAPTER 135—RESIDENCY AND SERVICE REQUIREMENTS IN FEDERALLY ASSISTED HOUSING**

\* \* \* \* \*

### **Subchapter 1—Standards and Obligations of Residency in Federally Assisted Housing**

\* \* \* \* \*

### **SEC. 13603. \* \* \***

- (a) \* \* \*
- (b) \* \* \*
- (1) \* \* \*

(2) \* \* \*

(3) PROCEDURE.—Not later than 90 days after the submission of the final report under subsection (a)(7), the Secretary shall issue a notice of proposed rulemaking of the regulations under this subsection providing for notice and opportunity for public comment regarding the regulations, pursuant to the provisions of section 553 of title 5 [(notwithstanding subsections (a)(2), (b)(B), and (d)(3) of such section)] (*notwithstanding subsections (a)(2), (g)(3), and (h)(2) of such section*). The duration of the period for public comment under such section 553 shall not be less than 60 days. The Secretary shall issue final regulations under this subsection not later than the expiration of the 60-day period beginning upon the conclusion of the comment period, which shall take effect upon issuance.

\* \* \* \* \*

**SEC. 13643. REGULATIONS.**

The Secretary shall issue regulations necessary to carry out subtitles B through F of this title and the amendments made by such subtitles not later than the expiration of the 6-month period beginning on October 28, 1992. The regulations shall be issued after notice and opportunity for public comment pursuant to the provisions of section 553 of title 5 [(notwithstanding subsections (a)(2), (b)(B), and (d)(3) of such section)] (*notwithstanding subsections (a)(2), (g)(3), and (h)(2) of such section*).

\* \* \* \* \*

**TITLE 41—PUBLIC CONTRACTS**

\* \* \* \* \*

**Subtitle IV—Miscellaneous**

\* \* \* \* \*

**CHAPTER 85—COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED**

\* \* \* \* \*

**SEC. 8503. \* \* \***

(a) \* \* \*

(1) \* \* \*

(2) CHANGES TO LIST.—The Committee may, by rule made in accordance with the requirements of section [553(b) to (e)] *section 553 of title 5*, add to and remove from the procurement list products so produced and services so provided.

\* \* \* \* \*

**TITLE 46—SHIPPING**

\* \* \* \* \*

## Subtitle II—Vessels and Seamen

\* \* \* \* \*

### PART J—MEASUREMENT OF VESSELS

\* \* \* \* \*

#### CHAPTER 141—GENERAL

\* \* \* \* \*

##### **SEC. 14104. \* \* \***

(a) \* \* \*

(b) If a statute allows for an alternate tonnage to be prescribed under this section, the Secretary may prescribe it by regulation. Any such regulation [shall be considered to be an interpretive regulation for purposes of section 553 of title 5] shall be subject to section 553 of title 5. Until an alternate tonnage is prescribed, the statutorily established tonnage shall apply to vessels measured under chapter 143 or chapter 145 of this title.

\* \* \* \* \*

## TITLE 50—WAR AND NATIONAL DEFENSE

\* \* \* \* \*

### CHAPTER 55—DEFENSE PRODUCTION

\* \* \* \* \*

##### **SEC. 4559. \* \* \***

(a) \* \* \*

(b)

(1) IN GENERAL.—Except as provided in subsection (c), any regulation issued under this chapter shall be published in the Federal Register and opportunity for public comment shall be provided [for not less than 30 days, consistent with the requirements of section 553(b)] in a manner consistent with the requirements of section 553(c) of title 5.

