EXTENSIONS OF REMARKS

PROVIDING FOR CONSIDERATION OF H.R. 3136, CONTRACT WITH AMERICA ADVANCEMENT ACT OF 1996

SPEECH OF

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IN THE HOUSE OF REPRESENTATIVES

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Mr. HYDE. Mr. Speaker, I submit for the RECORD a summary of the Small Business Regulatory Enforcement Fairness Act, included in H.R. 3136.

SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT VIEWS OF THE HOUSE COMMITTEES OF JURISDICTION ON THE CONGRESSIONAL INTENT REGARDING THE ''SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996''

I. SUMMARY OF THE LEGISLATION

The Hyde amendment to H.R. 3136 replaced Title III of the Contract with America Advancement Act of 1996 to incorporate a revised version of the Small Business Regulatory Enforcement Fairness Act of 1996 (the ''Act'). As enacted, Title III of H.R. 3136 became Title II of Public Law 104-121. This legislation was originally passed by the Senate as S. 942. The Hyde amendment makes a number of changes to the Senate bill to better implement certain recommendations of the 1995 White House Conference on Small Business regarding the development and enforcement of Federal regulations, including judicial review of agency actions under the Regulatory Flexibility Act (RFA). The amendment also provides for expedited procedures for Congress to review agency rules and to enact Resolutions of Disapproval voiding agency rules.

The goal of the legislation is to foster a more cooperative, less threatening regulatory environment among agencies, small businesses and other small entities. The legislation provides a framework to make federal regulators more accountable for their enforcement actions by providing small entities with an opportunity for redress of arbitrary enforcement actions. The centerpiece of the legislation is the RFA which requires a regulatory flexibility analysis of all rules that have a ''significant economic impact on a substantial number'' of small entities. Under the RFA, this term ''small entities'' includes small businesses, small non-profit organizations, and small governmental units.

II. SECTION-BY-SECTION ANALYSIS

Section 201

This section entitles the Act the ''Small Business Regulatory Enforcement Fairness Act of 1996.'

Section 202

This section of the Act sets forth findings as to the need for a strong small business sector, the disproportionate impact of regulations on small businesses, the recommendations of the 1995 White House Conference on Small Business, and the need for judicial review of the Regulatory Flexibility Act.

Section 203

This section of the Act sets forth the purposes of this legislation. These include the need to address some of the key Federal regulatory recommendations of the 1995 White House Conference on Small Business. The White House Conference produced a consensus that small businesses should be included earlier and more effectively in the regulatory process. The Act seeks to create a more cooperative and less threatening regulatory environment to help small businesses in their compliance efforts. The Act also provides small businesses with legal redress from arbitrary enforcement actions by making Federal regulators accountable for their actions. Additionally, the Act provides for judicial review of the RFA.

Subtitle A—Regulatory Compliance Simplification

Agencies would be required to publish easily understood guides to assist small businesses in complying with regulations and provide them informal, non-binding advice about regulatory compliance. This subtitle creates permissive authority for Small Business Development Centers to offer regulatory compliance information to small businesses and to establish resource centers to disseminate reference materials. Federal agencies are directed to cooperate with states to create guides that fully integrate Federal and state regulatory requirements on small businesses.

Section 211

This section defines certain terms as used in this subtitle. The term ''small entity'' is currently defined in the RFA (5 U.S.C. 601) to include small business concerns, as defined by section 3(a) of the Small Business Act (15 U.S.C. 632(a)) small nonprofit organizations and small governmental jurisdictions. The process of determining whether a given business qualifies as a small business is straightforward, using size standard thresholds established by the SBA based on Standard Industrial Classification codes. The RFA also defines small organization and small governmental jurisdiction (5 U.S.C. 601). Any definition established by an agency for purposes of implementing the RFA would also apply to this Act.

Section 212

This section requires agencies to publish ''small entity compliance guides'' to assist small entities in complying with regulations which are the subject of a final regulatory flexibility analysis. The bill does not allow judicial review of the guide itself. However, the agency's claim that the guide provides ''plain English'' assistance would be a matter of public record. In addition, the small business compliance guide would be available as evidence of the reasonableness of any proposed fine on the small entity.

Agencies should endeavor to make these ''plain English'' guides available to small entities through a coordinated distribution system for regulatory compliance information utilizing means such as the SBA's U.S. Business Advisor, the Small Business Ombudsman at the Environmental Protection Agency, state-run compliance assistance programs established under section 507 of the Clean Air Act, Manufacturing Technology Centers or Small Business Development Centers established under the Small Business Act.

Section 213

This section directs agencies that regulate small entities to answer inquiries of small entities seeking information on and advice about regulatory compliance. Some agencies already have established successful programs to provide compliance assistance and the amendment intends to encourage these efforts. For example, the IRS, SEC and the Customs Service have an established practice of issuing private letter rulings applying the law to a particular set of facts. This legislation does not require other agencies to establish programs with the same level of formality as found in the current practice of issuing private letter rulings. The use of toll free telephone numbers and other informal means of responding to small entities is encouraged. This legislation does not mandate changes in current programs at the IRS, SEC and Customs Service, but these agencies should consider establishing less formal means of providing small entities with informal guidance in accordance with this section.

This section gives agencies discretion to establish procedures and conditions under which they would provide advice to small entities. There is no requirement that the agency's advice to small entities be binding as to the legal effects of the actions of other entities. Any guidance provided by the agency applying statutory or regulatory provisions to facts supplied by the small entity would be available as relevant evidence of the reasonableness of any subsequently proposed fine on the small entity.

Section 214

This section creates permissive authority for Small Business Development Centers (SBDC) to provide information to small businesses regarding compliance with regulatory requirements. SBDCs would not become the predominant source of regulatory information, but would supplement agency efforts to make such information widely available. This section is not intended to grant an exclusive franchise to SBDC's for providing information on regulatory compliance.

There are small business information and technical assistance programs, both Federal and state, in various forms throughout this country. Some of the manufacturing technology centers and other similar extension programs administered by the National Institute of Standards and Technology are providing environmental compliance assistance in addition to general technology assistance. The small business stationary source technical and environmental compliance assistance programs established under section 507 of the Clean Air Act Amendments of 1990 is also providing compliance assistance to small businesses. This section is designed to add to the currently available resources for small businesses.

Compliance assistance programs can save small businesses money, improve their environmental performance and increase their competitiveness. They can help small businesses learn about cost-saving pollution prevention programs and new environmental technologies. Most importantly, they can help small business owners avoid potentially costly regulatory citations and adjudications. Comments from small business representatives in a variety of fora support the need for expansion of technical information assistance programs.

Section 215

This section directs agencies to cooperate with states to create guides that fully integrate Federal and state requirements on

small entities. Separate guides may be created for each state, or states may modify or supplement a guide to Federal requirements. Since different types of small entities are affected by different agency regulations, or are affected in different ways, agencies should consider preparing separate guides for the various sectors of the small business community and other small entities subject to their jurisdiction. Priority in producing these guides should be given to areas of law where rules are complex and where the regulated community tend to be small entities. Agencies may contract with outside providers to produce these guides and, to the extent practicable, agencies should utilize entities with the greatest experience in developing similar guides.

Section 216

This section provides that the effective date for this subtitle is 90 days after the date of enactment. The requirement for agencies to publish compliance guides applies to final rules published after the effective date. Agencies have one year from the date of enactment to develop their programs for informal small entity guidance, but these programs should assist small entities with regulatory questions regardless of the date of publication of the regulation at issue.

Subtitle B—Regulatory Enforcement Reforms

This subtitle creates a Small Business and Agriculture Regulatory Enforcement Ombudsman at the Small Business Administration to give small businesses a confidential means to comment on and rate the performance of agency enforcement personnel. It also creates Regional Small Business Regulatory Fairness Boards at the Small Business Administration to coordinate with the Ombudsman and to provide small businesses a greater opportunity to come together on a regional basis to assess the enforcement activities of the various Federal regulatory agencies.

This subtitle directs all Federal agencies that regulate small entities to develop policies or programs providing for waivers or reductions of civil penalties for violations by small entities, under appropriate circumstances.

Section 221

This section provides definitions for the terms as used in the subtitle. [See discussion set forth under ''Section 211'' above.]

Section 222

The Act creates a Small Business and Agriculture Regulatory Enforcement Ombudsman at the SBA to give small businesses a confidential means to comment on Federal regulatory agency enforcement activities. This might include providing toll-free telephone numbers, computer access points, or mail-in forms allowing businesses to comment on the enforcement activities of inspectors, auditors and other enforcement personnel. As used in this section of the bill, the term ''audit'' is not intended to refer to audits conducted by Inspectors General. This Ombudsman would not replace or diminish any similar ombudsman programs in other agencies.

Concerns have arisen in the Inspector General community that this Ombudsman might have new enforcement powers that would conflict with those currently held by the Inspectors General. Nothing in the Act is intended to supersede or conflict with the provisions of the Inspector General Act of 1978, as amended, or to otherwise restrict or interfere with the activities of any Office of the Inspector General.

The Ombudsman will compile the comments of small businesses and provide an annual evaluation similar to a ''customer satisfaction'' rating for different agencies, regions, or offices. The goal of this rating system is to see whether agencies and their personnel are in fact treating small businesses more like customers than potential criminals. Agencies will be provided an opportunity to comment on the Ombudsman's draft report, as is currently the practice with reports by the General Accounting Office. The final report may include a section in which an agency can address any concerns that the Ombudsman does not choose to address.

The Act states that the Ombudsman shall ''work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by such personnel.'' The SBA shall publicize the existence of the Ombudsman generally to the small business community and also work cooperatively with enforcement agencies to make small businesses aware of the program at the time of agency enforcement activity. The Ombudsman shall report annually to Congress based on substantiated comments received from small business concerns and the Boards, evaluating the enforcement activities of agency personnel including a rating of the responsiveness to small business of the various regional and program offices of each regulatory agency. The report to Congress shall in part be based on the findings and recommendation of the Boards as reported by the Ombudsman to affected agencies. While this language allows for comment on the enforcement activities of agency personnel in order to identify potential abuses of the regulatory process, it does not provide a mandate for the boards and the Ombudsman to create a public performance rating of individual agency employees.

The goal of this section is to reduce the instances of excessive and abusive enforcement actions. Those actions clearly originate in the acts of individual enforcement personnel. Sometimes the problem is with the policies of an agency, and the goal of this section is also to change the culture and policies of Federal regulatory agencies. At other times, the problem is not agency policy, but individuals who violate the agency's enforcement policy. To address this issue, the legislation includes a provision to allow the Ombudsman, where appropriate, to refer serious problems with individuals to the agency's Inspector General for proper action.

The intent of the Act is to give small businesses a voice in evaluating the overall performances of agencies and agency offices in their dealings with the small business community. The purpose of the Ombudsman's reports is not to rate individual agency personnel, but to assess each program's or agency's performance as a whole. The Ombudsman's report to Congress should not single out individual agency employees by name or assign an individual evaluation or rating that might interfere with agency management and personnel policies.

The Act also creates Regional Small Business Regulatory Fairness Boards at the SBA to coordinate with the Ombudsman and to provide small businesses a greater opportunity to track and comment on agency enforcement policies and practices. These boards provide an opportunity for representatives of small businesses to come together on a regional basis to assess the enforcement activities of the various federal regulatory agencies. The boards may meet to collect information about these activities, and report and make recommendations to the Ombudsman about the impact of agency enforcement policies or practices on small businesses. The boards will consist of owners, operators or officers of small entities who are appointed by the Administrator of the Small Business Administration. Prior to appointing any board members, the Administrator must consult with the leadership of the House and Senate Small Business Committees. There is nothing in the bill that would exempt the boards from the Federal Advisory Committee Act, which would apply according to its terms. The Boards may accept donations of services such as the use of a regional SBA office for conducting their meetings.

Section 223

The Act directs all federal agencies that regulate small entities to develop policies or programs providing for waivers or reductions of civil penalties for violations by small entities in certain circumstances. This section builds on the current Executive Order on small business enforcement practices and is intended to allow agencies flexibility to tailor their specific programs to their missions and charters. Agencies should also consider the ability of a small entity to pay in determining penalty assessments under appropriate circumstances. Each agency would have discretion to condition and limit the policy or program on appropriate conditions. For purposes of illustration, these could include requiring the small entity to act in good faith, requiring that violations be discovered through participation in agency supported compliance assistance programs, or requiring that violations be corrected within a reasonable time.

An agency's policy or program could also provide for suitable exclusions. Again, for purposes of illustration, these could include circumstances where the small entity has been subject to multiple enforcement actions, the violation involves criminal conduct, or poses a grave threat to worker safety, public health, safety or the environment.

In establishing their programs, it is up to each agency to develop the boundaries of their program and the specific circumstances for providing for a waiver or reduction of penalties; but once established, an agency must implement its program in an even-handed fashion. Agencies may distinguish among types of small entities and among classes of civil penalties. Some agencies have already established formal or informal policies or programs that would meet the requirements of this section. For example, the Environmental Protection Agency has adopted a small business enforcement policy that satisfies this section. While this legislation sets out a general requirement to establish penalty waiver and reduction programs, some agencies may be subject to other statutory requirements or limitations applicable to the agency or to a particular program. For example, this section is not intended to override, amend or affect provisions of the Occupational Safety and Health Act or the Mine Safety and Health Act that may impose specific limitations on the operation of penalty reduction or waiver programs.

Section 224

This section provides that this subtitle takes effect 90 days after the date of enactment.

Subtitle C—Equal Access to Justice Act Amendments

The Equal Access to Justice Act (EAJA) provides a means for prevailing parties to recover their attorneys fees in a wide variety of civil and administrative actions between eligible parties and the government. This Act amends EAJA to create a new avenue for parties to recover a portion of their attorneys fees and costs where the government

makes excessive demands in enforcing compliance with a statutory or regulatory requirement, either in an adversary adjudication or judicial review of the agency's enforcement action, or in a civil enforcement action. While this is a significant change from current law, the legislation is not intended to result in the awarding of attorneys fees as a matter of course. Rather, the legislation is intended to assist in changing the culture among government regulators to increase the reasonableness and fairness of their enforcement practices. Past agency practice too often has been to treat small businesses like suspects. One goal of this bill is to encourage government regulatory agencies to treat small businesses as partners sharing in a common goal of informed regulatory compliance. Government enforcement attorneys often take the position that they must zealously advocate for their client, in this case a regulatory agency, to the maximum extent permitted by law, as if they were representing an individual or other private party. But in the new regulatory climate for small businesses under this legislation, government attorneys with the advantages and resources of the federal government behind them in dealing with small entities must adjust their actions accordingly and not routinely issue original penalties or other demands at the high end of the scale merely as a way of pressuring small entities to agree to quick settlements.

Sections 231 and 232

H.R. 3136 will allow parties which do not prevail in a case involving the government to nevertheless recover a portion of their fees and cost in certain circumstances. The test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case and is unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.

For purposes of this Act, the term ''party'' is amended to include a ''small entity'' as that term is defined in section 601(6) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This will ensure consistency of coverage between the provisions of this subtitle and those of the Small Business Act (15 U.S.C. 632 (a)). This broadening of the term ''party'' is intended solely for purposes of the amendments to the EAJA effected under this subtitle. Other portions of the EAJA will continue to be governed by the definition of ''party'' as appears in current law.

The comparison called for in the Act is always between a ''demand'' by the government for injunctive and monetary relief taken as a whole and the final outcome of the case in terms of injunctive and monetary relief taken as a whole. As used in these amendments, the term ''demand'' means an express written demand that leads directly to an adversary adjudication or civil action. Thus, the ''demand'' at issue would be the government's demand that was pending upon commencement of the adjudication or action. A written demand by the government for performance or payment qualifies under this section regardless of form; it would include, but not be limited to, a fine, penalty notice, demand letter or citation. In the case of an adversary adjudication, the demand would often be a statement of the ''Definitive Penalty Amount.'' In the case of a civil action brought by the United States, the demand could be in the form of a demand for settlement issued prior to commencement to the litigation. In a civil action to review the determination of an administrative proceeding, the demand could be the demand that led to such proceeding. However, the term ''demand'' should not be read to extend to a mere recitation of facts and law in a complaint. The bill's definition of the term ''demand'' expressly excludes a recitation of the maximum statutory penalty in the complaint or elsewhere when accompanied by an express demand for a lesser amount. This definition is not intended to suggest that a statement of the maximum statutory penalty somewhere other than the complaint, which is not accompanied by an express demand for a lesser amount, is per se a demand, but would depend on the circumstances.

This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it identifies and corrects situations where the agency's demand is so far in excess of the true value of the case, as compared to the final outcome, and where it appears the agency's assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case.

In addition, the bill excludes awards in connection with willful violations, bad faith actions and in special circumstances that would make such an award unjust. These additional factors are intended to provide a ''safety valve'' to ensure that the government is not unduly deterred from advancing its case in good faith. Whether a violation is ''willful'' should be determined in accordance with existing judicial construction of the subject matter to which the case relates. Special circumstances are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees and costs, even in situations where the ultimate award is significantly less than the amount demanded. Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of the fees unjust. The actions covered by ''bad faith'' include the conduct of the party seeking fees both at the time of the underlying violation, and during the enforcement action. For example, if the party seeking fees attempted to elude government officials, cover up its conduct, or otherwise impede the government's law enforcement activities, then attorneys' fees and costs should not be awarded.

The Committee does not intend by this provision to compensate a party for fees and costs which it would have been expended even had the government demand been reasonable under the circumstances. The amount of the award which a party may recover under this section is limited to the proportion of attorneys' fees and costs attributable to the excessive demand. Thus, for example, if the ultimate decision of the administrative law judge or the judgment of the court is twenty percent of the relevant government demand, the defendant might be entitled to eighty percent of fees and costs. The ultimate determination of the amount of fees and costs to be awarded is to be made by the administrative law judge or the court, based on the facts and circumstances of each case.

The Act also increases the maximum hourly rate for attorneys fees under the EAJA from $75 to $125. Agencies could avoid the possibility of paying attorneys fees by settling with the small entity prior to final judgement. The Committee anticipates that if a settlement is reached, all further claims of either party, including claims for attorneys fees, could be included as part of the settlement. The government may obtain a release specifically including attorneys fees under EAJA.

Additional language is included in the Act to ensure that the legislation did not violate of the PAYGO requirements of the Budget Act. This language requires agencies to satisfy any award of attorneys fees or expenses arising from an agency enforcement action from their discretionary appropriated funds, but does not require that an agency seek or obtain an individual line item or earmarked appropriation for these amounts.

Section 233

The new provisions of the EAJA apply to civil actions and adversary adjudications commenced on or after the date of enactment.

Subtitle D—Regulatory Flexibility Act Amendments

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), was first enacted in 1980. Under its terms, federal agencies are directed to consider the special needs and concerns of small entities—small businesses, small local governments, farmers, etc.—whenever they engage in a rulemaking subject to the Administrative Procedure Act. The agencies must then prepare and publish a regulatory flexibility analysis of the impact of the proposed rule on small entities, unless the head of the agency certifies that the proposed rule will not ''have a significant economic impact on a substantial number of small entities.''

Under current law, there is no provision for judicial review of agency action under the RFA. This makes the agencies completely unaccountable for their failure to comply with its requirements. This current prohibition on judicial enforcement of the RFA is contrary to the general principle of administrative law, and it has long been criticized by small business owners. Many small business owners believe that agencies have given lip service at best to the RFA, and small entities have been denied legal recourse to enforce the Act's requirements. Subtitle D gives teeth to the RFA by specifically providing for judicial review of selected sections.

Section 241

H.R. 3136 expands the coverage of the RFA to include Internal Revenue Service interpretative rules that provide for a ''collection of information'' from small entities. Many IRS rulemakings involve ''interpretative rules'' that IRS contends need not be promulgated pursuant to section 553 of the Administrative Procedures Act. However, these interpretative rules may have significant economic effects on small entities and should be covered by the RFA. The amendment applies to those IRS interpretative rulemakings that are published in the Federal Register for notice and comment and that will be codified in the Code of Federal Regulations. This limitation is intended to exclude from the RFA other, less formal IRS publications such as revenue rulings, revenue procedures, announcements, publications or private letter rulings.

The requirement that IRS interpretative rules comply with the RFA is further limited to those involving a ''collection of information.'' The term ''collection of information'' is defined in the Act to include the obtaining, causing to be obtained, soliciting of facts or opinions by an agency through a variety of means that would include the use of written report forms, schedules, or reporting or other record keeping requirements. It would also include any requirements that require the disclosure to third parties of any information. The intent of this phrase ''collection of information'' in the context of the RFA is to include all IRS interpretative rules of general applicability that lead to or result in small entities keeping records, filing reports or otherwise providing information to IRS or third parties.

While the term ''collection of information'' also is used in the Paperwork Reduction Act (44 U.S.C. 3502(4))(''PRA''), the purpose of the term in the context of the RFA is different than the purpose of the term in the PRA. Thus, while some courts have interpreted the PRA to exempt from its requirements certain recordkeeping requirements that are explicitly required by statute, such an interpretation would be inappropriate in the context of the RFA. If a collection of information is explicitly required by a regulation that will ultimately be codified in the Code of Federal Regulations (''CFR''), the effect might be to limit the possible regulatory alternatives available to the IRS in the proposed rulemaking, but would not exempt the IRS from conducting a regulatory flexibility analysis.

Some IRS interpretative rules merely reiterate or restate the statutorily required tax liability. While a small entity's tax liability may be a burden, the RFA cannot act to supersede the statutorily required tax rate. However, most IRS interpretative rules involve some aspect of defining or establishing requirements for compliance with the CFR, or otherwise require small entities to maintain records to comply with the CFR now be covered by the RFA. One of the primary purposes of the RFA is to reduce the compliance burdens on small entities whenever possible under the statute. To accomplish this purpose, the IRS should take an expansive approach in interpreting the phrase ''collection of information'' when considering whether to conduct a regulatory flexibility analysis.

The courts generally are given broad discretion to formulate appropriate remedies under the facts and circumstances of each individual case. The rights of judicial review and remedial authority of the courts provided in the Act as to IRS interpretative rules should be applied in a manner consistent with the purposes of the Anti-Injunction Act (26 U.S.C. 7421), which may limit remedies available in particular circumstances. The RFA, as amended by the Act, permits the court to remand a rule to an Agency for further consideration of the rule's impact on small entities. The amendment also directs the court to consider the public interest in determining whether or not to delay enforcement of a rule against small entities pending agency compliance with the court's findings. The filing of an action requesting judicial review pursuant to this section does not automatically stay the implementation of the rule. Rather, the court has discretion in determining whether enforcement of the rule shall be deferred as it relates to small entities. In the context of IRS interpretative rulemakings, this language should be read to require the court to give appropriate deference to the legitimate public interest in the assessment and collection of taxes reflected by the Anti-Injunction Act. The court should not exercise its discretion more broadly than necessary under the circumstances or in a way that might encourage excessive litigation.

If an agency is required to publish an initial regulatory flexibility analysis, the agency also must publish a final regulatory flexibility analysis. In the final regulatory flexibility analysis, agencies will be required to describe the impacts of the rule on small entities and to specify the actions taken by the agency to modify the proposed rule to minimize the regulatory impact on small entities. Nothing in the bill directs the agency to choose a regulatory alternative that is not authorized by the statute granting regulatory authority. The goal of the final regulatory flexibility analysis is to demonstrate how the agency has minimized the impact on small entities consistent with the underlying statute and other applicable legal requirements.

Section 242

H.R. 3136 removes the current prohibition on judicial review of agency compliance with certain sections of the RFA. It allows adversely affected small entities to seek judicial review of agency compliance with the RFA within one year after final agency action, except where a provision of law requires a shorter period for challenging a final agency action. The amendment is not intended to encourage or allow spurious lawsuits which might hinder important governmental functions. The Act does not subject all regulations issued since the enactment of the RFA to judicial review. The one-year limitation on seeking judicial review ensures that this legislation will not permit indefinite, retroactive application of judicial review.

For rules promulgated after the effective date, judicial review will be available pursuant to this Act. The procedures and standards for review to be used are those set forth in the Administrative Procedure Act at Chapter 7 of Title 5. If the court finds that a final agency action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, the court may set aside the rule or order the agency to take other corrective action. The court may also decide that the failure to comply with the RFA warrants remanding the rule to the agency or delaying the application of the rule to small entities pending completion of the court ordered corrective action. However, in some circumstances, the court may find that there is good cause to allow the rule to be enforced and to remain in effect pending the corrective action.

Judicial review of the RFA is limited to agency compliance with the requirements of sections 601, 604, 605(b), 608(b) and 610. Review under these sections is not limited to the agency's compliance with the procedural aspects of the RFA; final agency action under these sections will be subject to the normal judicial review standards of Chapter 7 of Title 5. While the Committees determined that agency compliance with sections 607 and 609(a) of the RFA is important, it did not believe that a party should be entitled to judicial review of agency compliance with those sections in the absence of a judiciable claim for review of agency compliance with section 604. Therefore, under the Act, an agency's failure to comply with sections 607 or 609(a) may be reviewed only in conjunction with a challenge under section 604 of the RFA.

Section 243

Section 243 of the Act alters the content of the statement which an agency must publish when making a certification under section 605 of the RFA that a regulation will not impose a significant economic impact on a substantial number of small entities. Current law requires only that the agency publish a ''succinct statement explaining the reasons for such certification.'' The Committee believes that more specific justification for its determination should be provided by the agency. Under the amendment, the agency must state its factual basis for the certification. This will provide a record upon which a court may review the agency's determination in accordance with the judicial review provisions of the Administrative Procedure Act.

Section 244

H.R. 3136 amends the existing requirements of section 609 of the RFA for small business participation in the rulemaking process by incorporating a modified version of S. 917, the Small Business Advocacy Act, which was introduced by Senator Domenici, to provide early input from small businesses into the regulatory process. For proposed rules with a significant economic impact on a substantial number of small entities, EPA and OSHA would have to collect advice and recommendations from small businesses to better inform the agency's regulatory flexibility analysis on the potential impacts of the rule. The House version drops the provision of the Senate bill that would have required the panels to reconvene prior to publication of the final rule.

The agency promulgating the rule would consult with the SBA's Chief Counsel for Advocacy to identify individuals who are representative of affected small businesses. The agency would designate a senior level official to be responsible for implementing this section and chairing an interagency review panel for the rule. Before the publication of an initial regulatory flexibility analysis for a proposed EPA or OSHA rule, the SBA's Chief Counsel for Advocacy will gather information from individual representatives of small businesses and other small entities, such as small local governments, about the potential impacts of that proposed rule. This information will then be reviewed by a panel composed of members from EPA or OSHA, OIRA, and the Chief Counsel for Advocacy. The panel will then issue a report on those individuals' comments, which will become part of the rulemaking record. The review panel's report and related rulemaking information will be placed in the rulemaking record in a timely fashion so that others who are interested in the proposed rule may have an opportunity to review that information and submit their own responses for the record before the close of the agency's public comment period for the proposed rule. The legislation includes limits on the period during which the review panel conducts its review. It also creates a limited process allowing the Chief Counsel for Advocacy to waive certain requirements of the section after consultation with the Office of Information and Regulatory Affairs and small businesses.

Section 245

This section provides that the effective date of subtitle D is 90 days after enactment. Proposed rules published after the effective date must be accompanied by an initial regulatory flexibility analysis or a certification under section 605 of the RFA. Final rules published after the effective date must be accompanied by a final regulatory flexibility analysis or a certification under section 605 of the RFA, regardless of when the rule was first proposed. Thus judicial review shall apply to any final regulation published after the effective date regardless of when the rule was proposed. However, IRS interpretative rules proposed prior to enactment will not be subject to the amendments made in this subchapter expanding the scope of the RFA to include IRS interpretative rules. Thus, the IRS could finalize previously proposed interpretative rules according to the terms of currently applicable law, regardless of when the final interpretative rule is published.

Subtitle E—Congressional review subtitle

Subtitle E adds a new chapter to the Administrative Procedure Act (APA), ''Congressional Review of Agency Rulemaking,'' which is codified in the United States Code as chapter 8 of title 5. The congressional review chapter creates a special mechanism for Congress to review new rules issued by federal agencies (including modification, repeal, or reissuance of existing rules). During the review period, Congress may use expedited procedures to enact joint resolutions of disapproval to overrule the federal rulemaking actions. In the 104th Congress, four slightly different versions of this legislation passed the Senate and two different versions passed the House. Yet, no formal legislative history

document was prepared to explain the legislation or the reasons for changes in the final language negotiated between the House and Senate. This joint statement of the committees of jurisdiction on the congressional review subtitle is intended to cure this deficiency.

Background

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulation is often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

This legislation establishes a government-wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects. Congress may find a rule to be too burdensome, excessive, inappropriate or duplicative. Subtitle E uses the mechanism of a joint resolution of disapproval which requires passage by both houses of Congress and the President (or veto by the President and a two-thirds' override by Congress) to be effective. In other words, enactment of a joint resolution of disapproval is the same as enactment of a law.

Congress has considered various proposals for reviewing rules before they take effect for almost twenty years. Use of a simple (one-house), concurrent (two-house), or joint (two houses plus the President) resolution are among the options that have been debated and in some cases previously implemented on a limited basis. In *INS* v. *Chadha,* 462 U.S. 919 (1983), the Supreme Court struck down as unconstitutional any procedure where executive action could be overturned by less than the full process required under the Constitution to make laws—that is, approval by both houses of Congress and presentment to the President. That narrowed Congress' options to use a joint resolution of disapproval. The one-house or two-house legislative veto (as procedures involving simple and concurrent resolutions were previously called), was thus voided.

Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.

Brief procedural history of congressional review chapter

In the 104th Congress, the congressional review legislation originated as S. 348, the ''Regulatory Oversight Act,'' which was introduced on February 2, 1995. The text of S. 348 was offered by its sponsors, Senators Don Nickles and Harry Reid, as a substitute amendment to S. 219, the ''Regulatory Transition Act of 1995.'' As amended, S. 219 provided for a 45-day delay on the effectiveness of a major rule, and provided expedited procedures that Congress could use to pass resolutions disapproving of the rule. On March 29, 1995, the Senate passed the amended version of S. 219 by a vote of 100–0. The Senate later substituted the text of S. 219 for the text of H.R. 450, the House passed ''Regulatory Transition Act of 1995.'' Although the House did not agree to a conference on H.R. 450 and S. 219, both Houses continued to incorporate the congressional review provisions in other legislative packages. On May 25, the Senate Governmental Affairs Committee reported out S. 343, the ''Comprehensive Regulatory Reform Act of 1995,'' and S. 291, the ''Regulatory Reform Act of 1995,'' both with congressional review provisions. On May 26, 1995, the Senate Judiciary Committee reported out a different version of S. 343, the ''Comprehensive Regulatory Reform Act of 1995,'' which also included a congressional review provision. The congressional review provision in S. 343 that was debated by the Senate was quite similar to S. 219, except that the delay period in the effectiveness of a major rule was extended to 60 days and the legislation did not apply to rules issued prior to enactment. A fillibuster of S. 343, unrelated to the congressional review provisions, led to the withdrawal of that bill.

The House next took up the congressional review legislation by attaching a version of it (as section 3006) to H.R. 2586, the first debt limit extension bill. The House made several changes in the legislation that was attached to H.R. 2586, including a provision that would allow the expedited procedures also to apply to resolutions disapproving of proposed rules, and provisions that would have extended the 60-day delay on the effectiveness of a major rule for any period when the House or Senate was in recess for more than three days. On November 9, 1995 both the House and Senate passed this version of the congressional review legislation as part of the first debt limit extension bill. President Clinton vetoed the bill a few days later, for reasons unrelated to the congressional review provision.

On February 29, 1996, a House version of the congressional review legislation was published in the Congressional Record as title III of H.R. 994, which was scheduled to be brought to the House floor in the coming weeks. The congressional review title was almost identical to the legislation approved by both Houses in H.R. 2586. On March 19, 1996, the Senate adopted a congressional review amendment by voice vote to S. 942, which bill passed the Senate 100–0. The congressional review legislation in S. 942 was similar to the original version of S. 219 that passed the Senate on March 29, 1995.

Soon after passage of S. 942, representatives of the relevant House and Senate committees and principal sponsors of the congressional review legislation met to craft a congressional review subtitle that was acceptable to both Houses and would be added to the debt limit bill that was scheduled to be taken up in Congress the week of March 24. The final compromise language was the result of these joint discussions and negotiations.

On March 28, 1996, the House and Senate passed title III, the ''Small Business Regulatory Enforcement Fairness Act of 1996,'' as part of the second debt limit bill, H.R. 3136. There was no separate vote in either body on the congressional review subtitle or on title III of H.R. 3136. However, title III received broad support in the House and the entire bill passed in the Senate by unanimous consent. The President signed H.R. 3136 into law on March 29, 1996, exactly one year after the first congressional review bill passed the Senate.

Submission of rules to Congress and to GAO

Pursuant to subsection 801(a)(1)(A), a federal agency promulgating a rule must submit a copy of the rule and a brief report about it to each House of Congress and to the Comptroller General before the rule can take effect. In addition to a copy of the rule, the report shall contain a concise general statement relating to the rule, including whether it is a major rule under the chapter, and the proposed effective date of the rule. Because most rules covered by the chapter must be published in the Federal Register before they can take effect, it is not expected that the submission of the rule and the report to Congress and the Comptroller General will lead to any additional delay.

Section 808 provides the only exception to the requirement that rules must be submitted to each House of Congress and the Comptroller General before they can take effect. Subsection 808(1) excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping. Subsection 808(2) excepts certain rules that are not subject to notice-and-comment procedures. It provides that if the relevant agency finds ''for good cause ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, [such rules] shall take effect at such time as the Federal agency promulgating the rule determines.'' Although rules described in section 808 shall take effect when the relevant Federal agency determines pursuant to other provisions of law, the federal agency still must submit such rules and the accompanying report to each House of Congress and to the Comptroller General as soon as practicable after promulgation. Thus, rules described in section 808 are subject to congressional review and the expedited procedures governing joint resolutions of disapproval. Moreover, the congressional review period will not begin to run until such rules and the accompanying reports are submitted to each House of Congress and the Comptroller General.

In accordance with current House and Senate rules, covered agency rules and the accompanying report must be separately addressed and transmitted to the Speaker of the House (the Capitol, Room H–209), the President of the Senate (the Capitol, Room S-212), and the Comptroller General (GAO Building, 441 G Street, N.W., Room 1139). Except for rules described in section 808, any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A). In almost all cases, there will be sufficient time for an agency to submit notice-and-comment rules or other rules that must be published to these legislative officers during normal office hours. There may be a rare instance, however, when a federal agency must issue an emergency rule that is effective upon actual notice and does not meet one of the section 808 exceptions. In such a rare case, the federal agency may provide contemporaneous notice to the Speaker of the House, the President of the Senate, and the Comptroller General. These legislative officers have accommodated the receipt of similar, emergency communications in the past and will utilize the same means to

receive emergency rules and reports during non-business hours. If no other means of delivery is possible, delivery of the rule and related report by telefax to the Speaker of the House, the President of the Senate, and the Comptroller General shall satisfy the requirements of subsection 801(a)(1)(A).

Additional delay in the effectiveness of major rules

Subsection 553(d) of the APA requires publication or service of most substantive rules at least 30 days prior to their effective date. Pursuant to subsection 801(a)(3)(A), a major rule (as defined in subsection 804(2)) shall not take effect until at least 60 calendar days after the later of the date on which the rule and accompanying information is submitted to Congress or the date on which the rule is published in the Federal Register, if it is so published. If the Congress passes a joint resolution of disapproval and the President vetoes such resolution, the delay in the effectiveness of a major rule is extended by subsection 801(a)(3)(B) until the earlier date on which either House of Congress votes and fails to override the veto or 30 session days[1] after the date on which the Congress receives the veto and objections from the President. By necessary implication, if the Congress passes a joint resolution of disapproval within the 60 calendar days provided in subsection 801(a)(3)(A), the delay period in the effectiveness of a major rule must be extended at least until the President acts on the joint resolution or until the time expires for the President to act. Any other result would be inconsistent with subsection 801(a)(3)(B), which extends the delay in the effectiveness of a major rule for a period of time after the President vetoes a resolution.

Of course, if Congress fails to pass a joint resolution of disapproval within the 60-day period provided by subsection 801(a)(3)(A), subsection 801(a)(3)(B) would not apply and would not further delay the effective date of the rule. Moreover, pursuant to subsection 801(a)(5), the effective date of a rule shall not be delayed by this chapter beyond the date on which either house of Congress votes to reject a joint resolution of disapproval.

Although it is not expressly provided in the congressional review chapter, it is the committees' intent that a rule may take effect if an adjournment of Congress prevents the President from returning his veto and objections within the meaning of the Constitution. Such will be the case if the President does not act on a joint resolution within 10 days (Sundays excepted) after it is presented to him, and ''the Congress by their Adjournment prevent its Return'' within the meaning of Article I, §7, cl. 2, or when the President affirmatively vetoes a resolution during such an adjournment. This is the logical result because Congress cannot act to override these vetoes. Congress would have to begin anew, pass a second resolution, and present it to the President in order for it to become law. It is also the committees' intent that a rule may take effect immediately if the President returns a veto and his objections to Congress but Congress adjourns its last session sine die before the expiration of time provided in subsection 801(a)(3)(B). Like the situations described immediately above, no subsequent Congress can act further on the veto, and the next Congress would have to begin anew, pass a second resolution of disapproval, and present it to the President in order for it to become law.

Purpose of and exceptions to the delay of major rules

The reason for the delay in the effectiveness of a major rule beyond that provided in APA subsection 553(d) is to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule. Congress may continue to use the expedited procedures to pass resolutions of disapproval for a period of time after a major rule takes effect, but it would be preferable for Congress to act during the delay period so that fewer resources would be wasted. To increase the likelihood that Congress would act before a major rule took effect, the committees agreed on an approximately 60-day delay period in the effective date of a major rule, rather than an approximately 45-day delay period in some earlier versions of the legislation.

There are four exceptions to the required delay in the effectiveness of a major rule in the congressional review chapter. The first is in subsection 801(c), which provides that a major rule is not subject to the delay period of subsection 801(a)(3) if the President determines in an executive order that one of four specified situations exist and notifies Congress of his determination. The second is in subsection 808(1), which excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3). The third is in subsection 808(2), which excepts certain rules from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3) if the relevant agency finds ''for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' This ''good cause'' exception in subsection 808(2) is taken from the APA and applies only to rules which are exempt from notice and comment under subsection 553(b)(B) or an analogous statute. The fourth exception is in subsection 804(2). Any rule promulgated under the Telecommunications Act of 1996 or any amendments made by that Act that otherwise could be classified as a ''major rule'' is exempt from that definition and from the 60-day delay in section 801(a)(3). However, such an issuance still would fall within the definition of ''rule'' and would be subject to the requirements of the legislation for non-major rules. A determination under subsection 801(c), subsection 804(2), or section 808 shall have no effect on the procedures to enact joint resolutions of disapproval.

A court may not stay or suspend the effectiveness of a rule beyond the period specified in section 801 simply because a resolution of disapproval is pending in Congress

The committees discussed the relationship between the period of time that a major rule is delayed and the period of time during which Congress could use the expedited procedures in section 802 to pass a resolution of disapproval. Although it would be best for Congress to act pursuant to this chapter before a major rule goes into effect, it was recognized that Congress could not often act immediately after a rule was issued because it may be issued during a recesses of Congress, shortly before such recesses, or during other periods when Congress cannot devote the time to complete prompt legislative action. Accordingly, the committees determined that the proper public policy was to give Congress an adequate opportunity to deliberate and act on joint resolutions of disapproval, while ensuring that major rules could go into effect without unreasonable delay. In short, the committees decided that major rules could take effect after an approximate 60-day delay, but the period governing the expedited procedures in section 802 for review of joint resolution of disapproval would extend for a period of time beyond that.

Accordingly, courts may not stay or suspend the effectiveness of any rule beyond the periods specified in section 801 simply because a joint resolution is pending before Congress. Such action would be contrary to the many express provisions governing when different types of rules may take effect. Such court action also would be contrary to the committees' intent because it would upset an important compromise on how long a delay there should be on the effectiveness of a major rule. The final delay period was selected as a compromise between the period specified in the version that passed the Senate on March 19, 1995 and the version that passed both Houses on November 9, 1995. It is also the committees' belief that such court action would be inconsistent with the principles of (and potentially violate) the Constitution, art. I, §7, cl. 2, in that courts may not give legal effect to legislative action unless it results in the enactment of law pursuant that Clause. See *INS* v. *Chadha*, 462 U.S. 919 (1983). Finally, the committees believe that a court may not predicate a stay on the basis of possible future congressional action because it would be improper for a court to rule that the movant had demonstrated a ''likelihood of success on the merits,'' unless and until a joint resolution is enacted into law. A judicial stay prior to that time would raise serious separation of powers concerns because it would be tantamount to the court making a prediction of what Congress is likely to do and then exercising its own power in furtherance of that prediction. Indeed, the committees believe that Congress may have been reluctant to pass congressional review legislation at all if its action or inaction pursuant to this chapter would be treated differently than its action or inaction regarding any other bill or resolution.

Time periods governing passage of joint resolutions of disapproval

Subsection 802(a) provides that a joint resolution disapproving of a particular rule may be introduced in either House beginning on the date the rule and accompanying report are received by Congress until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress). But if Congress did not have sufficient time in a previous session to introduce or consider a resolution of disapproval, as set forth in subsection 801(d), the rule and accompanying report will be treated as if it were first received by Congress on the 15th session day in the Senate, or 15th legislative day in the House, after the start of its next session. When a rule was submitted near the end of a Congress or prior to the start of the next Congress, a joint resolution of disapproval regarding that rule may be introduced in the next Congress beginning on the 15th session day in the Senate or the 15th legislative day in the House until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during the session) regardless of whether such a resolution was introduced in the prior Congress. Of course, any joint resolution pending from the first session of a Congress, may be considered further in the next session of the same Congress.

Subsections 802(c)–(d) specify special procedures that apply to the consideration of a

[1] In the Senate, a ''session day'' is a calendar day in which the Senate is in session. In the House of Representatives, the same term is normally expressed as a ''legislative day.'' In the congressional review chapter, however, the term ''session day'' means both a ''session day'' of the Senate and a ''legislative day'' of the House of Representatives unless the context of the sentence or paragraph indicates otherwise.

joint resolution of disapproval in the Senate. Subsection 802(c) allows 30 Senators to petition for the discharge of resolution from a Senate committee after a specified period of time (the later of 20 calendar days after the rule is submitted to Congress or published in the Federal Register, if it is so published). Subsection 802(d) specifies procedures for the consideration of a resolution on the Senate floor. Such a resolution is highly privileged, points of order are waived, a motion to postpone consideration is not in order, the resolution is unamendable, and debate on the joint resolution and ''on all debatable motions and appeals in connection therewith'' (including a motion to proceed) is limited to no more than 10 hours.

Subsection 802(e) provides that the special Senate procedures specified in subsections 802(c)–(d) shall not apply to the consideration of any joint resolution of disapproval of a rule after 60 session days of the Senate beginning with the later date that rule is submitted to Congress or published, if it is so published. However, if a rule and accompanying report are submitted to Congress shortly before the end of a session or during an intersession recess as described in subsection 801(d)(1), the special Senate procedures specified in subsections 802(c)–(d) shall expire 60 session days after the 15th session day of the succeeding session of Congress—or on the 75th session day after the succeeding session of Congress first convenes. For purposes of subsection 802(e), the term ''session day'' refers only to a day the Senate is in session, rather than a day both Houses are in session. However, in computing the time specified in subsection 801(d)(1), that subsection specifies that there shall be an additional period of review in the next session if either House did not have an adequate opportunity to complete action on a joint resolution. Thus, if either House of Congress did not have adequate time to consider a joint resolution in a given session (60 session days in the Senate and 60 legislative days in the House), resolutions of disapproval may be introduced or reintroduced in both Houses in the next session, and the special Senate procedures specified in subsection 802(c)–(d) shall apply in the next session of the Senate.

If a joint resolution of disapproval is pending when the expedited Senate procedures specified in subsections 802(c)–(d) expire, the resolution shall not die in either House but shall simply be considered pursuant to the normal rules of either House—with one exception. Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.

Effect of enactment of a joint resolution of disapproval

Subsection 801(b)(1) provides that: ''A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.'' Subsection 801(b)(2) provides that such a disapproved rule ''may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.'' Subsection 801(b)(2) is necessary to prevent circumvention of a resolution of disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The committees intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

Limitation on judicial review of congressional or administrative actions

Section 805 provides that a court may not review any congressional or administrative ''determination, finding, action, or omission under this chapter.'' Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to ''determine the Rules of its Proceedings,'' U.S. Const., art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when ''Congress does not enact a joint resolution of disapproval,'' or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the committees expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).

Enactment of a joint resolution of disapproval for a rule that was already in effect

Subsection 801(f) provides that: ''Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.'' Application of this subsection should be consistent with existing judicial precedents on rules that are deemed never to have taken effect.

Agency information required to be submitted to GAO

Pursuant to subsection 801(a)(1)(B), the federal agency promulgating the rule shall submit to the Comptroller General (and make available to each House) (i) a complete copy of the cost-benefit analysis of the rule, if any, (ii) the agency's actions related to the Regulatory Flexibility Act, (iii) the agency's actions related to the Unfunded Mandates Reform Act, and (iv) ''any other relevant information or requirements under any other Act and any relevant Executive Orders.'' Pursuant to subsection 801(a)(1)(B), this information must be submitted to the Comptroller General on the day the agency submits the rule to Congress and to GAO.

The committees intend information supplied in conformity with subsection 801(a)(1)(B)(iv) to encompass both agency-specific statutes and government-wide statutes and executive orders that impose requirements relevant to each rule. Examples of agency-specific statutes include information regarding compliance with the law that authorized the rule and any agency-specific procedural requirements, such as section 9 of the Consumer Product Safety Act, as amended, 15 U.S.C. §2054 (procedures for consumer product safety rules); section 6 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §655 (promulgation of standards); section 307(d) of the Clean Air Act, as amended, 42 U.S.C. §7607(d) (promulgation of rules); and section 501 of the Department of Energy Organization Act, 42 U.S.C. §7191 (procedure for issuance of rules, regulations, and orders). Examples of government-wide statutes include other chapters of the Administrative Procedure Act, 5 U.S.C. §§551–559 and 701–706; and the Paperwork Reduction Act, as amended, 44 U.S.C. §§3501–3520.

Examples of relevant executive orders include E.O. No. 12866 (Sept. 30, 1993) (Regulatory Planning and Review); E.O. No. 12606 (Sept. 2, 1987) (Family Considerations in Policy Formulation and Implementation); E.O. No. 12612 (Oct. 26, 1987) (Federalism Considerations in Policy Formulation and Implementation); E.O. No. 12630 (Mar. 15, 1988) (Government Actions and Interference with Constitutionally Protected Property Rights); E.O. No. 12875 (Oct. 26, 1993) (Enhancing the Intergovernmental Partnership); E.O. No. 12778 (Oct. 23, 1991) (Civil Justice Reform); E.O. No. 12988 (Feb. 5, 1996) (Civil Justice Reform) (effective May 5, 1996).

GAO reports on major rules

Fifteen days after the federal agency submits a copy of a major rule and report to each House of Congress and the Comptroller General, the Comptroller General shall prepare and provide a report on the major rule

to the committees of jurisdiction in each House. Subsection 801(a)(2)(B) requires agencies to cooperate with the Comptroller General in providing information relevant to the Comptroller General's reports on major rules. Given the 15-day deadline for these reports, it is essential that the agencies' initial submission to the General Accounting Office (GAO) contain all of the information necessary for GAO to conduct its analysis. At a minimum, the agency's submission must include the information required of all rules pursuant to 801(a)(1)(B). Whenever possible, OMB should work with GAO to alert GAO when a major rule is likely to be issued and to provide as much advance information to GAO as possible on such proposed major rule. In particular, OMB should attempt to provide the complete cost-benefit analysis on a major rule, if any, well in advance of the final rule's promulgation.

It also is essential for the agencies to present this information in a format that will facilitate the GAO's analysis. The committees expect that GAO and OMB will work together to develop, to the greatest extent practicable, standard formats for agency submissions. OMB also should ensure that agencies follow such formats. The committees also expect that agencies will provide expeditiously any additional information that GAO may require for a thorough report. The committees do not intend the Comptroller General's reports to be delayed beyond the 15-day deadline due to lack of information or resources unless the committees of jurisdiction indicate a different preference. Of course, the Comptroller General may supplement his initial report at any time with any additional information, on its own, or at the request of the relevant committees of jurisdiction.

Covered agencies and entities in the executive branch

The committees intend this chapter to be comprehensive in the agencies and entities that are subject to it. The term ''Federal agency'' in subsection 804(1) was taken from 5 U.S.C. §551(1). That definition includes ''each authority of the Government'' that is not expressly excluded by subsection 551(1)(A)–(H). With those few exceptions, the objective was to cover each and every government entity, whether it is a department, independent agency, independent establishment, or government corporation. This is because Congress is enacting the congressional review chapter, in large part, as an exercise of its oversight and legislative responsibility. Regardless of the justification for excluding or granting independence to some entities from the coverage of other laws, that justification does not apply to this chapter, where Congress has an interest in exercising its constitutional oversight and legislative responsibility as broadly as possible over all agencies and entities within its legislative jurisdiction.

In some instances, federal entities and agencies issue rules that are not subject to the traditional 5 U.S.C. §553(c) rulemaking process. However, the committees intend the congressional review chapter to cover every agency, authority, or entity covered by subsection 551(1) that establishes policies affecting any segment of the general public. Where it was necessary, a few special exceptions were provided, such as the exclusion for the monetary policy activities of the Board of Governors of the Federal Reserve System, rules of particular applicability, and rules of agency management and personnel. Where it was not necessary, no exemption was provided and no exemption should be inferred from other law. This is made clear by the provision of section 806 which states that the Act applies notwithstanding any other provision of law.

Definition of a ''major rule''

The definition of a ''major rule'' in subsection 804(2) is taken from President Reagan's Executive Order 12291. Although President Clinton's Executive Order 12866 contains a definition of a ''significant regulatory action'' that is seemingly as broad, several of the Administration's significant rule determinations under Executive Order 12866 have been called into question. The committees intend the term ''major rule'' in this chapter to be broadly construed, including the non-numerical factors contained in the subsections 804(2) (B) and (C).

Pursuant to subsection 804(2), the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (the Administrator) must make the major rule determination. The committees believe that centralizing this function in the Administrator will lead to consistency across agency lines. Moreover, from 1981–93, OIRA staff interpreted and applied the same major rule definition under E.O. 12291. Thus, the Administrator should rely on guidance documents prepared by OIRA during that time and previous major rule determinations from that Office as a guide in applying the statutory definition to new rules.

Certain covered agencies, including many ''independent agencies,'' include their proposed rules in the Unified Regulatory Agenda published by OMB but do not normally submit their final rules to OMB for review. Moreover, interpretative rules and general statements of policy are not normally submitted to OMB for review. Nevertheless, it is the Administrator that must make the major rule determination under this chapter whenever a new rule is issued. The Administrator may request the recommendation of any agency covered by this chapter on whether a proposed rule is a major rule within the meaning of subsection 804(2), but the Administrator is responsible for the ultimate determination. Thus, all agencies or entities covered by this chapter will have to coordinate their rulemaking activity with OIRA so that the Administrator may make the final, major rule determination.

Scope of rules covered

The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. The term ''rule'' in subsection 804(3) begins with the definition of a ''rule'' in subsection 551(4) and excludes three subsets of rules that are modeled on APA sections 551 and 553. This definition of a rule does not turn on whether a given agency must normally comply with the notice-and-comment provisions of the APA, or whether the rule at issue is subject to any other notice-and-comment procedures. The definition of ''rule'' in subsection 551(4) covers a wide spectrum of activities. First, there is formal rulemaking under section 553 that must adhere to procedures of sections 556 and 557 of title 5. Second, there is informal rulemaking, which must comply with the notice-and-comment requirements of subsection 553(c). Third, there are rules subject to the requirements of subsection 552(a)(1) and (2). This third category of rules normally either must be published in the Federal Register before they can adversely affect a person, or must be indexed and made available for inspection and copying or purchase before they can be used as precedent by an agency against a non-agency party. Documents covered by subsection 552(a) include statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public. Fourth, there is a body of materials that fall within the APA definition of ''rule'' and are the product of agency process, but that meet none of the procedural specifications of the first three classes. These include guidance documents and the like. For purposes of this section, the term rule also includes any rule, rule change, or rule interpretation by a self regulatory organization that is approved by a Federal agency. Accordingly, all ''rules'' are covered under this chapter, whether issued at the agency's initiative or in response to a petition, unless they are expressly excluded by subsections 804(3)(A)–(C). The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, ''guidelines,'' and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of ''rule'' was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.

The definition of a rule in subsection 551(4) covers most agency statements of general applicability and future effect. Subsection 804(3)(A) excludes ''any rule of particular applicability, including a rule that approves or prescribes rates, wages, prices, services, or allowances therefore, corporate and financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing'' from the definition of a rule. Many agencies, including the Treasury, Justice, and Commerce Departments, issue letter rulings or other opinion letters to individuals who request a specific ruling on the facts of their situation. These letter rulings are sometimes published and relied upon by other people in similar situations, but the agency is not bound by the earlier rulings even on facts that are analogous. Thus, such letter rulings or opinion letters do not fall within the definition of a rule within the meaning of subsection 804(3).

The different types of rules issued pursuant to the internal revenue laws of the United States are good examples of the distinction between rules of general and particular applicability. IRS private letter rulings and Customs Service letter rulings are classic examples of rules of particular applicability, notwithstanding that they may be cited as authority in transactions involving the same circumstances. Examples of substantive and interpretative rules of general applicability will include most temporary and final Treasury regulations issued pursuant to notice-and-comment rulemaking procedures, and most revenue rulings, revenue procedures, IRS notices, and IRS announcements. It does not matter that these later types of rules are issued without notice-and-comment rulemaking procedures or that they are accorded less deference by the courts than notice-and-comment rules. In fact, revenue rulings have been described by the courts as the ''classic example of an interpretative rul[e]'' within the meaning of the APA. See *Wing* v. *Commissioner*, 81 T.C. 17, 26 (1983). The test is whether such rules announce a general statement of policy or an interpretation of law of general applicability.

Most rules or other agency actions that grant an approval, license, registration, or similar authority to a particular person or particular entities, or grant or recognize an exemption or relieve a restriction for a particular person or particular entities, or permit new or improved applications of technology for a particular person or particular entities, or allow the manufacture, distribution, sale, or use of a substance or product are exempted under subsection 804(3)(A) from the definition of a rule. This is probably the largest category of agency actions excluded from the definition of a rule. Examples include import and export licenses, individual

rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits and habitat conservation plans, broadcast licenses, and product approvals, including approvals that set forth the conditions under which a product may be distributed.

Subsection 804(3)(B) excludes ''any rule relating to agency management or personnel'' from the definition of a rule. Pursuant to subsection 804(3)(C), however, a ''rule of agency organization, procedure, or practice,'' is only excluded if it ''does not substantially affect the rights or obligations of non-agency parties.'' The committees' intent in these subsections is to exclude matters of purely internal agency management and organization, but to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights or obligations of non-agency parties.

GRAND OPENING OF MAIN BRANCH, SAN FRANCISCO LIBRARY

HON. TOM LANTOS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. LANTOS. Mr. Speaker, I rise today, on the 90th anniversary of the devastating 1906 San Francisco earthquake, to celebrate with the city of San Francisco a monumental achievement of community cooperation and commitment. I invite my colleagues to join me in conveying our congratulations and admiration to the people of San Francisco who have committed their precious resources to the construction of the new main branch of the San Francisco Library, a beautiful and highly functional testament to the love that San Franciscans have for their city and for books and education. It is a love that has found its voice through the coordinated efforts of corporations, foundations, and individuals.

A library should reflect the pride, the culture, and the values of the diverse communities that it serves. The San Francisco main library will undoubtedly be successful in reaching this goal. The library will be home to special centers dedicated to the history and interests of African-Americans, Chinese-Americans, Filipino-Americans, Latino-Americans, and gays and lesbians. The library will be designed to serve the specialized needs of the businessman as well as the immigrant newcomer. It will become home to the diverse communities that make San Francisco unique among metropolitan areas of the world. It will also become a home, most importantly, that serves to unite.

The new San Francisco main library represents an opportunity to preserve and disperse the knowledge of times long since passed. The book serves as man's most lasting testament and the library serves as our version of a time machine into the past, the present and the future. This library, built upon the remains of the old City Hall destroyed 90 years ago today, is a befitting tribute to the immortality of thought. Buildings will come as they will most definitely pass, but the books of this new library and the information that they hold are eternal and serve as an indelible foundation that cannot be erased by the passage of time.

The expanded areas of the new main library will provide space for numerous hidden treasures that no longer will be hidden. The people of San Francisco will have the opportunity to reacquaint themselves with numerous literary treasures previously locked behind the dusty racks of unsightly storage rooms.

Although the new San Francisco main library serves as a portal into our past, it also serves to propel us into the future. It is an edifice designed to stoke the imagination by providing access to the numerous streams of information that characterize our society today. The technologically designed library will provide hundreds of public computer terminals to locate materials on-line, 14 multimedia stations, as well as access to data bases and the Information Superhighway. It will provide education and access for those previously unable to enter the ''computer revolution.'' The library will provide vital access and communication links so that it can truly serve as a resource for the city and for other libraries and educational institutions throughout the region. The new library will serve as an outstanding model for libraries around the world to emulate.

Like an educational institution,the San Francisco Library will be a repository of human knowledge, organized and made accessible for writers, students, lifelong learners and leisure readers. It will serve to compliment and expand San Francisco's existing civic buildings—City Hall, Davies Symphony Hall, Brooks Hall, and the War Memorial and Performing Arts Center. The library serves as a symbiotic commitment between the city of San Francisco and its people. In 1988, when electorates across the country refused to support new bond issues, the people of San Francisco committed themselves to a $109.5 million bond measure to build the new main library building and to strengthen existing branch libraries. Eight years later those voices are still clearly heard and they resonate with the dedication of this unique library, built by a community to advance themselves and their neighbors.

Mr. Speaker, on this day, when we celebrate the opening of the new main branch of the San Francisco Library, I ask my colleagues to join me in congratulating the community of San Francisco for their admirable accomplishments and outstanding determination.

TRIBUTE TO DAVID J. WHEELER

HON. WES COOLEY

OF OREGON

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. COOLEY of Oregon. Mr. Speaker, on February 1, 1996, the President signed H.R. 2061, a bill to designate the Federal building in Baker City, OR in honor of the late David J. Wheeler. As the congressional representative for Baker City, and as the sponsor of H.R. 2061, I recently returned to Baker City for the building dedication ceremony. Mr. Wheeler, a Forest Service employee, was a model father and an active citizen. In honor of Mr. Wheeler, I would like to submit, for the record, my speech at the dedication ceremony.

Thank you for inviting me here today. It has been an honor to sponsor the congressional bill to designate this building in memory of David Wheeler. I did not have the privilege of knowing Mr. Wheeler myself, but from my discussions with Mayor Griffith—and from researching his accomplishments—I've come to know what a fine man he was. I know that Mr. Wheeler was a true community leader, and I know that the community is that much poorer for his passing. With or without this dedication, his spirit will remain within the Baker City community.

Mayor Griffith, I have brought a copy of H.R. 2061—the law to honor David Wheeler. The bill has been signed by the President of the United States, by the Speaker of the House, and by the President of the Senate. Hopefully, this bill will find a suitable place within the new David J. Wheeler Federal Building.

I'd like to offer my deepest sympathy to the Wheeler family, and to everyone here who knew him. And, I'd like to offer a few words from Henry Wadsworth Longfellow—who once commented on the passing-away of great men. His words—I think—describe Mr. Wheeler well:

If a star were quenched on high,
For ages would its light,
Still traveling down from the sky,
Shine on our mortal sight.

So when a great man dies,
For years beyond our ken,
The light he leaves behind him lies
Upon the paths of men.''

So too with David Wheeler. His light will shine on the paths of us all—particularly of his family—for the rest of our days.

THE MINIMUM WAGE

HON. LEE H. HAMILTON

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. HAMILTON. Mr. Speaker, I would like to insert my Washington Report for Wednesday, April 17, 1996, into the CONGRESSIONAL RECORD.

RAISING THE MINIMUM WAGE

Rewarding work is a fundamental American value. There are many ways to achieve that goal, including deficit reduction to boost the economy, opening markets abroad to our products, improving education and skills training, and investing in technology and infrastructure. Increasing wages must be a central objective of government policies.

The economy is improving. It has in recent years reduced the unemployment rate of 5.6%, cut the budget deficit nearly in half, and spurred the creation of 8.4 million additional jobs. Real hourly earning has now begun to rise modestly, and the tax cut in 1993 for 15 million working families helped spur economic growth.

But much work needs to be done. We must build on the successes of the last few years, and address the key challenges facing our economy, including the problem of stagnant wages. This problem will not be solved overnight, but one action we can take immediately, and which I support, is to raise the minimum wage.

RAISING THE MINIMUM WAGE

The minimum wage was established in 1938 in an attempt to assist the working poor, usually non-union workers with few skills and little bargaining power. The wage has been increased 17 times, from 25 cents per hour in 1938 to $4.25 per hour in 1991. Currently some 5 million people work for wages at or below $4.25 per hour, and most of them are adults rather than teenagers.