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1ST SESSION

H. R. 3010

IN THE SENATE OF THE UNITED STATES

DECEMBER 5, 2011

Received; read twice and referred to the Committee on Homeland Security and
Governmental Affairs

AN ACT

To reform the process by which Federal agencies analyze
and formulate new regulations and guidance documents.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Regulatory Account-
3 ability Act of 2011”.

4 **SEC. 2. DEFINITIONS.**

5 Section 551 of title 5, United States Code, is amend-
6 ed—

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

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

11 (3) by adding at the end the following:

12 “(15) ‘major rule’ means any rule that the Ad-
13 ministrator of the Office of Information and Regu-
14 latory Affairs determines is likely to impose—

15 “(A) an annual cost on the economy of
16 \$100,000,000 or more, adjusted annually for
17 inflation;

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

22 “(C) significant adverse effects on competi-
23 tion, employment, investment, productivity, in-
24 novation, or on the ability of United States-
25 based enterprises to compete with foreign-based
26 enterprises in domestic and export markets; or

1 “(D) significant impacts on multiple sec-
2 tors of the economy;

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

8 “(17) ‘guidance’ means an agency statement of
9 general applicability and future effect, other than a
10 regulatory action, that sets forth a policy on a statu-
11 tory, regulatory or technical issue or an interpreta-
12 tion of a statutory or regulatory issue;

13 “(18) ‘major guidance’ means guidance that the
14 Administrator of the Office of Information and Reg-
15 ulatory Affairs finds is likely to lead to—

16 “(A) an annual cost on the economy of
17 \$100,000,000 or more, adjusted annually for
18 inflation;

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

23 “(C) significant adverse effects on competi-
24 tion, employment, investment, productivity, in-
25 novation, or on the ability of United States-

1 based enterprises to compete with foreign-based
2 enterprises in domestic and export markets; or

3 “(D) significant impacts on multiple sec-
4 tors of the economy;

5 “(19) the ‘Information Quality Act’ means sec-
6 tion 515 of Public Law 106–554, the Treasury and
7 General Government Appropriations Act for Fiscal
8 Year 2001, and guidelines issued by the Adminis-
9 trator of the Office of Information and Regulatory
10 Affairs or other agencies pursuant to the Act; and

11 “(20) the ‘Office of Information and Regulatory
12 Affairs’ means the office established under section
13 3503 of chapter 35 of title 44 and any successor to
14 that office.”.

15 **SEC. 3. RULE MAKING.**

16 (a) Section 553(a) of title 5, United States Code, is
17 amended by striking “(a) This section applies” and insert-
18 ing “(a) APPLICABILITY.—This section applies”.

19 (b) Section 553 of title 5, United States Code, is
20 amended by striking subsections (b) through (e) and in-
21 serting the following:

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

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

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

9 “(3) The specific nature and significance of the
10 problem the agency may address with a rule (includ-
11 ing the degree and nature of risks the problem poses
12 and the priority of addressing those risks compared
13 to other matters or activities within the agency’s ju-
14 risdiction), whether the problem warrants new agen-
15 cy action, and the countervailing risks that may be
16 posed by alternatives for new agency action.

17 “(4) Whether existing rules have created or
18 contributed to the problem the agency may address
19 with a rule and whether those rules could be amend-
20 ed or rescinded to address the problem in whole or
21 part.

22 “(5) Any reasonable alternatives for a new rule
23 or other response identified by the agency or inter-
24 ested persons, including not only responses that

1 mandate particular conduct or manners of compli-
2 ance, but also—

3 “(A) the alternative of no Federal re-
4 sponse;

5 “(B) amending or rescinding existing
6 rules;

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

10 “(D) potential responses that—

11 “(i) specify performance objectives
12 rather than conduct or manners of compli-
13 ance;

14 “(ii) establish economic incentives to
15 encourage desired behavior;

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

18 “(iv) incorporate other innovative al-
19 ternatives rather than agency actions that
20 specify conduct or manners of compliance.

21 “(6) Notwithstanding any other provision of
22 law—

23 “(A) the potential costs and benefits asso-
24 ciated with potential alternative rules and other
25 responses considered under section 553(b)(5),

1 including direct, indirect, and cumulative costs
2 and benefits and estimated impacts on jobs (in-
3 cluding an estimate of the net gain or loss in
4 domestic jobs), economic growth, innovation,
5 and economic competitiveness;

6 “(B) means to increase the cost-effective-
7 ness of any Federal response; and

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

12 “(c) ADVANCE NOTICE OF PROPOSED RULE MAKING
13 FOR MAJOR RULES, HIGH-IMPACT RULES, AND RULES
14 INVOLVING NOVEL LEGAL OR POLICY ISSUES.—In the
15 case of a rule making for a major rule or high-impact rule
16 or a rule that involves a novel legal or policy issue arising
17 out of statutory mandates, not later than 90 days before
18 a notice of proposed rule making is published in the Fed-
19 eral Register, an agency shall publish advance notice of
20 proposed rule making in the Federal Register. In pub-
21 lishing such advance notice, the agency shall—

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

24 “(A) the nature and significance of the
25 problem the agency may address with a rule, in-

1 including data and other evidence and informa-
2 tion on which the agency expects to rely for the
3 proposed rule;

4 “(B) the legal authority under which a rule
5 may be proposed, including whether a rule mak-
6 ing is required by statute, and if so, whether by
7 a specific date, or whether the agency has dis-
8 cretion to commence a rule making;

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

12 “(D) in the case of a rule that involves a
13 novel legal or policy issue arising out of statu-
14 tory mandates, the nature of and potential rea-
15 sons to adopt the novel legal or policy position
16 upon which the agency may base a proposed
17 rule;

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

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

24 “(d) NOTICES OF PROPOSED RULE MAKING; DETER-
25 MINATIONS OF OTHER AGENCY COURSE.—(1) Before it

1 determines to propose a rule, and following completion of
2 procedures under subsection (c), if applicable, the agency
3 shall consult with the Administrator of the Office of Infor-
4 mation and Regulatory Affairs. If the agency thereafter
5 determines to propose a rule, the agency shall publish a
6 notice of proposed rule making, which shall include—

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

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

11 “(C) the terms of the proposed rule;

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

15 “(i) a summary of information known to
16 the agency concerning the considerations speci-
17 fied in subsection (b);

18 “(ii) a summary of additional information
19 the agency provided to and obtained from inter-
20 ested persons under subsection (c);

21 “(iii) a summary of any preliminary risk
22 assessment or regulatory impact analysis per-
23 formed by the agency; and

24 “(iv) information specifically identifying all
25 data, studies, models, and other evidence or in-

1 formation considered or used by the agency in
2 connection with its determination to propose
3 the rule;

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

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

9 “(F) a reasoned preliminary determination that
10 the benefits of the proposed rule meet the relevant
11 statutory objectives and justify the costs of the pro-
12 posed rule (including all costs to be considered under
13 subsection (b)(6)), based on the information de-
14 scribed under subparagraph (D);

15 “(G) a discussion of—

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

19 “(ii) the costs and benefits of those alter-
20 natives (including all costs to be considered
21 under subsection (b)(6));

22 “(iii) whether those alternatives meet rel-
23 evant statutory objectives; and

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

1 “(H)(i) a statement of whether existing rules
2 have created or contributed to the problem the agen-
3 cy seeks to address with the proposed rule; and

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

6 All information provided to or considered by the
7 agency, and steps to obtain information by the agen-
8 cy, in connection with its determination to propose
9 the rule, including any preliminary risk assessment
10 or regulatory impact analysis prepared by the agen-
11 cy and all other information prepared or described
12 by the agency under subparagraph (D) and, at the
13 discretion of the President or the Administrator of
14 the Office of Information and Regulatory Affairs, in-
15 formation provided by that Office in consultations
16 with the agency, shall be placed in the docket for the
17 proposed rule and made accessible to the public by
18 electronic means and otherwise for the public’s use
19 when the notice of proposed rule making is pub-
20 lished.

21 “(2)(A) If the agency undertakes procedures under
22 subsection (c) and determines thereafter not to propose
23 a rule, the agency shall, following consultation with the
24 Office of Information and Regulatory Affairs, publish a
25 notice of determination of other agency course. A notice

1 of determination of other agency course shall include in-
2 formation required by paragraph (1)(D) to be included in
3 a notice of proposed rule making and a description of the
4 alternative response the agency determined to adopt.

5 “(B) If in its determination of other agency course
6 the agency makes a determination to amend or rescind
7 an existing rule, the agency need not undertake additional
8 proceedings under subsection (c) before it publishes a no-
9 tice of proposed rule making to amend or rescind the exist-
10 ing rule.

11 All information provided to or considered by the agency,
12 and steps to obtain information by the agency, in connec-
13 tion with its determination of other agency course, includ-
14 ing but not limited to any preliminary risk assessment or
15 regulatory impact analysis prepared by the agency and all
16 other information that would be required to be prepared
17 or described by the agency under paragraph (1)(D) if the
18 agency had determined to publish a notice of proposed rule
19 making and, at the discretion of the President or the Ad-
20 ministrator of the Office of Information and Regulatory
21 Affairs, information provided by that Office in consulta-
22 tions with the agency, shall be placed in the docket for
23 the determination and made accessible to the public by
24 electronic means and otherwise for the public’s use when
25 the notice of determination is published.

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

6 “(A) if a hearing is required under paragraph
7 (4)(B) or subsection (e), opportunity for oral presen-
8 tation shall be provided pursuant to that require-
9 ment; or

10 “(B) when other than under subsection (e) of
11 this section rules are required by statute or at the
12 discretion of the agency to be made on the record
13 after opportunity for an agency hearing, sections
14 556 and 557 shall apply, and paragraph (4), the re-
15 quirements of subsection (e) to receive comment out-
16 side of the procedures of sections 556 and 557, and
17 the petition procedures of subsection (e)(6) shall not
18 apply.

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

23 “(4)(A) Within 30 days of publication of notice of
24 proposed rule making, a member of the public may peti-
25 tion for a hearing in accordance with section 556 to deter-

1 mine whether any evidence or other information upon
2 which the agency bases the proposed rule fails to comply
3 with the Information Quality Act.

4 “(B)(i) The agency may, upon review of the petition,
5 determine without further process to exclude from the rule
6 making the evidence or other information that is the sub-
7 ject of the petition and, if appropriate, withdraw the pro-
8 posed rule. The agency shall promptly publish any such
9 determination.

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

21 “(C) There shall be no judicial review of the agency’s
22 disposition of issues considered and decided or determined
23 under subparagraph (B)(ii) until judicial review of the
24 agency’s final action. There shall be no judicial review of

1 an agency’s determination to withdraw a proposed rule
2 under subparagraph (B)(i) on the basis of the petition.

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

7 “(e) HEARINGS FOR HIGH-IMPACT RULES.—Fol-
8 lowing notice of a proposed rule making, receipt of com-
9 ments on the proposed rule, and any hearing held under
10 subsection (d)(4), and before adoption of any high-impact
11 rule, the agency shall hold a hearing in accordance with
12 sections 556 and 557, unless such hearing is waived by
13 all participants in the rule making other than the agency.
14 The agency shall provide a reasonable opportunity for
15 cross-examination at such hearing. The hearing shall be
16 limited to the following issues of fact, except that partici-
17 pants at the hearing other than the agency may waive de-
18 termination of any such issue:

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

21 “(2) Whether there is an alternative to the pro-
22 posed rule that would achieve the relevant statutory
23 objectives at a lower cost (including all costs to be
24 considered under subsection (b)(6)) than the pro-
25 posed rule.

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

6 “(4) Whether, if the agency proposes to adopt
7 a rule that is more costly than the least costly alter-
8 native that would achieve the relevant statutory ob-
9 jectives (including all costs to be considered under
10 subsection (b)(6)), the additional benefits of the
11 more costly rule exceed the additional costs of the
12 more costly rule.

13 “(5) Whether the evidence and other informa-
14 tion upon which the agency bases the proposed rule
15 meets the requirements of the Information Quality
16 Act.

17 “(6) Upon petition by an interested person who
18 has participated in the rule making, other issues rel-
19 evant to the rule making, unless the agency deter-
20 mines that consideration of the issues at the hearing
21 would not advance consideration of the rule or
22 would, in light of the nature of the need for agency
23 action, unreasonably delay completion of the rule
24 making. An agency shall grant or deny a petition

1 under this paragraph within 30 days of its receipt
2 of the petition.

3 No later than 45 days before any hearing held under this
4 subsection or sections 556 and 557, the agency shall pub-
5 lish in the Federal Register a notice specifying the pro-
6 posed rule to be considered at such hearing, the issues
7 to be considered at the hearing, and the time and place
8 for such hearing, except that such notice may be issued
9 not later than 15 days before a hearing held under sub-
10 section (d)(4)(B).

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

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

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

23 “(B) The agency may adopt a rule that is more costly
24 than the least costly alternative that would achieve the rel-
25 evant statutory objectives only if the additional benefits

1 of the more costly rule justify its additional costs and only
2 if the agency explains its reason for doing so based on
3 interests of public health, safety or welfare that are clearly
4 within the scope of the statutory provision authorizing the
5 rule.

6 “(4) When it adopts a final rule, the agency shall
7 publish a notice of final rule making. The notice shall in-
8 clude—

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

11 “(B) the agency’s reasoned final determination
12 of need for a rule to address the problem the agency
13 seeks to address with the rule, including a statement
14 of whether a rule is required by statute and a sum-
15 mary of any final risk assessment or regulatory im-
16 pact analysis prepared by the agency;

17 “(C) the agency’s reasoned final determination
18 that the benefits of the rule meet the relevant statu-
19 tory objectives and justify the rule’s costs (including
20 all costs to be considered under subsection (b)(6));

21 “(D) the agency’s reasoned final determination
22 not to adopt any of the alternatives to the proposed
23 rule considered by the agency during the rule mak-
24 ing, including—

1 “(i) the agency’s reasoned final determina-
2 tion that no alternative considered achieved the
3 relevant statutory objectives with lower costs
4 (including all costs to be considered under sub-
5 section (b)(6)) than the rule; or

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

9 “(E) the agency’s reasoned final determina-
10 tion—

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

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

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

20 “(II) whether and how the agency in-
21 tends to amend or rescind the existing rule
22 separate from adoption of the rule;

23 “(F) the agency’s reasoned final determination
24 that the evidence and other information upon which

1 the agency bases the rule complies with the Informa-
2 tion Quality Act; and

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

12 “(ii) review of a rule under a plan required by
13 clause (i) of this subparagraph shall take into ac-
14 count the factors and criteria set forth in sub-
15 sections (b) through (f) of section 553 of this title.

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

23 “(g) EXCEPTIONS FROM NOTICE AND HEARING RE-
24 QUIREMENTS.—(1) Except when notice or hearing is re-
25 quired by statute, the following do not apply to interpre-

1 tive rules, general statements of policy, or rules of agency
2 organization, procedure, or practice:

3 “(A) Subsections (c) through (e).

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

6 “(C) Subparagraphs (B) through (H) of sub-
7 section (f)(4).

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

18 “(B) If, following compliance with subparagraph (A)
19 of this paragraph, the agency adopts an interim rule, it
20 shall commence proceedings that comply fully with sub-
21 sections (d) through (f) of this section immediately upon
22 publication of the interim rule, shall treat the publication
23 of the interim rule as publication of a notice of proposed
24 rule making and shall not be required to issue supple-
25 mental notice other than to complete full compliance with

1 subsection (d). No less than 270 days from publication
2 of the interim rule (or 18 months in the case of a major
3 rule or high-impact rule), the agency shall complete rule
4 making under subsections (d) through (f) of this sub-
5 section and take final action to adopt a final rule or re-
6 scind the interim rule. If the agency fails to take timely
7 final action, the interim rule will cease to have the effect
8 of law.

9 “(C) Other than in cases involving interests of na-
10 tional security, upon the agency’s publication of an interim
11 rule without compliance with subsections (c), (d), or (e)
12 or requirements to render final determinations under sub-
13 section (f) of this section, an interested party may seek
14 immediate judicial review under chapter 7 of this title of
15 the agency’s determination to adopt such interim rule. The
16 record on such review shall include all documents and in-
17 formation considered by the agency and any additional in-
18 formation presented by a party that the court determines
19 necessary to consider to assure justice.

20 “(3) When the agency for good cause finds (and in-
21 corporates the finding and a brief statement of reasons
22 therefor in the rules issued) that notice and public proce-
23 dure thereon are unnecessary, including because agency
24 rule making is undertaken only to correct a de minimis
25 technical or clerical error in a previously issued rule or

1 for other noncontroversial purposes, the agency may pub-
2 lish a rule without compliance with subsections (c), (d),
3 (e), or (f)(1)–(3) and (f)(4)(B)–(F). If the agency receives
4 significant adverse comment within 60 days after publica-
5 tion of the rule, it shall treat the notice of the rule as
6 a notice of proposed rule making and complete rule mak-
7 ing in compliance with subsections (d) and (f).

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

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

19 “(1) a substantive rule which grants or recog-
20 nizes an exemption or relieves a restriction;

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

22 or

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

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

4 “(k) RULE MAKING GUIDELINES.—(1)(A) The Ad-
5 ministrator of the Office of Information and Regulatory
6 Affairs shall establish guidelines for the assessment, in-
7 cluding quantitative and qualitative assessment, of the
8 costs and benefits of proposed and final rules and other
9 economic issues or issues related to risk that are relevant
10 to rule making under this title. The rigor of cost-benefit
11 analysis required by such guidelines shall be commensu-
12 rate, in the Administrator’s determination, with the eco-
13 nomic impact of the rule.

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

21 “(2) The Administrator of the Office of Information
22 and Regulatory Affairs shall also issue guidelines to pro-
23 mote coordination, simplification and harmonization of
24 agency rules during the rule making process and other-
25 wise. Such guidelines shall assure that each agency avoids

1 regulations that are inconsistent or incompatible with, or
2 duplicative of, its other regulations and those of other
3 Federal agencies and drafts its regulations to be simple
4 and easy to understand, with the goal of minimizing the
5 potential for uncertainty and litigation arising from such
6 uncertainty.

7 “(3) To ensure consistency in Federal rule making,
8 the Administrator of the Office of Information and Regu-
9 latory Affairs shall—

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

16 “(B) issue guidelines for the conduct of hear-
17 ings under subsections 553(d)(4) and 553(e) of this
18 section, including to assure a reasonable opportunity
19 for cross-examination. Each agency shall adopt regu-
20 lations for the conduct of hearings consistent with
21 the guidelines issued under this subparagraph.

22 “(4) The Administrator of the Office of Information
23 and Regulatory Affairs shall issue guidelines pursuant to
24 the Information Quality Act to apply in rule making pro-
25 ceedings under sections 553, 556, and 557 of this title.

1 In all cases, such guidelines, and the Administrator’s spe-
2 cific determinations regarding agency compliance with
3 such guidelines, shall be entitled to judicial deference.

4 “(l) INCLUSION IN THE RECORD OF CERTAIN DOCU-
5 MENTS AND INFORMATION.—The agency shall include in
6 the record for a rule making, and shall make available by
7 electronic means and otherwise, all documents and infor-
8 mation prepared or considered by the agency during the
9 proceeding, including, at the discretion of the President
10 or the Administrator of the Office of Information and Reg-
11 ulatory Affairs, documents and information communicated
12 by that Office during consultation with the Agency.

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

1 **SEC. 4. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR**
2 **GUIDANCE; PRESIDENTIAL AUTHORITY TO**
3 **ISSUE GUIDELINES FOR ISSUANCE OF GUID-**
4 **ANCE.**

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

8 **“§ 553a. Agency guidance; procedures to issue major**
9 **guidance; authority to issue guidelines**
10 **for issuance of guidance**

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

14 “(1) make and document a reasoned determina-
15 tion that—

16 “(A) assures that such guidance is under-
17 standable and complies with relevant statutory
18 objectives and regulatory provisions (including
19 any statutory deadlines for agency action);

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

22 “(C) identifies the costs and benefits (in-
23 cluding all costs to be considered during a rule
24 making under section 553(b) of this title) of
25 conduct conforming to such guidance and

1 assures that such benefits justify such costs;
2 and

3 “(D) describes alternatives to such guid-
4 ance and their costs and benefits (including all
5 costs to be considered during a rule making
6 under section 553(b) of this title) and explains
7 why the agency rejected those alternatives; and

8 “(2) confer with the Administrator of the Office
9 of Information and Regulatory Affairs on the
10 issuance of such guidance to assure that the guid-
11 ance is reasonable, understandable, consistent with
12 relevant statutory and regulatory provisions and re-
13 quirements or practices of other agencies, does not
14 produce costs that are unjustified by the guidance’s
15 benefits, and is otherwise appropriate.

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

20 “(b) Agency guidance—

21 “(1) is not legally binding and may not be re-
22 lied upon by an agency as legal grounds for agency
23 action;

24 “(2) shall state in a plain, prominent and per-
25 manent manner that it is not legally binding; and

1 “(3) shall, at the time it is issued or upon re-
2 quest, be made available by the issuing agency to in-
3 terested persons and the public by electronic means
4 and otherwise.

5 Agencies shall avoid the issuance of guidance that is in-
6 consistent or incompatible with, or duplicative of, the
7 agency’s governing statutes or regulations, with the goal
8 of minimizing the potential for uncertainty and litigation
9 arising from such uncertainty.

10 “(c) The Administrator of the Office of Information
11 and Regulatory Affairs shall have authority to issue guide-
12 lines for use by the agencies in the issuance of major guid-
13 ance and other guidance. Such guidelines shall assure that
14 each agency avoids issuing guidance documents that are
15 inconsistent or incompatible with, or duplicative of, the
16 law, its other regulations, or the regulations of other Fed-
17 eral agencies and drafts its guidance documents to be sim-
18 ple and easy to understand, with the goal of minimizing
19 the potential for uncertainty and litigation arising from
20 such uncertainty.”.

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

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

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

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

6 “(e)(1) The transcript of testimony and exhibits, to-
7 gether with all papers and requests filed in the proceeding,
8 constitutes the exclusive record for decision in accordance
9 with section 557 and shall be made available to the parties
10 and the public by electronic means and, upon payment of
11 lawfully prescribed costs, otherwise. When an agency deci-
12 sion rests on official notice of a material fact not appear-
13 ing in the evidence in the record, a party is entitled, on
14 timely request, to an opportunity to show the contrary.

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

20 “(f) When an agency conducts rule making under this
21 section and section 557 directly after concluding pro-
22 ceedings upon an advance notice of proposed rule making
23 under section 553(c), the matters to be considered and
24 determinations to be made shall include, among other rel-
25 evant matters and determinations, the matters and deter-

1 minations described in subsections (b) and (f) of section
2 553.

3 “(g) Upon receipt of a petition for a hearing under
4 this section, the agency shall grant the petition in the case
5 of any major rule, unless the agency reasonably deter-
6 mines that a hearing would not advance consideration of
7 the rule or would, in light of the need for agency action,
8 unreasonably delay completion of the rule making. The
9 agency shall publish its decision to grant or deny the peti-
10 tion when it renders the decision, including an explanation
11 of the grounds for decision. The information contained in
12 the petition shall in all cases be included in the adminis-
13 trative record. This subsection shall not apply to rule mak-
14 ings that concern monetary policy proposed or imple-
15 mented by the Board of Governors of the Federal Reserve
16 System or the Federal Open Market Committee.”.

17 **SEC. 6. ACTIONS REVIEWABLE.**

18 Section 704 of title 5, United States Code, is amend-
19 ed—

20 (1) by striking “Agency action made” and in-
21 serting “(a) Agency action made”; and

22 (2) by adding at the end the following: “Denial
23 by an agency of a correction request or, where ad-
24 ministrative appeal is provided for, denial of an ap-
25 peal, under an administrative mechanism described

1 in subsection (b)(2)(B) of the Information Quality
2 Act, or the failure of an agency within 90 days to
3 grant or deny such request or appeal, shall be final
4 action for purposes of this section.

5 “(b) Other than in cases involving interests of na-
6 tional security, notwithstanding subsection (a) of this sec-
7 tion, upon the agency’s publication of an interim rule with-
8 out compliance with section 553(c), (d), or (e) or require-
9 ments to render final determinations under subsection (f)
10 of section 553, an interested party may seek immediate
11 judicial review under this chapter of the agency’s deter-
12 mination to adopt such rule on an interim basis. Review
13 shall be limited to whether the agency abused its discre-
14 tion to adopt the interim rule without compliance with sec-
15 tion 553(c), (d), or (e) or without rendering final deter-
16 minations under subsection (f) of section 553.”.

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

18 Section 706 of title 5, United States Code is amend-
19 ed—

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

22 (2) in paragraph (2)(A) of subsection (a) (as
23 designated by paragraph (1) of this section), by in-
24 serting after “in accordance with law” the following:

25 “(including the Information Quality Act)”; and

1 (3) by adding at the end the following:

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

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

7 “(2) determination of the costs and benefits or
8 other economic or risk assessment of the action, if
9 the agency failed to conform to guidelines on such
10 determinations and assessments established by the
11 Administrator of the Office of Information and Reg-
12 ulatory Affairs under section 553(k);

13 “(3) determinations made in the adoption of an
14 interim rule; or

15 “(4) guidance.

16 “(c) The court shall review agency denials of petitions
17 under section 553(e)(6) or any other petition for a hearing
18 under sections 556 and 557 for abuse of agency discre-
19 tion.”.

20 **SEC. 8. ADDED DEFINITION.**

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

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

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

3 (3) by adding at the end the following:

4 “(3) ‘substantial evidence’ means such relevant
5 evidence as a reasonable mind might accept as ade-
6 quate to support a conclusion in light of the record
7 considered as a whole, taking into account whatever
8 in the record fairly detracts from the weight of the
9 evidence relied upon by the agency to support its de-
10 cision.”.

11 **SEC. 9. EFFECTIVE DATE.**

12 The amendments made by this Act to—

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

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

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

18 (4) subsection (c) of section 706 of such title,
19 shall not apply to any rule makings pending or completed
20 on the date of enactment of this Act.

 Passed the House of Representatives December 2,
2011.

Attest:

KAREN L. HAAS,

Clerk.