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REGULATORY ACCOUNTABILITY ACT OF 2013

SEPTEMBER 28, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2122]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2122) to reform the process by which Federal agencies analyze and formulate new regulations and guidance documents, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 2122, the "Regulatory Accountability Act of 2013" (RAA) promotes job creation, economic growth, and the accountability of Federal regulatory agencies by requiring agencies to lower the costs of regulation while meeting statutory objectives; improving agencies' decision-making processes and enhancing regulatory transparency and accountability to the public; and strengthening judicial review of agency action. The legislation achieves these ends through carefully focused reforms to particular sections of the Administrative Procedure Act (APA).

Background and Need for the Legislation

I. GENERAL BACKGROUND

The annual cost to the economy of Federal regulations has recently been estimated to be in excess of $1 trillion dollars, and this cost is increasing each year. This burden, coupled with uncertainty over what additional Federal regulation may be imposed in the near term, have been cited as key factors continuing to hold back economic recovery and the creation of new jobs.

The current regulatory burden is largely the fruit of inadequate administrative law. Most important, the APA, known as the "constitution" of agency rulemaking, imposes only a few light-handed constraints on the vast majority of agency rulemaking proceedings. Nowhere in the APA, for example, is an agency required to consider the costs of a proposed regulation and weigh them against potential benefits.

In the 67 years since it was enacted on June 11, 1946, the APA has never been modernized. In the 109th Congress, the Subcommittee on Commercial and Administrative Law documented a host of potential rulemaking reforms to modernize the APA and other administrative law statutes.[1] In the 112th Congress, the Subcommittee on Courts, Commercial and Administrative Law held a series of hearings to reconsider more precisely how the APA could be improved to create jobs and promote economic growth by improving agencies' decision-making processes and enhancing regulatory transparency and accountability.

On February 28, 2011, the Subcommittee held a hearing entitled, "The APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?"[2] Witnesses at this hearing were Susan E. Dudley, director of George Washington University's Regulatory Studies Center and former administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) (2007–09); Jeffrey A. Rosen, Esq., Kirkland & Ellis LLP and former OMB general counsel (2006–09); and, Professor Peter L. Strauss, Betts Professor of Law, Columbia Law School.

On March 29, 2011, the Subcommittee held a hearing entitled, "Raising the Agencies' Grades: Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory

[1] HOUSE COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY (Comm. Print 10).

[2] *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law,* 112th Cong. (Feb. 28, 2011).

Need."[3] At this hearing, the Subcommittee heard testimony from Dr. Jerry Ellig, Ph.D., director of the Mercatus Center's Regulatory Report Card project; Dr. Richard Williams, Ph.D., Director of Policy Research at the Mercatus Center and former OMB regulatory development and review official; and, Professor Robert L. Glicksman, J.B. and Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School.

On May 4, 2011, the Subcommittee held a hearing entitled, "Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits."[4] Witnesses at this hearing were John Graham, Dean of Indiana University's School of Public and Environmental Affairs and former OIRA Administrator (2001–06); Jeffrey R. Holmstead, Esq., Bracewell & Giuliani LLP and former EPA Assistant Administrator for Air and Radiation (2001–05); Dr. Harold Furchtgott-Roth, Ph.D., former Commissioner, Federal Communications Commission (1997–2001); and, Sally Katzen, Visiting Professor, NYU School of Law, Senior Advisor at the Podesta Group, and former OIRA Administrator (1993–98).

On May 31, 2011, the Subcommittee held a hearing entitled, "Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability."[5] The Subcommittee heard testimony from Noel J. Francisco, Esq., former Associate Counsel to President George W. Bush (2001–2003) and Deputy Assistant Attorney General for the Department of Justice's Office of Legal Counsel (2003–2005), and current member, Government Regulation Practice Group, Jones Day LLP; Edward W. Warren, P.C., Environmental Practice Group, Kirkland & Ellis LLP; and, Professor Matthew Stephenson, Harvard Law School.

As the fruit of these hearings, H.R. 3010, the "Regulatory Accountability Act of 2011," was introduced on September 22, 2011. The Committee held a legislative hearing on H.R. 3010 on October 25, 2011. Witnesses at the hearing included the Honorable C. Boyden Gray, Esq., Boyden Gray & Associates, White House Counsel (1989–93) and Ambassador to the European Union (2006–07); Arnold Baker, Chair of the National Black Chamber of Commerce and CEO of Baker Ready-Mix, a concrete supply company in New Orleans; the Honorable Christopher DeMuth, former OIRA Administrator (1981–1984) and President of the American Enterprise Institute (1986–2008); and, Professor Sidney Shapiro, University Distinguished Chair in Law, Wake Forest University School of Law.

On February 28, 2013, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law held an oversight hearing to commence consideration in the 113th Congress of issues relevant to the RAA and the Committee's other regulatory reform legislation. Testimony at the hearing concentrated on the need for regulatory reform in light of the Obama administration's continuing high levels

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[3] *Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law,* 112th Cong. (Mar. 29, 2011).

[4] *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law,* 112th Cong. (May 4, 2011).

[5] *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law,* 112th Cong. (May 31, 2011).

of new, major regulation, the adverse impacts of new regulation on jobs, and the adverse impacts of new regulation on communities that suffer displaced industry and jobs. Numerous issues discussed at the hearing bore on the need for Administrative Procedure Act reform. Witnesses at the hearing included Douglas Holtz-Eakin, President of the American Action Forum and former Director of the Congressional Budget Office; Drew Greenblatt, CEO, Marlin Steel, Baltimore, Maryland; Rob James, Member, City Council, City of Avon Lake, Ohio; and, Professor Glicksman.

Chairman Goodlatte reintroduced the Regulatory Accountability Act on May 23, 2013 by introducing H.R. 2122, the "Regulatory Accountability Act of 2013." As mentioned above, on July 9, 2013, the Subcommittee held a legislative hearing on H.R. 2122. Testimony was received at the hearing from Jeffrey A. Rosen, Esq., Kirkland & Ellis (formerly general counsel of the Office of Management and Budget); Keith Hall, Mercatus Center (formerly Commissioner of the Bureau of Labor Statistics; Diana Thomas, Huntsman School of Business, Utah State University; Robert A. Sells, Titan America Mid-Atlantic Business Division; David Goldston, Natural Resources Defense Council; and, Professor Ronald Levin, Washington University School of Law. Mr. Rosen and Mr. Sells provided detailed testimony regarding the continuing need for Administrative Procedure Act reform and the potential benefits of the Regulatory Accountability Act's provisions. Mr. Hall and Prof. Thomas offered testimony regarding the extent to which new regulations promulgated under existing law create adverse jobs impacts and regressive effects on lower income populations. Mr. Goldston and Prof. Levin testified against the bill, offering their views that the Regulatory Accountability Act would unnecessarily slow down the ability of regulators to issue new regulations.

II. REQUIRING CONSIDERATION OF COSTS AND BENEFITS AND IMPROVING AGENCY DECISION MAKING

A. Codifying Executive Order Rulemaking Principles

"Whereas Congress has *never* amended the APA in a material way, the Executive Branch has frequently created its own requirements for how Federal agencies ought to function, and established a variety of principles, requirements, coordination mechanisms, and the like. . . ."[6] Over the last 30-plus years, presidents from both parties have issued executive orders that require regulatory agencies to take steps in addition to those required by the APA. Executive Orders 12291, 12866, 13422 and 13563 all required regulatory agencies in the Executive Branch to conduct regulatory impact analyses, including cost-benefit analysis requirements, and to coordinate rulemaking with the OIRA Administrator. Other requirements of the orders include consideration of reasonable alternatives to proposed rules, identification of the least burdensome alternative and consideration of whether it would be more appropriate to defer to State and local authorities than to issue a Federal rule.

To enforce the requirements of these executive orders, however, has been up to White House discretion, not the courts. As a result, "agency regulatory analysis is often incomplete and seldom used in

[6] *APA at 65,* note 2 *supra,* at 31 (Testimony of Jeffrey Rosen).

decisions. This pattern persists across Administrations, suggesting that the source of the problem is institutional, not political."[7] In the Mercatus Center's Regulatory Report Card project, Drs. Ellig and Williams "examine[d] how well the executive-branch regulatory agencies do what presidents have been telling them to do for more than three decades."[8] Overall, Drs. Ellig and Williams found that the quality of agencies' regulatory impact analysis is lacking,[9] and that agencies rarely utilize the analysis in the decision making process.[10] Specifically, in evaluations of 34 major rulemakings conducted by 17 agencies from 2008 through 2011, the highest average score obtained by any agency was a meager 35 points out of 60 (earned by the Department of Justice). The Social Security Administration earned the worst performance with a score of seven points.

Dr. Williams observed that agencies only have an incentive to regulate; there is no incentive *not* to issue a new regulation.[11] Drawing on his 27 years of experience as an FDA economist, Dr. Williams testified that "there is no discussion [within agencies] of whether or not a regulation is required. There is also no discussion as to whether there is a failure of the market or some other reason for regulatory intervention; whether the market will solve the problem in the near future without intervention (baseline analysis); or if there is a need for federal, as opposed to some other level of government, intervention."[12] Consequently, "the regulatory analysis analyzes a decision, not a problem."[13]

To remedy this failing, Dr. Ellig testified, "[r]egulatory analysis needs to be legislatively required for all Federal agencies, including independent agencies."[14] The proposal to codify some or all of the Executive Orders' decision-making criteria also was endorsed by Mr. Rosen,[15] Ms. Dudley,[16] Prof. Strauss,[17] Dean Graham,[18] Mr. Holmstead,[19] and Dr. Furchtgott-Roth.[20]

Section 3(b) of the Bill addresses this issue by codifying the key rulemaking principles found in the Executive Orders. This would make the Executive Orders' criteria permanent and extend them to independent agencies, as numerous witnesses suggested. To codify these criteria also would make them judicially enforceable, which they currently are not[21], but which multiple witnesses supported.[22]

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[7] *Raising the Agencies' Grades,* note 3 *supra,* at 20 (Testimony of Jerry Ellig).
[8] *Id.* at 21.
[9] *Id.* at 23 ("One of the major areas where regulatory analysis is weakest is identification of the systemic problem the regulation is supposed to solve.").
[10] *Id.* at 21 ("All too often, agency economists have to conduct regulatory analysis after most major decisions about regulations have already been made. The analysis then becomes an advocacy document written to justify the agency's decisions, or a mere paperwork exercise to fulfill requirements imposed by the Office of Management and Budget.").
[11] *Id.* at 73–74.
[12] *Id.* at 74.
[13] *Ibid.*
[14] *Raising the Agencies' Grades,* note 3 *supra,* at 20.
[15] *APA at 65,* note 2 *supra,* at 33–35.
[16] *Id.* at 20–21.
[17] *Id.* at 47.
[18] *Cost-Justifying Regulations,* note 4 *supra,* at 6.
[19] *Id.* at 16.
[20] *Id.* at 38.
[21] *See* Exec. Order No. 12,866, § 10; Exec. Order 13,563, § 7.
[22] *Cost-Justifying Regulations,* note 4 *supra,* at 38 (Testimony of Harold Furchtgott-Roth) ("The absence of judicial review of the regulatory process means that both the Federal agency and the outside parties do not take the regulatory process seriously. If Congress were to alter the regulatory process, it would be important to have mechanisms whereby courts can review

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As Dean Graham recommended, under section 3(b) (provisions of new subsection 553(k) of title 5), OIRA would also have authority to issue more detailed guidance for agencies to follow during the decision-making process, including norms for cost-benefit analysis.[23]

B. Improving the Process for Notice-and-Comment Rulemaking

In his testimony to the Subcommittee on May 4, 2011, Dr. Furchtgott-Roth explained:

> One of the most important aspects of the Notice of Proposed Rulemaking process is to obtain guidance from the public about how best to craft a rule. A Federal agency should solicit ideas from the public first rather than develop a predetermined rule before seeking public comment. An agency that can articulate in detail the possible costs and benefits to various segments of our economy of each proposed rule and alternatives to it demonstrates some thoughtful analysis behind the proposed rule. And the agency can explain other forms of the rule, including no new rule, that can be considered.[24]

Drawing on his experience at the FCC, Dr. Furchtgott-Roth described how that independent regulatory agency falls short in its decision-making processes.[25] Specifically regarding cost-benefit analysis, Mr. Holmstead remarked, "I have also seen, however, that Federal agencies sometimes do not use [cost-benefit analysis] to *inform* their regulatory decision, but rather to *justify* actions they may want to take for other reasons."[26]

In the Regulatory Report Card project, Drs. Ellig and Williams found that agencies do a poor job of both analyzing the problem they are trying to solve,[27] and then applying whatever analysis is conducted to the drafting of a new regulation.[28] This is not to say

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Federal agency decisions."); *id.* at 6–7 (Testimony of John Graham) ("Since presidents and agencies do not always adhere to the provisions in presidential executive orders, it is imperative that judicial review of the new statutory requirements be authorized.").

[23] *Id.* at 7 ("Second, I recommend that Congress require OMB to issue guidance on the proper conduct of BCA, and that this guidance be updated periodically.").

[24] *Id.* at 37.

[25] *Id.* at 38 ("Perhaps partly because it is not covered by the executive orders, the FCC does not directly weigh or even itemize the benefits and costs of a particular regulation. The FCC does not systematically consider alternative forms of regulation including no regulation. The FCC certainly does not focus on the alternative with the greatest net benefit. The only presentation of the costs and benefits of a regulation is an appendix for the Regulatory Flexibility Act. This appendix is at best an afterthought: a short, rarely read boilerplate passage that is outside the deliberative process. Sometimes it is forgotten altogether. I have seen little change in the regulatory analyses at the FCC since I left the Commission.").

[26] *Id.* at 15.

[27] *Raising the Agencies' Grades,* note 3 *supra,* at 23 (Testimony of Jerry Ellig) ("One of the major areas where regulatory analysis is weakest is identification of the systemic problem the regulation is supposed to solve (criterion 6). This is a key weakness. . . . If the agency cannot identify and demonstrate the existence of a systemic problem that a regulation might solve, how can it assess whether the regulation is likely to solve the problem or identify alternative solutions that might be more effective?"); *id.* at 74 (Testimony of Richard Williams) ("Discussion of whether there is a problem and whether Federal regulation is the best way to solve that problem is 'off the table.' That is, there is no discussion of whether or not a regulation is required. There is also no discussion as to whether there is a failure of the market or some other reason for regulatory intervention; whether the market will solve the problem in the near future without intervention (baseline analysis); or if there is a need for federal, as opposed to some other level of government, intervention.").

[28] *Id.* at 74 (Testimony of Richard Williams) (regulatory impact analysis "is generally begun after the decision on how to regulate has been announced. That is a key part of the problem: the regulatory analysis analyzes a decision, not a problem."); *id.* at 25 (Testimony of Jerry Ellig) ("But the average scores on our Use criteria are relatively low—less than 2.5 out of a possible 5 points on each of these criteria. Even under our relatively liberal definition of 'use,' agencies

that agencies are ignorant of how to make good decisions. Drs. Ellig and Williams found that in 2008 and 2009, across Republican and Democratic administrations, "a few regulatory analyses received a score of '5' for employing potential best practices."[29] This shows that "[t]he *knowledge* required to produce better regulatory analysis exists, dispersed throughout agencies in the Federal Government. OMB Circular A–4 also summarizes a great deal of this knowledge. What's lacking are institutional *incentives* to produce good analysis and use it to guide decisions."[30]

Section 3(b) of the Bill (in its new subsections 553(c)–(f) of title 5) addresses these recommendations in the process it establishes for agencies to follow in advance notices of proposed rulemaking, notice-and-comment rulemaking on rules actually proposed, final rulemaking hearings for "major" and "high-impact" rules, as defined in Section 2, and promulgation criteria for final rules, in order to focus agencies on identifying the cause of the problem at hand, weighing solutions to solve that problem and adopting final rules. For example, in a notice of proposed rulemaking, the agency must summarize all information known to it through application of the executive-order-based rulemaking principles codified in Section 3(b) of the Bill, as well as information acquired through an advance-notice process, if one was used. The agency must provide "a reasoned preliminary determination of the need for the rule," a preliminary cost-benefit analysis supporting the rule, an analysis of the alternatives considered and why they were not proposed, and "a statement of whether existing regulations have created or contributed to the problem" the agency is trying to solve (and, if so, whether rescinding or modifying those regulations could solve the problem). If, following an advance notice of proposed rulemaking, the agency chooses to proceed on a course of conduct other than rulemaking, then the agency must identify that course to the public and make public the information received during the advance notice process. After publishing a notice of proposed rulemaking, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data." Interested persons also are given the opportunity to challenge the data supporting the proposed rule under the Information Quality Act, which is discussed in more detail below.

Section 3(b) of the Bill also requires that, when agencies promulgate final rules, they render final determinations on issues addressed with preliminary determinations in their notices of proposed rulemaking (new subsection 553(f) of title 5). Further, it requires that an agency generally must issue the least costly alternative rule considered during the rulemaking that meets the relevant statutory objectives. (*Id.*) An agency may in certain instances adopt a more costly rule, but only to serve interests of public health, safety or welfare clearly within the scope of the statutory provision that authorizes the rule and only if the additional benefits of the more costly rule justify the additional costs. (*Id.*) An agency also may only adopt a rule "on the basis of the best reasonably obtainable scientific, technical, economic, and other informa-

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claim to use the regulatory impact analysis for significant decisions only about 20 percent of the time at best. . . .").

[29] *Id.* at 27 (Testimony of Jerry Ellig).

[30] *Ibid.*

tion" and only after consulting with the OIRA Administrator. (*Id.*) For major rules and high-impact rules, the agency also must publish a plan to review the rule every 10 years to determine whether it remains efficacious as written or should be modified or rescinded. (*Id.*) Agency review of the continuing efficacy of their rules is another function in which Drs. Ellig and Williams found agencies deficient.[31]

C. Bringing Major Guidance within the Rulemaking Process

In 2007, President Bush expanded the scope of Executive Order 12866 to bring major agency guidance documents within the OIRA review process.[32] Promptly upon taking office, however, President Obama revoked this Executive Order, thus excluding major guidance documents from the OIRA review process.[33]

In his testimony on May 31, 2011, Mr. Francisco described how current judicial review doctrines encourage agencies to use the rulemaking process to issue broad, ambiguous regulations, and then interpret those regulations through mere guidance documents, which do not have to be promulgated through any established processes.[34] Under these circumstances, a court will defer to the agency's interpretation of its own ambiguous regulation even though the guidance document does not have the force of law. Both Dean Graham and Mr. Holmstead, testifying on May 4, 2011, recommended that agencies be required to follow some decision-making criteria when issuing significant guidance documents.[35]

To curb agency abuse of guidance documents, the Bill adopts several measures. First, to change agency incentives, Section 7(b) legislatively overrules the doctrine by which courts defer to agency interpretations of regulations when the interpretations are issued outside of rulemaking. In addition, Section 4 requires agencies to take certain steps before issuing "major guidance," as defined in Section 2 (*e.g.,* guidance with an economic impact of $100 million or more). Specifically, the agency must assure that the guidance is understandable and that the benefits justify the costs, and also must identify the alternatives considered and why the agency rejected them. The agency must confer with the OIRA Administrator in making these determinations. The OIRA Administrator, further, is authorized to establish guidelines for agencies to follow when issuing guidance documents. Finally, agencies must identify any guidance "in a plain, prominent and permanent manner as guid-

[31] *See id.* at 26 ("Scores are even lower on criteria 11 and 12, which indicate whether the agency commits to using the results of regulatory analysis in the future by establishing goals and measures for the regulation's outcomes and tracking data to measure the regulation's performance. The average scores on these criteria are barely above 1. This indicates that, on average, agency regulatory analyses provide some semblance of a framework for evaluating the regulation's effects on the future, but agencies have made no commitment to do so.").

[32] Exec. Order No. 13,422, *Further Amendment to Executive Order 12866 on Regulatory Planning and Review,* 72 Fed. Reg. 2763 (Jan. 18, 2007).

[33] Exec. Order No. 13,497, *Revocation of Certain Executive Orders Concerning Regulatory Planning and Review,* 74 Fed. Reg. 6113 (Jan. 30, 2009).

[34] *Formal Rulemaking and Judicial Review,* note 5 *supra,* at 179–80 (discussing *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945) and *Auer v. Robbins,* 519 U.S. 452, 461 (1997)).

[35] *Cost-Justifying Regulations,* note 4 *supra,* at 7 (Testimony of John Graham) ("Third, I recommend that Congress expand the scope of the statutory mandate to include significant guidance documents as well as legislative rules, at least in cases where the agency's action to issue a guidance document has the same practical effect on regulated parties as a regulation."); *id.* at 18 (Testimony of Jeffrey Holmstead) ("I also recommend that the Subcommittee go beyond just rules and regulations to require that significant guidance documents are subject to analysis and interagency review.").

ance that is not legally binding" must publish guidance when issued or upon request, and may not rely on guidance as legal grounds for agency action, such as agency enforcement action.

III. ENHANCING REGULATORY ACCOUNTABILITY

A. Modernizing Judicial Review Doctrines

At its February 28, 2011, and May 31, 2011, hearings, the Subcommittee received testimony that "federal courts in general are exceedingly deferential" to regulatory agencies in the Executive Branch.[36] Messrs. Rosen[37] and Francisco[38] both testified to this effect, and they both commented on the apparently counter-intuitive system whereby agency decisions made by informal rulemaking receive a lower standard of judicial review, and therefore a greater degree of judicial deference, than agency decisions made by more rigorous formal rulemaking.[39]

Consistent with academic criticism, Mr. Francisco specifically questioned the deference doctrines established by the Supreme Court in *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945), *Auer v. Robbins,* 519 U.S. 452 (1997), and in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council,* 462 U.S. 87 (1983).[40] Mr. Francisco also objected to the notion, over which the courts of appeals are split, that a court should defer to an agency's interpretation of its own jurisdiction.[41] Regarding the well-established, two-step analysis first described by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), Mr. Francisco suggested "limit[ing] *Chevron* deference to agency decisions made in strict compliance with an agency's own internal administrative processes and those required by the APA. Absent strict adherence to administrative procedure, *Skidmore* [*v. Swift & Co.,* 323 U.S. 134 (1944)] deference applies."[42]

Section 7(b) of the Bill incorporates provisions that draw upon certain of these recommendations. In particular, Section 7(b) effectively abolishes *Seminole Rock/Auer* deference. (Notably, Justice Scalia—the author of *Auer*—recently admitted that he has "become increasingly doubtful of its validity."[43]) Subsection 7(b) also withholds deference to agency cost-benefit determinations, other economic determinations, and risk assessments not made in accordance with guidelines for the conduct of such analyses issued by OIRA under the bill's new subsection 553(k) of title 5. In addition,

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[36] *APA at 65,* note 2 *supra,* at 35 (Testimony of Jeffrey Rosen).

[37] *Ibid.*

[38] *Formal Rulemaking and Judicial Review,* note 5 *supra,* at 179 ("Over time, however, the balance between deference and judicial oversight has tended strongly toward deference and away from rigorous judicial review. This shift toward ever-increasing deference weakens the primary check on agency discretion.").

[39] *APA at 65,* note 2 *supra,* at 39 (Testimony of Jeffrey Rosen); *Formal Rulemaking and Judicial Review,* note 5 *supra,* at 175 (Testimony of Noel Francisco).

[40] *Formal Rulemaking and Judicial Review,* note 5 *supra,* at 179–81.

[41] *Id.* at 180.

[42] *Id.* at 182.

[43] *Talk Am., Inc. v. Mich. Bell Tel. Co.,* 2011 U.S. LEXIS 4375, *30–*31 (June 9, 2011) (Scalia, J., concurring) ("When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning. . . . 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.'") (quoting Montesquieu, THE SPIRIT OF THE LAWS).

under Section 7(b), courts would not defer to an agency's legal or factual determinations made in support of an interim-final rule.

B. Review of Interim-Final Rules

The APA allows an agency to make what is known as an "interim-final rule" "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[44] The interim-final rule is effective immediately, but "[t]he adopting agency declares that it will consider . . . public comments" after the interim-final rule is issued, "will modify the rule in light of those comments, and will then adopt a final rule."[45]

Because interim-final rules necessarily "restrict public participation"[46] and "hinder APA procedures,"[47] both Ms. Dudley and Mr. Rosen suggested that Congress examine this issue. Section 3(b) of the Bill (new subsection 553(g) of title 5) allows agencies to make an interim-final rule without following full rulemaking procedures if it is "impracticable or contrary to the public interest, including interests of national security. . . ." Within 270 days after publishing an interim-final rule—or, in the case of an interim-final major or high-impact rule, within 18 months of publication—the agency must complete full rulemaking procedures "and take final action to adopt a final rule or rescind the interim rule." Under the Bill, a party may seek immediate judicial review of an agency's decision to adopt an interim-final rule except in cases involving national security interests. Section 6 limits judicial review to abuse of discretion by the agency.

IV. INCREASING REGULATORY TRANSPARENCY AND THE VETTING OF FACTUAL INFORMATION

A. Requiring Advance Notice of Potential High-Impact and Major Rulemakings

At the Subcommittee's March 29, 2011, hearing, Drs. Ellig and Williams both testified that agencies often make the decision to regulate behind closed doors, away from the public eye and before commencing the legally required regulatory process.[48] "This doesn't mean that no stakeholders have influence over the early decisions. Generally, those that have petitioned for and favor regulations are heard from early in the process to help shape the initial decisions."[49] As Professor Strauss observed at the February 28, 2011, hearing,

> Often what occurs before a notice of proposed rulemaking has been published produces commitments that, in the

[44] 5 U.S.C. § 553(b)(3)(B).

[45] Michael Asimow, *Interim-Final Rules: Making Haste Slowly,* 51 ADMIN. L. REV. 703, 704 (Summer 1999).

[46] *APA at 65,* note 2 *supra,* at 37 (Testimony of Jeffrey Rosen).

[47] *Id.* at 21 (Testimony of Susan Dudley).

[48] *Raising the Agencies' Grades,* note 3 *supra,* at 21 (Testimony of Jerry Ellig) ("All too often, agency economists have to conduct regulatory analysis after most major decisions about regulations have already been made. The analysis then becomes an advocacy document written to justify the agency's decisions, or a mere paperwork exercise to fulfill requirements imposed by the Office of Management and Budget."); *id.* at 74 (Testimony of Richard Williams) ("But that analysis is generally begun after the decision on how to regulate has been announced. That is a key part of the problem: the regulatory analysis analyzes a decision, not a problem.").

[49] *Id.* at 78 (Testimony of Richard Williams).

> words of President George H.W. Bush's General Counsel at the EPA, convert notice and comment rulemaking into a form of Kabuki theater—"a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[50]

Dr. Williams observed that this phenomenon is a result of the agency's overriding incentive to regulate whenever possible, and that what is needed is "to decouple the agency's decision from both early analysis of and democratic input into a problem. That is, initially, agencies should perform regulatory analysis and make that analysis available for public comment. There should be no discussion of the agency's preferred solutions in this document."[51] Specifically, Dr. Williams recommended:

- a clear definition of the problem that the agency seeks to solve and the evidence it relied on to define the problem;
- an explanation of and evidence for why a Federal solution is required for this problem;
- the possible ways to solve the problem; and
- a preliminary estimate of the benefits and costs of each of the options listed.[52]

Dr. Ellig concurred in these recommendations.[53] Mr. Rosen also testified, "[g]reater use of the Advanced Notice of Proposed Rulemaking and similar advance processes would be a good thing."[54] Ms. Dudley recommended Congress consider this proposal as well.[55] Relatedly, on May 4, 2011, Mr. Holmstead described how potentially collusive litigation between regulatory agencies and interested parties can short-circuit the regulatory process.[56]

For major rules and high-impact rules, as defined in Section 2 of the Bill, Section 3(b) (new subsection 553(c) of title 5) requires regulatory agencies to publish an advance notice of proposed rulemaking no fewer than 90 days before publishing a notice of proposed rulemaking, and to provide no fewer than 60 days in which the public may comment. Whether or not the agency ultimately decides to propose a new rule, the agency must publish its decision about what course of action, if any, is appropriate. If the agency decides to modify or rescind an existing rule, then the agency may proceed directly to a notice of proposed rulemaking, without undertaking to comply once more with the Bill's advance-notice requirement.

B. Improving the Effectiveness of the Information Quality Act

Congress enacted the Information Quality Act as Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001.[57] The IQA requires the Director of the Office of Management and Budget to "issue guidelines . . . that provide pol-

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[50] *APA at 65,* note 2 *supra,* at 48–49 (quoting E. Donald Elliott, *Re-Inventing Rulemaking,* 41 DUKE L.J. 1490, 1492 (June 1992)).
[51] *Raising the Agencies' Grades,* note 3 *supra,* at 77.
[52] *Id.* at 78.
[53] *Id.* at 28.
[54] *APA at 65,* note 2 *supra,* at 37.
[55] *Id.* at 20.
[56] *Cost-Justifying Regulations,* note 4 *supra,* at 18.
[57] *See* Pub. L. No. 106–554, §515.

icy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of" the Paperwork Reduction Act.[58] Further, the IQA instructs that Federal agencies shall "issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency," to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency" and to report both "the number and nature of complaints received by the agency regarding the accuracy of information disseminated" and "how such complaints were handled."[59]

On February 28, 2011, Mr. Rosen testified that Congress should clarify that judicial review is available under the IQA.[60] Ms. Dudley suggested that Congress "consider amending the IQA to make agency decisions reviewable."[61] In the same vein, on May 31, 2011, Mr. Francisco suggested that one way to enhance the effectiveness of the IQA would be to incorporate it into the APA itself.[62] Drawing upon these recommendations, Section 3(b) (new subsections 553(d)(4), (e)(5) and (f)(4)(F)) weaves IQA standards into the APA rulemaking process. Section 7 also establishes that an IQA violation qualifies as agency action "not in accordance with law," clearly rendering the IQA judicially enforceable.

C. Improving the Record to Support High-Impact and Major Rules

At the Subcommittee's February 28, 2011 hearing, Mr. Rosen discussed how formal rulemaking—*i.e.,* rulemaking based on formal agency hearings—was specifically contemplated by the APA, but has become a dead letter over the past several decades.[63] Mr. Rosen testified that the formal procedures discussed in 5 U.S.C. §§ 556 and 557 (with evidence presentation and cross-examination) "can be especially beneficial for issues involving complex empirical or scientific issues."[64] Mr. Rosen added, "[t]here is no better tool than cross-examination to expose unsupportable factual assertions and assure the public that only the best science underlies agency action."[65] One option Mr. Rosen suggested is that "all 'major rules' above a certain threshold could be subject to formal rulemaking. . . ."[66] Ms. Dudley suggested that "legislators might consider amending the APA to . . . expand the use of formal rulemaking procedures."[67]

On May 31, 2011, Mr. Francisco observed that "[f]ormal rulemaking is often called 'rulemaking on a record' because these trial-type proceedings provide much more opportunity for the agency to develop a formal record before issuing a final rule."[68] Mr. Francisco also explained that formal rulemaking is subject to a higher

[58] *Id.* § 515(a).
[59] *Id.* § 515(b).
[60] *APA at 65,* note 2 *supra,* at 39.
[61] *Id.* at 18.
[62] *Formal Rulemaking and Judicial Review,* note 5 *supra,* at 183.
[63] *Id.* at 35, 38.
[64] *Id.* at 35.
[65] *Id.* at 38.
[66] *Ibid.*
[67] *APA at 65,* note 2 *supra,* at 17.
[68] *Formal Rulemaking and Judicial Review,* note 5 *supra,* at 177.

standard of judicial review than informal rulemaking, *i.e.,* "substantial evidence" versus "arbitrary or capricious" review.[69] Mr. Francisco suggested that Congress consider legislation to put "a renewed emphasis on formal rulemaking procedures."[70] Also on May 31, 2011, Mr. Warren testified at length in favor of "mak[ing] carefully-tailored amendments to the Administrative Procedure Act ('APA') which would permit slightly more formal procedures for major rules currently reviewed by [OIRA] under Executive Orders 12866 and 13563." Believing "that additional procedures are warranted in the interest of improving the agency work product,"[71] Mr. Warren suggested that the additional formal procedures should be "in addition to, not in lieu of," the procedures for informal rulemaking.[72]

Consistent with these recommendations, for high-impact rules Section 3(b) of the bill (new subsection 553(e) of title 5) requires agencies to engage in "hybrid" rulemaking that mixes the strengths of formal rulemaking hearings and informal notice-and-comment procedures. Through this procedure, agencies must hold targeted factual hearings according to the APA's formal rulemaking requirements, after following notice-and-comment procedures and before adopting the proposed high-impact rule. The agency must publish public notice of the hearing not less than 45 days in advance. At the hearing, which will allow for cross-examination, only a subset of issues in the rulemaking is to be determined, including the key issues of the factual predicate for the rule (*i.e.,* what evidence establishes a need for the rule); whether statutory objectives could be achieved at lower cost by an alternative to the proposed rule; whether there is a compelling need to protect public health, safety or welfare that justifies a more costly solution; and whether the information supporting the rule satisfies the Information Quality Act. An interested person who has participated in the rulemaking can bring a petition to have additional issues considered, which the agency must rule upon within 30 days and may deny if consideration of those additional issues through a hearing would unduly delay completion of the rulemaking. Participants in the rulemaking other than the agency may waive the hearing entirely or consideration of any of the above issues at the hearing, to assure efficiency of the process. This hybrid use of informal and formal rulemaking procedures builds upon successful precedents such the Occupational Safety and Health Act.

Hearings

The Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law held one hearing on H.R. 2122 on July 9, 2013. Testimony was received from Jeffrey A. Rosen, Esq., Kirkland & Ellis (formerly general counsel of the Office of Management and Budget); Keith Hall, Mercatus Center (formerly Commissioner of the Bureau of Labor Statistics); Diana Thomas, Huntsman School of Business, Utah State University; Robert A. Sells, Titan America Mid-Atlantic Business Division; David Goldston, Natural Resources Defense Council; and, Professor Ronald Levin,

[69] *Id.* at 178.
[70] *Ibid.*
[71] *Formal Rulemaking and Judicial Review,* note 5 *supra,* at 39.
[72] *Ibid.*

Washington University School of Law, with additional material submitted by the U.S Chamber of Commerce, the Business Roundtable, the Honorable C. Boyden Gray, the Associated Builders and Contractors, Inc., the National Association of Federal Credit Unions, a coalition of 88 trade associations, and a group of 42 administrative law teachers and practitioners.

Committee Consideration

On July 18, 2013, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law met in open session and ordered the bill H.R. 2122 favorably reported without amendment, by voice vote, a quorum being present. On July 24, 2013, the Committee met in open session and ordered the bill H.R. 2122 favorably reported without amendment, by a rollcall vote of 13 to 9, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 2122.

1. The amendment offered by Mr. Conyers exempts from cost-benefit-related requirements of H.R. 2122's new regulations for which existing law limits or precludes consideration of the regulations' costs. The amendment was defeated by a rollcall vote of 11–13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Amodei (NV)			
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)			
Total	11	13	

2. The amendment offered by Mr. Watt exempts from requirements of H.R. 2122 new regulations and guidance to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act. The amendment was defeated by a rollcall vote of 9–11.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Amodei (NV)			
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)			
Mr. Holding (NC)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)			
Total	9	11	

3. The amendment offered by Mr. Cohen exempts from requirements of H.R. 2122 new regulations and guidance to strengthen existing prohibitions against financial companies owning non-financial businesses. The amendment was defeated by a rollcall vote of 9–13.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)			
Mr. Holding (NC)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Smith (MO)		X	
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)			
Total	9	13	

4. The bill was reported by a rollcall vote of 13–9.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)			
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Bachus (AL)	X		
Mr. Issa (CA)			
Mr. Forbes (VA)	X		
Mr. King (IA)			
Mr. Franks (AZ)			
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Amodei (NV)			
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)			
Mr. Holding (NC)			
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Mr. Smith (MO)	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Mr. Scott (VA)		X	
Mr. Watt (NC)		X	
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)		X	
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)		X	
Mr. Jeffries (NY)			
Total	13	9	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2122, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 1, 2013.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2122, the "Regulatory Accountability Act of 2013."

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

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 2122—Regulatory AccountabilityAct of 2013.

As ordered reported by the House Committee on the Judiciary on August 1, 2013.

SUMMARY

H.R. 2122 would amend the Administrative Procedures Act (APA), which is the law that governs how Federal agencies propose and establish regulations. Enacting this legislation would codify many practices aimed at increasing regulatory transparency and accountability that are currently required under several executive orders. However, this legislation also would impose some new requirements on Federal agencies related to the rulemaking process and would extend some of the current requirements under the executive orders to additional Federal agencies. Except for changes permitting judicial review for compliance with the Information Quality Act (enacted as part of the Consolidated Appropriations Acts, 2001 [Public Law 106–554]), the changes contained in this legislation would not apply to any rulemaking pending or completed on the date of enactment.

CBO estimates that implementing H.R. 2122 would cost about $70 million over the 2014–2018 period, assuming appropriation of the necessary funds. Such funding would cover the government-wide costs of additional personnel, contractor costs, and other administrative expenses associated with meeting the new requirements under the legislation.

CBO also expects that enacting H.R. 2122 could delay the issuance of some final rules each year. As a result, CBO and the staff of the Joint Committee on Taxation (JCT) expect that enacting H.R. 2122 could have effects on both direct spending and revenues. Therefore, pay-as-you-go procedures apply to the legislation. However, given the large number of major rules issued each year and the extent to which rules vary in their nature and scope, we cannot determine the level of costs or savings stemming from delaying the effective date of some rules. In addition, while enacting the bill could affect direct spending and revenues if agencies not funded through annual appropriations incur additional costs, CBO estimates that any net increase in spending or change in revenues for those agencies would not be significant.

CBO expects that H.R. 2122 would impose no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 2122 on discretionary spending is shown in the following table. The costs of this legislation fall within all budget functions that include agencies that issue regulations.

By Fiscal Year, in Millions of Dollars

	2014	2015	2016	2017	2019	2014–2018
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	5	10	15	20	20	70
Estimated Outlays	4	9	14	20	20	67

Enacting H.R. 2122 also would affect direct spending and revenues, but CBO and JCT cannot determine the extent or sign of those effects.

BASIS OF ESTIMATE

For this estimate, CBO assumes that the legislation will be enacted near the end of 2013, that the necessary amounts will be appropriated near the start of each fiscal year, and that spending will follow historical patterns for regulatory analysis activities.

Background

CBO is unaware of any comprehensive information on current spending for regulatory activities governmentwide. However, according to the Congressional Research Service, Federal agencies issue 3,000 to 4,000 final rules each year. Most are promulgated by the Departments of Transportation, Homeland Security, and Commerce, and the Environmental Protection Agency (EPA). Agencies that issue the most major rules (those with an estimated economic impact on the economy of more than $100 million per year) include the Department of Health and Human Services, the Department of Agriculture, and EPA.

H.R. 2122 would amend the APA to codify certain practices currently required under several executive orders, including Executive Orders 12866, 13563, and 13422. (Those instructions require agencies in the executive branch to analyze the impacts of regulations (including costs and benefits), to coordinate with the Office of Information and Regulatory Affairs (OIRA) during the rulemaking, and to perform other activities and analyses related to the rulemaking process.) The legislation would add several definitions to the APA, including *major rule*, *major guidance*, and *high-impact* rule.

A major rule would be defined as any rule, as determined by OIRA, likely to impose:

- An annual cost on the economy of $100 million or more, adjusted annually for inflation;
- A major increase in costs or prices for consumers, individual industries, Federal, state, local, or tribal government agencies, or geographic regions;

- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or
- Significant impacts on multiple sectors of the economy.

This definition of a major rule differs from the one contained in the Congressional Review Act (CRA) of 1996, which defines a major rule as one having an annual effect on the economy instead of an annual cost as defined in H.R. 2122.

The legislation would define the term major guidance issued by Federal agencies using the same criteria as that used for a major rule. A high-impact rule would be defined as any rule that OIRA determines is likely to impose an annual cost on the economy of $1 billion or more. That threshold would be adjusted annually for inflation.

Enacting H.R. 2122 also would add several new requirements that would broadly change the current rulemaking process. For all major and high-impact rules as well as rules that involve "novel legal or policy issues," agencies would be required to publish an advance notice of proposed rulemaking (ANPRM) in the Federal Register 90 days prior to publishing a Notice of Proposed Rulemaking (NPRM). The legislation specifies minimum requirements for the ANPRM, including a period of not less than 60 days during which interested parties may submit data, views, or argument to the agency. A pre-proposal process occurs on a voluntary basis for some rules under current law, as guided by Executive Order 13563.

The NPRM process, as defined in the APA, would be amended to codify certain requirements in place under Executive Orders 12866 and 13563. While many agencies subject to the executive orders may already be implementing those practices for certain rules, some independent agencies outside the purview of executive orders may face an increase in workload with respect to the rulemaking process. For all agencies, H.R. 2122 would increase requirements for documenting cost-benefit analyses as well as placing other supporting documentation in the docket for the proposed rule. Furthermore, the legislation would incorporate into the rulemaking process a remedy for members of the public to petition for a hearing to determine if any information used by the agency in developing the proposed rule violates the Information Quality Act.

The legislation would require agencies to hold a hearing for all high-impact rules. The hearing would occur after comments have been received on the proposed rule and after any hearings were held under the NPRM process but before adoption of the rule. The hearing could be waived if all participants-not including the agency-agree.

Spending Subject to Appropriation

Based on information from several Federal agencies, CBO estimates that more resources would be needed for Federal agencies to produce additional guidance documents and cost-benefit analyses, support judicial reviews and hearings, and perform other administrative tasks related to the rulemaking process. Eventually, CBO estimates that Federal agencies would spend about $20 million an-

nually to meet the requirements under this legislation. We expect that it would take about 3 years to reach that level of effort.

Direct Spending

CBO expects that enacting H.R. 2122 would delay a number of major and high-impact rules from taking effect each year. Therefore, in assessing the budgetary effects of H.R. 2122, CBO considered the costs and savings that would be realized if anticipated major and high-impact rules were delayed. Delaying the issuance of some major or high-impact rules, which would delay when they take effect, could result in costs, while delaying others could result in savings. CBO expects that the rules with the largest effects on Federal spending would be those related to Federal health programs, particularly Medicare; thus, enacting H.R. 2122 could significantly affect Medicare spending relative to current law.

CBO cannot determine the level of costs or savings in direct spending over the 2014–2023 period. However, we expect that such budgetary effects would largely be driven by delaying annual updates to payment schedules for providing Medicare services and other routine revisions to aspects of other government programs.

Revenues

Enacting H.R. 2122 also would affect revenues by changing the way the Internal Revenue Service could issue its nonregulatory guidance and by slowing down rulemaking generally. JCT expects those delays would reduce revenue collections in some cases and increase them in others. However, JCT cannot determine the level of costs or savings of those possible effects.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Pay-as-you-go procedures apply to H.R. 2122 because enacting the legislation would affect direct spending and revenues. CBO and JCT cannot determine the level of costs or savings associated with those effects.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

CBO expects that H.R. 2122 would impose no intergovernmental or private-sector mandates as defined in UMRA. By potentially delaying Federal rules, the bill could affect public or private entities in a number of other ways, for example, by slowing reimbursements or delaying the implementation of regulatory requirements. While the costs and savings associated with such effects could be significant, because we cannot predict the nature or number of regulations that could be delayed, CBO has no basis for estimating the level of costs or savings that would result.

ESTIMATE PREPARED BY:

Federal Spending: Susanne S. Mehlman

Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle

Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Theresa Gullo
Deputy Assistant Director for Budget Analysis

Holly Harvey
Deputy Assistant Director for Budget Analysis

Duplication of Federal Programs

No provision of H.R. 2122 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 2122 specifically directs each Federal regulatory agency to complete one specific rule making within the meaning of 5 U.S.C. 551 to prescribe procedures for the conduct of agency hearings.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R.2122 is designed to promote job creation, economic growth, and the accountability of Federal regulatory agencies by reforming the Administrative Procedure Act to require agencies to lower the costs of regulation while meeting statutory objectives, to improve agencies' decision-making processes and enhance regulatory transparency and accountability to the public, and to strengthen judicial review of agency action.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2122 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Sec. 1. Short title.

Designates the Bill the "Regulatory Accountability Act of 2013."

Sec. 2. Definitions.

Adds to the APA definitions of the following terms: "major rule," based on the definition given to that term in Section 1(b) of Executive Order 12291; "high-impact rule" as any rule likely to impose an annual cost of $1 billion on the economy; "guidance," based on the definition given to that term in Section 3(g) of Executive Order 13422; "major guidance," based on the definition given to the term "significant guidance document" in Section 3(h) of Executive Order 13422; "Information Quality Act," as Section 515 of Public Law 106–554 and its implementing OMB and agency guidelines; and, the "Office of Information and Regulatory Affairs."

Sec. 3. Rulemaking (references are to amended section 553 of title 5).

- *Subsec. 553(b): Rulemaking Principles.* Incorporates into the APA universally applicable rulemaking principles rooted in the good-government principles of Executive Orders 12291, 12866, 13422 and 13563, making them statutorily mandatory and judicially enforceable. The agency must consider
  - *Subsec. 553(b)(1)–(2):* The legal authority for the rule and other relevant statutory considerations.
  - *Subsec. 553(b)(3):* The specific nature of the problem, whether it genuinely warrants new regulations, and countervailing risks that may be posed by alternatives for new agency action.
  - *Subsec. 3(b)(4):* Whether the problem could be addressed by repealing or modifying existing regulations.
  - *Subsec. 553(b)(5):* Potential alternatives to adopting a new regulation, including no Federal response and a regional/State/local/tribal response.
  - *Subsec. 553(b)(6):* Notwithstanding any other law, the potential costs and benefits—direct, indirect and cumulative—associated with each alternative, as well as estimated impacts on jobs, economic growth, innovation and economic competitiveness.
- *Subsec. 553(c): Early Public Outreach.* Consistent with President Obama's call in E.O. 13563 for earlier, more transparent outreach to the public and affected entities, the Bill requires Advance Notices of Proposed Rulemaking (ANPRs) 90 days before an agency may propose any major or high-impact rule. ANPRs must disclose information already known to the agency, the legal basis for a potential rulemaking, and allow the public 60 days to submit written views about the information and issues discussed in the advance notice.
- *Subsec. 553(d)(1): Improved Notices of Proposed Rulemaking.* Improved Notice of Proposed Rulemaking requirements that assure major and high-impact proposed rules are built upon the sound, transparent decision-making platform made possible by the ANPR process and that other proposed rules also rest on a more robust and transparent decision-making platform. These requirements will crystallize for final public comment the agency's preliminary determinations of whether a Federal regulation is needed; whether the benefits of the proposed rule meet statutory objectives and justify its costs; whether alternatives exist that could achieve statutory objectives at lower costs; whether and why the agency has not proposed a lower-cost alternative; whether existing regulations or other law have produced or contributed to the problem the agency seeks to correct with new regulation; and, if so, whether modification or repeal of those other regulations or laws could resolve the problem more effectively than a new rule.

- *Subsec. 553(d)(2): Determination of Other Agency Course.* After concluding the ANPR process, if applicable, an agency may alternatively publish a Determination of Other Agency Course, describing the alternative response the agency chose rather than issue a new rule.
- *Subsec. 553(d)(3): Public Participation in Rulemaking.* Requires the agency to give interested parties at least 90 days to submit written data, views or arguments related to the proposed rule and 120 days to do so for any proposed major or high-impact rule.
- *Subsec. 553(d)(4): Efficient Early Resolution of Information Quality Act Issues.* Early opportunities for quick administrative appeals of whether the key studies or other information on which agencies base their proposed rules meet vital information quality standards set under the Information Quality Act.

- *Subsecs. 553(e), (h): Formal Rulemaking Hearings on the Most Critical Issues for High-Impact Rules.* Formal hearings with opportunities for cross-examination on the most critical factual issues for proposed rules that impose a $1 billion burden on the economy. These issues concern the key information on "whether the agency's asserted factual predicate for the rule is supported by the evidence"; whether there is a lower-cost alternative for regulation that achieves statutory objectives, and why the agency did not choose it; and whether the final information on which the agency relies satisfies standards under the Information Quality Act. The agency must publish public notice of the hearing not less than 45 days in advance. Upon petition, hearings or issues may be waived by participants in the rulemaking other than the agency. Issues also may be added to hearings on high-impact rules, and hearings may be granted on major rules, upon petition and at the agency's discretion.
- *Subsec. 553(f): Improved Requirements for Final Rules.* In adopting a final rule, the agency must:
  - Subsec. 553(f)(1): Consult with the OIRA Administrator.
  - *Subsec. 553(f)(2):* Rely only on the best reasonably obtainable scientific, technical and economic information.
  - *Subsec. 553(f)(3):* Adopt only the least-cost alternative considered during rulemaking that meets statutory objectives, unless the agency explains why a more costly rule is justified to serve interests of public health, safety or welfare clearly within the scope of the statutory provision that authorizes the rule and the more costly rule's additional benefits justify its additional costs.
  - Subsec. 553(f)(4): Publish a notice of final rulemaking giving: "a concise, general statement of the rule's basis and purpose," an explanation of the need for the rule, the costs and benefits, and why the agency did not adopt an alternative rule or amend or rescind an existing rule. The agency must rest on specific, final determinations on the critical issues considered during formal rulemaking hear-

ings, based on data that meets the strictures of the Information Quality Act.

- *Subsec. 553(f)(5)(G):* Publish plans for periodic review of high-impact and major rules to determine whether the agency's final rule still is needed, achieves statutory objectives, and produces benefits that justify its costs or whether the rule could be modified or rescinded.

- *Subsec. 553(g): Better Protections against Abuse of Interim-Final Rules.* Allows agencies in cases of public urgency to issue "interim-final rules" that are effective before full rulemaking procedures are completed, but also requires prompt subsequent completion of full rulemaking procedures and allows affected entities to seek rapid judicial review of agency decisions to adopt interim-final rules (except for national security rules).
- *Subsec. 553(i):* Requires publication of a substantive final or interim rule no less than 30 days before its effective date.
- *Subsec. 553(j):* "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."
- *Subsec. 553(k): Guidance for Agencies on Cost-Benefit Analysis and other Key Issues.* Authorizes OIRA to issue guidelines for agencies to follow as they assess economic and scientific issues in rulemaking; observe statute-specific rulemaking regimes in conjunction with the generally applicable procedures of the APA as amended; work to assure better coordination, simplification and coordination by agencies in rulemaking; and conduct hearings under sections 553, 556 and 557 of title 5.
- *Subsec. 553(l):* Requires the agency to include in the rule making record "all documents and information considered by the agency during the proceeding" including, at the discretion of the President or the OIRA Administrator, communications from OIRA to the agency.
- *Subsec. 553(m):* Exempts the Board of Governors of the Federal Reserve System and the Federal Open Market Committee from performing cost-benefit analysis or holding formal hearings for monetary policy rules.

Sec. 4. Agency Guidance.

Curbs agency abuse of purportedly non-binding "guidance"—particularly guidance with major or significant economic impacts—to avoid statutory rulemaking requirements.

Sec. 5. Hearings.

Adopts technical changes to existing APA requirements for formal, on-the-record rulemaking hearings that support hearing-based reforms in Section 3 of the Bill.

Sec. 6. Actions Reviewable.

Provides for immediate judicial review of agency decisions to establish "interim-final rules" before complying with normal rule-

making requirements. An abuse of discretion standard applies in such review.

Sec. 7. Scope of Review.

Clarifies that courts may review agency action for violations of the Information Quality Act. Prohibits judicial deference to agency interpretations of regulations rendered outside of rulemaking; agency determinations of cost-benefit issues, other economic assessments or risk assessments that do not comply with applicable OIRA guidelines; and agency determinations of law and fact to support interim-final rules. Allows agency denials of petitions for hearings or consideration of specific issues in hearings to be reviewed for abuse of discretion.

Sec. 8. Added Definition.

Codifies the definition of the term "substantial evidence" given by the Supreme Court in *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

Sec. 9. Effective Date.

Provides that the Bill's provisions generally do not apply to any rulemaking pending or completed on the date of enactment. Exceptions are made for the Bill's amendments to establish definitions in section 551 of title 5; prohibit judicial deference to agency interpretations of regulations outside of rulemaking; and guarantee judicial review of Information Quality Act violations.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; **[**and**]**

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter**[**.**]***;*

(15) "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose—

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

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

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

(D) significant impacts on multiple sectors of the economy;

(16) "high-impact rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose an annual cost on the economy of $1,000,000,000 or more, adjusted annually for inflation;

(17) "guidance" means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue;

(18) "major guidance" means guidance that the Administrator of the Office of Information and Regulatory Affairs finds is likely to lead to—

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

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

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

(D) significant impacts on multiple sectors of the economy;

(19) the "Information Quality Act" means section 515 of Public Law 106–554, the Treasury and General Government Appropriations Act for Fiscal Year 2001, and guidelines issued by the Administrator of the Office of Information and Regulatory Affairs or other agencies pursuant to the Act; and

(20) the "Office of Information and Regulatory Affairs" means the office established under section 3503 of chapter 35 of title 44 and any successor to that office.

* * * * * * *

§ 553. Rule making

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

(1) * * *

* * * * * * *

[(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

[(1) a statement of the time, place, and nature of public rule making proceedings;

[(2) reference to the legal authority under which the rule is proposed; and

[(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

[(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

[(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

[(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

[(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

[(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

[(2) interpretative rules and statements of policy; or

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

[(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.]

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

(1) The legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making.

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

(3) The specific nature and significance of the problem the agency may address with a rule (including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction), whether the problem warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action.

(4) Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or part.

(5) Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including not only responses that mandate particular conduct or manners of compliance, but also—

(A) the alternative of no Federal response;

(B) amending or rescinding existing rules;

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

(D) potential responses that—

(i) specify performance objectives rather than conduct or manners of compliance;

(ii) establish economic incentives to encourage desired behavior;

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

(iv) incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance.

(6) Notwithstanding any other provision of law—

(A) the potential costs and benefits associated with potential alternative rules and other responses considered under section 553(b)(5), including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs (including an estimate of the net gain or loss in domestic jobs), economic growth, innovation, and economic competitiveness;

(B) means to increase the cost-effectiveness of any Federal response; and

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

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

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

(A) the nature and significance of the problem the agency may address with a rule, including data and other evidence and information on which the agency expects to rely for the proposed rule;

(B) the legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making;

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

(D) in the case of a rule that involves a novel legal or policy issue arising out of statutory mandates, the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule;

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

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

(d) NOTICES OF PROPOSED RULE MAKING; DETERMINATIONS OF OTHER AGENCY COURSE.—(1) Before it determines to propose a rule, and following completion of procedures under subsection (c), if applicable, the agency shall consult with the Administrator of the Office of Information and Regulatory Affairs. If the agency thereafter determines to propose a rule, the agency shall publish a notice of proposed rule making, which shall include—

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

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

(C) the terms of the proposed rule;

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

(i) a summary of information known to the agency concerning the considerations specified in subsection (b);

(ii) a summary of additional information the agency provided to and obtained from interested persons under subsection (c);

(iii) a summary of any preliminary risk assessment or regulatory impact analysis performed by the agency; and

(iv) information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination to propose the rule;

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

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

(F) a reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule (including all costs to be considered under subsection (b)(6)), based on the information described under subparagraph (D);

(G) a discussion of—

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

(ii) the costs and benefits of those alternatives (including all costs to be considered under subsection (b)(6));

(iii) whether those alternatives meet relevant statutory objectives; and

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

(H)(i) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule; and

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

All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its determination to propose the rule, including any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information prepared or described by the agency under subparagraph (D) and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the proposed rule and made accessible to the public by electronic means and otherwise for the public's use when the notice of proposed rule making is published.

(2)(A) If the agency undertakes procedures under subsection (c) and determines thereafter not to propose a rule, the agency shall, following consultation with the Office of Information and Regulatory Affairs, publish a notice of determination of other agency course. A notice of determination of other agency course shall include information required by paragraph (1)(D) to be included in a notice of proposed rule making and a description of the alternative response the agency determined to adopt.

(B) If in its determination of other agency course the agency makes a determination to amend or rescind an existing rule, the agency need not undertake additional proceedings under subsection (c) before it publishes a notice of proposed rule making to amend or rescind the existing rule.

All information provided to or considered by the agency, and steps to obtain information by the agency, in connection with its deter-

mination of other agency course, including but not limited to any preliminary risk assessment or regulatory impact analysis prepared by the agency and all other information that would be required to be prepared or described by the agency under paragraph (1)(D) if the agency had determined to publish a notice of proposed rule making and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the determination and made accessible to the public by electronic means and otherwise for the public's use when the notice of determination is published.

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

(A) if a hearing is required under paragraph (4)(B) or subsection (e), opportunity for oral presentation shall be provided pursuant to that requirement; or

(B) when other than under subsection (e) of this section rules are required by statute or at the discretion of the agency to be made on the record after opportunity for an agency hearing, sections 556 and 557 shall apply, and paragraph (4), the requirements of subsection (e) to receive comment outside of the procedures of sections 556 and 557, and the petition procedures of subsection (e)(6) shall not apply.

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

(4)(A) Within 30 days of publication of notice of proposed rule making, a member of the public may petition for a hearing in accordance with section 556 to determine whether any evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act.

(B)(i) The agency may, upon review of the petition, determine without further process to exclude from the rule making the evidence or other information that is the subject of the petition and, if appropriate, withdraw the proposed rule. The agency shall promptly publish any such determination.

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

(C) There shall be no judicial review of the agency's disposition of issues considered and decided or determined under subparagraph (B)(ii) until judicial review of the agency's final action. There shall be no judicial review of an agency's determination to withdraw a proposed rule under subparagraph (B)(i) on the basis of the petition.

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

(e) HEARINGS FOR HIGH-IMPACT RULES.—Following notice of a proposed rule making, receipt of comments on the proposed rule, and any hearing held under subsection (d)(4), and before adoption of any high-impact rule, the agency shall hold a hearing in accordance with sections 556 and 557, unless such hearing is waived by all participants in the rule making other than the agency. The agency shall provide a reasonable opportunity for cross-examination at such hearing. The hearing shall be limited to the following issues of fact, except that participants at the hearing other than the agency may waive determination of any such issue:

(1) Whether the agency's asserted factual predicate for the rule is supported by the evidence.

(2) Whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including all costs to be considered under subsection (b)(6)) than the proposed rule.

(3) If there is more than one alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost than the proposed rule, which alternative would achieve the relevant statutory objectives at the lowest cost.

(4) Whether, if the agency proposes to adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives (including all costs to be considered under subsection (b)(6)), the additional benefits of the more costly rule exceed the additional costs of the more costly rule.

(5) Whether the evidence and other information upon which the agency bases the proposed rule meets the requirements of the Information Quality Act.

(6) Upon petition by an interested person who has participated in the rule making, other issues relevant to the rule making, unless the agency determines that consideration of the issues at the hearing would not advance consideration of the rule or would, in light of the nature of the need for agency action, unreasonably delay completion of the rule making. An agency shall grant or deny a petition under this paragraph within 30 days of its receipt of the petition.

No later than 45 days before any hearing held under this subsection or sections 556 and 557, the agency shall publish in the Federal Register a notice specifying the proposed rule to be considered at such hearing, the issues to be considered at the hearing, and the time and place for such hearing, except that such notice may be issued not later than 15 days before a hearing held under subsection (d)(4)(B).

(f) FINAL RULES.—(1) The agency shall adopt a rule only following consultation with the Administrator of the Office of Information and Regulatory Affairs to facilitate compliance with applicable rule making requirements.

(2) The agency shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule.

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

(B) The agency may adopt a rule that is more costly than the least costly alternative that would achieve the relevant statutory objectives only if the additional benefits of the more costly rule justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule.

(4) When it adopts a final rule, the agency shall publish a notice of final rule making. The notice shall include—

(A) a concise, general statement of the rule's basis and purpose;

(B) the agency's reasoned final determination of need for a rule to address the problem the agency seeks to address with the rule, including a statement of whether a rule is required by statute and a summary of any final risk assessment or regulatory impact analysis prepared by the agency;

(C) the agency's reasoned final determination that the benefits of the rule meet the relevant statutory objectives and justify the rule's costs (including all costs to be considered under subsection (b)(6));

(D) the agency's reasoned final determination not to adopt any of the alternatives to the proposed rule considered by the agency during the rule making, including—

(i) the agency's reasoned final determination that no alternative considered achieved the relevant statutory objectives with lower costs (including all costs to be considered under subsection (b)(6)) than the rule; or

(ii) the agency's reasoned determination that its adoption of a more costly rule complies with subsection (f)(3)(B);

(E) the agency's reasoned final determination—

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

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

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

(II) whether and how the agency intends to amend or rescind the existing rule separate from adoption of the rule;

(F) the agency's reasoned final determination that the evidence and other information upon which the agency bases the rule complies with the Information Quality Act; and

(G)(i) for any major rule or high-impact rule, the agency's plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives; and

(ii) review of a rule under a plan required by clause (i) of this subparagraph shall take into account the factors and criteria set forth in subsections (b) through (f) of section 553 of this title.

All information considered by the agency in connection with its adoption of the rule, and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the rule and made accessible to the public for the public's use no later than when the rule is adopted.

(g) EXCEPTIONS FROM NOTICE AND HEARING REQUIREMENTS.—(1) Except when notice or hearing is required by statute, the following do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice:

(A) Subsections (c) through (e).

(B) Paragraphs (1) through (3) of subsection (f).

(C) Subparagraphs (B) through (H) of subsection (f)(4).

(2)(A) When the agency for good cause, based upon evidence, finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that compliance with subsection (c), (d), or (e) or requirements to render final determinations under subsection (f) of this section before the issuance of an interim rule is impracticable or contrary to the public interest, including interests of national security, such subsections or requirements to render final determinations shall not apply to the agency's adoption of an interim rule.

(B) If, following compliance with subparagraph (A) of this paragraph, the agency adopts an interim rule, it shall commence proceedings that comply fully with subsections (d) through (f) of this section immediately upon publication of the interim rule, shall treat the publication of the interim rule as publication of a notice of proposed rule making and shall not be required to issue supplemental notice other than to complete full compliance with subsection (d). No less than 270 days from publication of the interim rule (or 18 months in the case of a major rule or high-impact rule), the agency shall complete rule making under subsections (d) through (f) of this subsection and take final action to adopt a final rule or rescind the interim rule. If the agency fails to take timely final action, the interim rule will cease to have the effect of law.

(C) Other than in cases involving interests of national security, upon the agency's publication of an interim rule without compliance with subsections (c), (d), or (e) or requirements to render final determinations under subsection (f) of this section, an interested party may seek immediate judicial review under chapter 7 of this title of the agency's determination to adopt such interim rule. The record on such review shall include all documents and information considered by the agency and any additional information presented by a party that the court determines necessary to consider to assure justice.

(3) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are unnecessary, including because agency rule making is undertaken only to correct a de minimis technical or clerical error in a previously issued rule or for

other noncontroversial purposes, the agency may publish a rule without compliance with subsections (c), (d), (e), or (f)(1)–(3) and (f)(4)(B)–(F). If the agency receives significant adverse comment within 60 days after publication of the rule, it shall treat the notice of the rule as a notice of proposed rule making and complete rule making in compliance with subsections (d) and (f).

(h) ADDITIONAL REQUIREMENTS FOR HEARINGS.—When a hearing is required under subsection (e) or is otherwise required by statute or at the agency's discretion before adoption of a rule, the agency shall comply with the requirements of sections 556 and 557 in addition to the requirements of subsection (f) in adopting the rule and in providing notice of the rule's adoption.

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

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretive rules and statements of policy; or

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

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

(k) RULE MAKING GUIDELINES.—(1)(A) The Administrator of the Office of Information and Regulatory Affairs shall establish guidelines for the assessment, including quantitative and qualitative assessment, of the costs and benefits of proposed and final rules and other economic issues or issues related to risk that are relevant to rule making under this title. The rigor of cost-benefit analysis required by such guidelines shall be commensurate, in the Administrator's determination, with the economic impact of the rule.

(B) To ensure that agencies use the best available techniques to quantify and evaluate anticipated present and future benefits, costs, other economic issues, and risks as accurately as possible, the Administrator of the Office of Information and Regulatory Affairs shall regularly update guidelines established under paragraph (1)(A) of this subsection.

(2) The Administrator of the Office of Information and Regulatory Affairs shall also issue guidelines to promote coordination, simplification and harmonization of agency rules during the rule making process and otherwise. Such guidelines shall assure that each agency avoids regulations that are inconsistent or incompatible with, or duplicative of, its other regulations and those of other Federal agencies and drafts its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

(3) To ensure consistency in Federal rule making, the Administrator of the Office of Information and Regulatory Affairs shall—

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

(B) issue guidelines for the conduct of hearings under subsections 553(d)(4) and 553(e) of this section, including to assure

a reasonable opportunity for cross-examination. Each agency shall adopt regulations for the conduct of hearings consistent with the guidelines issued under this subparagraph.

(4) The Administrator of the Office of Information and Regulatory Affairs shall issue guidelines pursuant to the Information Quality Act to apply in rule making proceedings under sections 553, 556, and 557 of this title. In all cases, such guidelines, and the Administrator's specific determinations regarding agency compliance with such guidelines, shall be entitled to judicial deference.

(l) INCLUSION IN THE RECORD OF CERTAIN DOCUMENTS AND INFORMATION.—The agency shall include in the record for a rule making, and shall make available by electronic means and otherwise, all documents and information prepared or considered by the agency during the proceeding, including, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, documents and information communicated by that Office during consultation with the Agency.

(m) MONETARY POLICY EXEMPTION.—Nothing in subsection (b)(6), subparagraphs (F) and (G) of subsection (d)(1), subsection (e), subsection (f)(3), and subparagraphs (C) and (D) of subsection (f)(5) shall apply to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

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

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

(1) make and document a reasoned determination that—

(A) assures that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions (including any statutory deadlines for agency action);

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

(C) identifies the costs and benefits (including all costs to be considered during a rule making under section 553(b) of this title) of conduct conforming to such guidance and assures that such benefits justify such costs; and

(D) describes alternatives to such guidance and their costs and benefits (including all costs to be considered during a rule making under section 553(b) of this title) and explains why the agency rejected those alternatives; and

(2) confer with the Administrator of the Office of Information and Regulatory Affairs on the issuance of such guidance to assure that the guidance is reasonable, understandable, consistent with relevant statutory and regulatory provisions and requirements or practices of other agencies, does not produce costs that are unjustified by the guidance's benefits, and is otherwise appropriate.

Upon issuing major guidance, or guidance that involves a novel legal or policy issue arising out of statutory mandates, the agency

shall publish the documentation required by subparagraph (1) by electronic means and otherwise.

(b) Agency guidance—

(1) is not legally binding and may not be relied upon by an agency as legal grounds for agency action;

(2) shall state in a plain, prominent and permanent manner that it is not legally binding; and

(3) shall, at the time it is issued or upon request, be made available by the issuing agency to interested persons and the public by electronic means and otherwise.

Agencies shall avoid the issuance of guidance that is inconsistent or incompatible with, or duplicative of, the agency's governing statutes or regulations, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

(c) The Administrator of the Office of Information and Regulatory Affairs shall have authority to issue guidelines for use by the agencies in the issuance of major guidance and other guidance. Such guidelines shall assure that each agency avoids issuing guidance documents that are inconsistent or incompatible with, or duplicative of, the law, its other regulations, or the regulations of other Federal agencies and drafts its guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

[(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.**]**

(e)(1) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 and shall be made available to the parties and the public by electronic means and, upon payment of lawfully prescribed costs, otherwise. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

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

(f) When an agency conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rule making under section 553(c), the matters to be considered and determinations to be made shall include,

among other relevant matters and determinations, the matters and determinations described in subsections (b) and (f) of section 553.

(g) Upon receipt of a petition for a hearing under this section, the agency shall grant the petition in the case of any major rule, unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rule making. The agency shall publish its decision to grant or deny the petition when it renders the decision, including an explanation of the grounds for decision. The information contained in the petition shall in all cases be included in the administrative record. This subsection shall not apply to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

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CHAPTER 7—JUDICIAL REVIEW

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§ 701. Application; definitions

(a) * * *

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) * * *

* * * * * * *

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; **[**and**]**

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

(3) "substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision.

* * * * * * *

§ 704. Actions reviewable

[Agency action made**]** *(a) Agency action made* reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency

authority. *Denial by an agency of a correction request or, where administrative appeal is provided for, denial of an appeal, under an administrative mechanism described in subsection (b)(2)(B) of the Information Quality Act, or the failure of an agency within 90 days to grant or deny such request or appeal, shall be final action for purposes of this section.*

(b) Other than in cases involving interests of national security, notwithstanding subsection (a) of this section, upon the agency's publication of an interim rule without compliance with section 553(c), (d), or (e) or requirements to render final determinations under subsection (f) of section 553, an interested party may seek immediate judicial review under this chapter of the agency's determination to adopt such rule on an interim basis. Review shall be limited to whether the agency abused its discretion to adopt the interim rule without compliance with section 553(c), (d), or (e) or without rendering final determinations under subsection (f) of section 553.

* * * * * * *

§ 706. Scope of review

[To the extent necessary**]** *(a) To the extent necessary* to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law *(including the Information Quality Act)*;

* * * * * * *

(b) The court shall not defer to the agency's—

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

(2) determination of the costs and benefits or other economic or risk assessment of the action, if the agency failed to conform to guidelines on such determinations and assessments established by the Administrator of the Office of Information and Regulatory Affairs under section 553(k);

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

(4) guidance.

(c) The court shall review agency denials of petitions under section 553(e)(6) or any other petition for a hearing under sections 556 and 557 for abuse of agency discretion.

* * * * * * *

Dissenting Views

INTRODUCTION

H.R. 2122, the "Regulatory Accountability Act of 2013," substantially amends the Administrative Procedure Act (APA)[1] to impose new procedural and analytical requirements on the Federal rulemaking process. It does this by adding *more than 60* additional procedural and analytical requirements to the process that agencies use to promulgate regulations under the APA, many of which have long been rejected as being ill-conceived. Most critically, H.R. 2122 would override laws that prohibit agencies from considering costs when public health and safety are at stake such as the Clean Air Act,[2] the Clean Water Act,[3] the Occupational Safety and Health Act,[4] and the Federal Mine Safety and Health Act.[5] As a result, agencies will be forced to weigh the financial and economic costs of critical public health and safety measures against the number of illnesses and lost lives that will result in the absence of such a regulation.

In addition to imposing burdensome and unnecessary analytical and procedural requirements, H.R. 2122 will greatly increase the ability of anti-regulatory interests to obstruct agency rulemaking. Specifically, the bill will give anti-regulatory interests multiple opportunities to intervene in the rulemaking process by broadening the scope of judicial review and requiring a less deferential standard of review. H.R. 2122 will also give industry additional opportunities to engage in dilatory tactics by requiring the use of the trial-type procedures of formal rulemaking for so-called "high-impact" rules. In addition, H.R. 2122 facilitates greater political interference by giving the White House Office of Information and Regulatory Affairs (OIRA) more control over congressionally-mandated rulemaking, providing industry with an additional chokepoint for the issuance of rules. As a result of these changes, H.R. 2122 would drastically undermine the Federal rulemaking process by hobbling the ability of agencies to effectively regulate consumer health and product safety, environmental protection, workplace safety, and financial services industry misconduct, among other matters.

In response to a virtually identical bill considered in the last Congress,[6] the Obama administration issued a strong veto threat.[7] It warned that the bill "would seriously undermine the ability of agencies to execute their statutory duties" and would also "impede the ability of agencies to provide the public with basic protections," among other concerns.[8] In addition, 42 administrative law academics,[9] the Administrative Law and Regulatory Practice Section

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[1] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2013).

[2] Pub. L. No. 91–604, 84 Stat. 1676 (1970), as amended. The cost prohibition is codified at 42 U.S.C. Sec. 7142(d)(2) (2013).

[3] Pub. L. No. 95–217, 86 Stat. 816 (1977), as amended. The limitation on cost consideration is codified at 33 U.S.C. Sec. 1311(b) (2013).

[4] Pub. L. No. 91–596, 84 Stat. 1590, 84 Stat. 1590 (1970), as amended. The limitation on cost consideration is codified at 29 U.S.C. Sec. 655(b)(5) (2013).

[5] Pub. L. No. 95–164, 91 Stat. 1290 (1977), as amended. The limitation on cost consideration is contained in section 101(a)(6)(A) of the Act.

[6] H.R. 3010, 112th Cong. (2011).

[7] Executive Office of the President, Office of Management and Budget, Statement of Administration Policy for H.R. 3010—Regulatory Accountability Act of 2011 (Nov. 29, 2011).

[8] *Id.*

[9] Letter from 42 administrative law academics to Lamar Smith, House Judiciary Committee Chair, and John Conyers, Jr., House Judiciary Committee Ranking Member (Oct. 24, 2011) (on file with the H. Committee on the Judiciary Democratic staff).

of the American Bar Association,[10] and the Coalition for Sensible Safeguards (which includes more than 70 member organizations)[11] have expressed strong opposition to this bill. For example, the Coalition stated that the bill represented "the biggest threat to environmental standards, workplace safety rules, public health, and financial reform regulations to appear in decades."[12]

In sum, our principal concerns with H.R. 2122 are that the bill: (1) is based on the false premise that it will "promote job creation and economic growth;"[13] (2) unnecessarily expands cost-benefit analysis requirements and overrides existing statutes such as the Clean Air Act and the Occupational Safety and Health Act that prohibit consideration of cost when public health and safety are at stake; (3) will effectively prevent critical public health and safety rules from being promulgated by expanding the use of formal rulemaking; (4) will unduly hamper agency rulemaking, lead to endless litigation, and allow courts to substitute their policy judgments for those of agencies without enhancing due process; (5) will provide numerous opportunities for regulated entities to challenge proposed rulemakings and encourage dilatory tactics by opponents of regulation; and (6) may undermine the independence of regulatory agencies by extending cost-benefit analysis requirements to such agencies.

For these reasons, and others discussed below, we respectfully dissent and urge our colleagues to reject this seriously flawed legislation.

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[10] American Bar Ass'n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act (Oct. 24, 2011) (on file with the H. Committee on the Judiciary Democratic staff).

[11] Coalition for Sensible Safeguards, The Regulatory Accountability Act of 2011: Legislation Would Override and Threaten Decades of Public Protections, at 1 (undated) (on file with the H. Committee on the Judiciary Democratic staff). Current members of the Coalition include: AFL–CIO; Alliance for Justice; American Association of University Professors; American Federation of State, County and Municipal Employees; American Federation of Teachers Americans for Financial Reform; American Lung Association; American Rivers; American Values Campaign; American Sustainable Business Council; BlueGreen Alliance; Campaign for Contract Agriculture Reform; Center for Effective Government; Center for Digital Democracy; Center for Food Safety; Center for Foodborne Illness Research & Prevention; Center for Independent Living; Center for Science in the Public Interest; Citizens for Sludge-Free Land; Clean Air Watch; Clean Water Network; Consortium for Citizens with Disabilities; Consumer Federation of America; Consumers Union; CounterCorp; Cumberland Countians for Peace & Justice; Demos; Economic Policy Institute; Edmonds Institute; Environment America; Farmworker Justice; Free Press; Friends of the Earth; Green for All; Health Care for America Now; In the Public Interest; International Brotherhood of Teamsters; International Center for Technology Assessment; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); League of Conservation Voters; Los Angeles Alliance for a New Economy; Main Street Alliance; National Association of Consumer Advocates; National Center for Healthy Housing; National Consumers League; National Council for Occupational Safety and Health; National Employment Law Project; National Lawyers Guild, Louisville Chapter; National Women's Health Network; National Women's Law Center; Natural Resources Defense Council; Network for Environmental & Economic Responsibility of United Church of Christ; New Jersey Work Environment Council; New York Committee for Occupational Safety and Health; Oregon PeaceWorks; People for the American Way; Protect All Children's Environment; Public Citizen; Reproductive Health Technologies Project; Safe Tables Our Priority; Sierra Club; Service Employees International Union; Southern Illinois Committee for Occupational Safety and Health; The Arc of the United States; The Partnership for Working Families; Trust for America's Health; U.S. Chamber Watch; U.S. PIRG; Union of Concerned Scientists; Union Plus; United Food and Commercial Workers Union; United Steelworkers; Waterkeeper Alliance; and Worksafe. Coalition for Sensible Safeguards—Our Members, *available at* http://sensiblesafeguards.org/our-members (last visited June 21, 2013).

[12] Coalition for Sensible Safeguards, The Regulatory Accountability Act of 2011: Legislation Would Override and Threaten Decades of Public Protections, at 1 (undated) (on file with the H. Committee on the Judiciary Democratic staff).

[13] H. Rep. No. 112–294, at 10 (2011).

DESCRIPTION AND BACKGROUND

DESCRIPTION

A brief summary of H.R. 2122's principal provisions is presented here and a more detailed section-by-section explanation of the bill appears at the end of our dissenting views.

H.R. 2122 amends the APA in numerous ways to impose new procedural and analytical requirements on the Federal rulemaking process. For instance, the bill requires agencies to consider "potential" costs of proposed rules even when existing law explicitly directs such agencies not to consider the costs of such rules. Another provision requires agencies to follow formal rulemaking procedures for proposed "high impact"rules, defined in the bill as those rules that have a $1 billion or more cost on the economy. The bill also greatly expands the ability of courts to second-guess agency decisions by expanding the scope of judicial review and imposing a less deferential standard of review. In addition, the bill contains various provisions intended to give OIRA even greater control over congressionally-mandated rulemakings. Finally, the bill allows the President and OIRA to withhold documents and information communicated by OIRA during consultation with the agency, which would further undermine transparency of the rulemaking process.

BACKGROUND

The current rulemaking process provides ample opportunity for public participation and comment. In addition, all three branches of government have the ability to review rulemakings. Overall, the system works well and, if anything, could be streamlined to address the often lengthy process by which regulations are promulgated.

I. THE CURRENT RULEMAKING PROCESS

The APA, enacted in 1946, establishes the minimum rulemaking [14] and formal adjudication requirements for all administrative agencies. The APA also sets forth standards for judicial review of final agency actions. While the APA sets minimum standards, many agency actions may involve procedures that depart from or go beyond APA requirements. As one academic noted, "[T]he American administrative system, by evolution and design, is characterized by a considerable degree of informality, agency discretion and procedural flexibility." [15] The APA's baseline procedural requirements are designed to maintain a balance between this flexibility and the requirements of due process. The APA effectively functions as an "administrative Constitution." Indeed, Committee Chairman Bob Goodlatte (R–VA) cited the APA's "critical protections . . . against errors and excesses in agency rulemakings." [16]

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[14] The APA defines "rulemaking" as the "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(5) (2013). A "rule," in turn, is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2013).

[15] Gary J. Edles, *Lessons from the Administrative Conference of the United States,* 2 EUR. PUB. L. 571, 572 (1996).

[16] Unofficial Transcript of Markup of H.R. 1947, the "Federal Agriculture Reform and Risk Management Act," by the H. Committee on the Judiciary, 113th Cong. 6 (June 5, 2013).

The principal way by which agencies promulgate rules is the informal notice-and-comment rulemaking process.[17] Although called "informal" rulemaking, the process is, in fact, heavily proceduralized. Agencies are required to provide the public with adequate notice of a proposed rule and a meaningful opportunity to comment on the rule's content,[18] including giving the public the opportunity to submit written "data, views, or arguments."[19] There is no minimum time period during which an agency must accept comments, but courts reviewing an agency's compliance with this requirement typically consider whether the opportunity to comment was "adequate." Furthermore, the agency must consider the public's comments and incorporate into the adopted rule a "concise general statement" of the "basis and purpose" of the final rule.[20] The statement should be sufficient to allow the public to obtain a general idea of the purpose of and basic justification for the rule. The final rule and the general statement must be published in the *Federal Register* not less than 30 days before the rule's effective date.[21]

In addition to informal rulemaking, agencies follow the APA's formal rulemaking procedures "when rules are required by statute to be made on the record after opportunity for an agency hearing."[22] These procedures require the agency to carry the burden of proof in support of its rule through a trial-like process.[23] Any interested party has the opportunity to present evidence and conduct cross-examination, with an administrative law judge or other agency official presiding.[24] The presiding officer can administer oaths, issue subpoenas, exclude irrelevant evidence, and make other rulings concerning the conduct of the proceeding.[25] The rule must be supported by substantial evidence.[26] In contrast to an informal rulemaking, a court can review a rule subject to formal rulemaking to determine whether the "evidence" supporting the rule was "substantial."[27] Since the 1970's, however, formal rulemaking procedures have generally fallen into disuse not only because they are unnecessarily cumbersome and time-consuming, but also because they offer little advantage over informal rulemaking procedures.[28]

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[17] The APA exempts from all of its informal rulemaking requirements rules concerning: (1) "a military or foreign affairs function of the United States;" (2) "a matter relating to agency management or personnel;" or (3) a matter relating to "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a) (2013).

[18] 5 U.S.C. §§ 553(b), (c) (2013). Under the APA's good cause exception, an agency may be exempted from the notice-and-comment requirements when such "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (2013). At least one court has noted that "good cause requires some showing of exigency beyond generic complexity of data collection and time constraints." Natural Resources Defense Council, Inc. v. Evans, 316 F.3d 904, 906 (9th Cir. 2003).

[19] 5 U.S.C. § 553(c) (2013).

[20] *Id.*

[21] 5 U.S.C. § 553(d) (2013).

[22] 5 U.S.C. § 553(c) (2013). The Supreme Court, in an opinion authored by then-Justice William Rehnquist, interpreted this language to mean that unless Congress specifically states in a statute governing the substance of the rulemaking that agency "hearings" regarding proposed rules are to be "on the record," an agency is not required to use formal rulemaking procedures. United States v. Florida East Coast Railway Co., 410 U.S. 224, 237–238 (1973).

[23] 5 U.S.C. § 556(d) (2013).

[24] 5 U.S.C. §§ 556(c), (d) (2013).

[25] 5 U.S.C. § 556(d) (2013).

[26] *Id.*

[27] *See* 5 U.S.C. § 706(2) (2013) (outlining various bases for judicial review).

[28] Stephen G. Breyer *et al.,* ADMINISTRATIVE LAW AND REGULATORY POLICY, at 582 (4th ed. 1999).

In addition to the APA's rulemaking procedures, Federal agencies sometimes use rulemaking processes that are not specified by the APA. For example, Congress may direct an agency to follow specified rulemaking procedures that go beyond the APA's informal procedures.[29] These procedures often include elements of both the APA's formal and informal rulemaking requirements and are sometimes referred to as "hybrid" rulemaking procedures. Such processes attempt to strike a balance between the flexibility of notice-and-comment rulemaking and greater public participation that a more formal rulemaking process may allow.

II. JUDICIAL, PRESIDENTIAL, AND CONGRESSIONAL CHECKS ON AGENCY RULEMAKING

A. Judicial Review

The APA provides for judicial review of final agency action when there is no other adequate judicial remedy available.[30] The APA requires a reviewing court to compel agency action when it is unlawfully withheld or unreasonably delayed and to set aside as unlawful agency action, findings, and conclusions when they are found to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in [a formal rulemaking] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[31]

The two exceptions to this presumption of judicial review under the APA are when "statutes preclude judicial review" and when "agency action is committed to agency discretion by law."[32] A court, however, always has the authority to review the constitutionality of agency action, including those actions that are otherwise unreviewable.[33]

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* the Supreme Court held that a reviewing court can invalidate an agency rule or formal adjudication only when it violates a constitutional provision or when the agency's rule exceeds its statutory authority to issue the rule as clearly expressed by Congress.[34] Where the statute is ambiguous, courts must defer to an agency's permissible interpretation of the statute.[35] The court cannot strike down a rule

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[29] *See, e.g.,* 15 U.S.C. § 57a (2013) (imposing heightened notice and congressional reporting requirements on the Federal Trade Commission).
[30] 5 U.S.C. §§ 702, 704 (2013).
[31] 5 U.S.C. § 706(2) (2013).
[32] 5 U.S.C. § 701 (2013).
[33] *See* Webster v. Doe, 486 U.S. 592 (1988); Oestereich v. Selective Service System, 393 U.S. 233 (1968).
[34] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[35] *Id.*

based on substantive policy grounds, out of deference to an agency's substantive expertise in the matter being regulated.[36] Subsequent to the *Chevron* decision, the Supreme Court has limited the *Chevron* doctrine to legislative rules[37] (i.e., those having the effect of law), and the extent of judicial deference can be unclear in a given case.

Courts will also invalidate a rule that is arbitrary or capricious. Normally, this type of scrutiny applies to informal rulemaking.[38] Although originally an extremely deferential standard, the Supreme Court, in a series of decisions since the 1970's, has left unclear precisely what level of deference is required, suggesting that the "arbitrary or capricious" standard may not be as deferential towards agency action as it is in other contexts.[39] The Court has suggested that, even under the arbitrary or capricious standard, a reviewing court must conduct a "searching and careful" review of agency action.[40] This type of heightened review under the arbitrary or capricious standard has been referred to as the "hard look" doctrine, under which a court examines "carefully the administrative record and the agency's explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions."[41]

B. Presidential Review

There are various mechanisms through which the President can exert control over Federal agency rulemaking. For example, centralized review of agencies' regulations within the Executive Office of the President has been part of the rulemaking process since the early 1970's. OIRA reviews significant proposed and final rules before they are published in the Federal Register.[42] As a result of such reviews, draft rules may be revised before publication, withdrawn before a review is completed, or returned to the agencies "because, in OIRA's analysis, certain aspects of the rule need to be reconsidered."[43]

Presidents have also imposed various rulemaking requirements on Federal agencies through executive orders (EO). For example, President Bill Clinton issued EO 12866 in 1993, which requires, *inter alia,* agencies to prepare cost-benefit analyses for their "economically significant" rules and imposes expanded transparency requirements.[44] President Barack Obama issued EO 13563 in Janu-

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[36] *Id.*

[37] United States v. Mead Corp., 533 U.S. 218 (2001).

[38] STAFF OF SUBCOMM. ON COMM. AND ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21st CENTURY 112 (COMM. PRINT 2006) [hereinafter "Interim Report"], *available at* http://judiciary.house.gov/Media/PDFS/Printers/109th/31505.pdf.

[39] Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[40] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Interim Report at 113.

[41] Interim Report at 113 (quoting Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process,* 41 Duke L.J. 1385, 1410 (1992)).

[42] Paperwork Reduction Act of 1980 § 3503, 44 U.S.C. ch. 35 (2007).

[43] Interim Report at 39.

[44] Exec. Ord. No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). In its statement of regulatory philosophy, EO 12866 states that agencies should assess all costs and benefits of available regu-

Continued

ary 2011, which emphasizes the need to increase public participation in the rulemaking process, to the "extent feasible and consistent with law."[45] EO 13563 also requires agencies to: (1) identify, "as appropriate, means to achieve regulatory goals designed to promote innovation;" (2) reduce costs and simplify and harmonize rules through inter-agency coordination; (3) identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (4) conduct periodic reviews of existing significant regulations that "may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[46] Later that same year, President Obama issued EO 13579, which encouraged independent regulatory agencies[47] to follow the principles of EO 13563, including complying with its retrospective review requirement.[48] Then-OIRA Administrator Cass Sunstein, however, made clear that EO 13579 was not binding on independent agencies.[49]

C. Congressional Review

There are various ways in which Congress can check agency rulemaking behavior: limiting or restricting delegations of authority, defunding rulemaking activities through the appropriations process, and conducting oversight activity. In addition, Congress can exert its powers under the Congressional Review Act (CRA).[50] The CRA authorizes Congress to disapprove an agency rule to which it objects by enacting a joint resolution of disapproval.[51] Such a joint resolution must be introduced within at least 60 days of the rule's

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latory alternatives, including, significantly, both quantitative *and qualitative* measures. It also provides that agencies should select regulatory approaches that maximize net benefits (unless a statute requires another approach). Pursuant to the order, agencies, where permissible and applicable, should adhere to a set of principles when developing rules, including: (1) consideration of the degree and nature of risk posed when setting regulatory priorities, (2) adoption of regulations only upon a "reasoned determination that the benefits of the intended regulation justify its costs," and (3) tailoring regulations to impose the least burden on society needed to achieve the regulatory objectives. Among the EO's stated objectives are "to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public." The "primacy" of the agencies provision signaled a significant change in regulatory philosophy, vesting greater control of the rulemaking process with regulatory agencies and taking away authority from OIRA. Also, the requirement that the benefits of a regulation "justify" its costs was a noticeably lower threshold than the requirement in EO 12291, i.e., that the benefits must "outweigh" the costs. *Id.*

[45] Exec. Ord. No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011). For example, EO 13563 directs agencies to give the public a meaningful opportunity to comment on proposed rules through the Internet, to provide a minimum 60-day comment period, and to provide online access to the rulemaking docket (including scientific and technical findings and public comments) in an easily searchable and downloadable format. Agencies are also directed to seek the views of those likely to be affected, including those who are likely to benefit and those likely to be subject to a proposed rule, prior to issuing a notice of proposed rulemaking.

[46] *Id.*

[47] Independent regulatory agencies, as opposed to executive branch agencies, are considered "independent"because the President has limited authority to remove their leaders, who can only be removed for cause, rather than simply serving at the President's pleasure. Such agencies are usually styled "commissions" or "boards" (e.g., National Labor Relations Board, Securities and Exchange Commission). Stephen G. Breyer, et al., Administrative Law and Regulatory Policy, at 100 (4th ed. 1999).

[48] Exec. Ord. No. 13,579, 76 Fed. Reg. 41587 (July 11, 2011).

[49] Memorandum from Cass R. Sunstein to the Heads of Independent Regulatory Agencies, (July 22, 2011) ("It is understood that this guidance is issued with full respect for the independence of the agencies to which it is addressed, and hence nothing said here is meant to be binding."), *available at* http://www.whitehouse.gov/omb/international__regulatory__cooperation #eo13579.

[50] 5 U.S.C. §§ 801–08 (2013).

[51] *See* 5 U.S.C. § 802 (2013) (outlining congressional disapproval procedure).

submission to Congress.[52] For a joint resolution of disapproval to take effect, it must pass both Houses of Congress and be signed by the President, thereby meeting the Constitution's Bicameralism and Presentment Clauses' requirements.[53] If a joint resolution is enacted into law, the disapproved rule is deemed not to have been in effect at any time.[54] Additionally, the CRA prohibits an agency from reissuing a rule that is substantially the same as a disapproved rule.[55]

CONCERNS WITH H.R. 2122

I. H.R. 2122 IS BASED ON THE FALSE PREMISE THAT REGULATIONS INHIBIT JOB CREATION AND STIFLE ECONOMIC GROWTH

H.R. 2122's proponents rely on unsupported assertions that regulations inhibit job creation and stifle economic growth by imposing burdensome costs on business and creating regulatory uncertainty.[56] While these arguments can sound appealing on the surface, no facts actually support them.

A. Regulations Have No Discernible Impact on Job Creation

Over the course of 22 hearings held by the Committee since the beginning of the 112th Congress, proponents of deregulatory measures like H.R. 2122 have repeatedly argued that regulations stifle job creation by creating business uncertainty.[57] Noticeably absent,

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[52] 5 U.S.C. § 802(a) (2013). The CRA prescribes special expedited procedures for Senate consideration of a joint resolution of disapproval, though it does not provide for similar procedures in the House of Representatives. 5 U.S.C. § 802(c) (2013).

[53] U.S. Const. Art. I, § 7, cl. 2, 3.

[54] 5 U.S.C. § 801(f) (2013).

[55] 5 U.S.C. § 801(b)(2) (2013).

[56] Former Judiciary Committee Chairman Lamar Smith (R–TX), for example, asserted last Congress:

> The American people urgently need jobs that only economic growth can give. Standing in the way of growth and job creation is a wall of Federal regulation.
>
> * * *
>
> New regulatory burdens and uncertainty about the economy have helped to keep trillions of dollars of private sector capital on the sidelines. Companies cannot safely invest if they cannot tell whether tomorrow's regulations will make their investments unprofitable.

The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. (2011) [hereinafter H.R. 3010 Hearing] (remarks of Rep. Lamar Smith (R–TX), Chair, H. Comm. on the Judiciary).

[57] *See, e.g., Regulatory Accountability Act of 2013: Hearing on H.R. 2122 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013); *Regulatory Flexibility Improvements Act of 2013: Hearing on H.R. 2542 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013)*; Sunshine for Regulatory Decrees and Settlements Act of 2013: Hearing on H.R. 1493 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013); *REINS Act: Promoting Jobs, Growth and American Competitiveness: Hearing on H.R. 367 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013); *The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013); *Responsibly and Professionally Invigorating Development Act of 2013: Hearing on H.R. 2641 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013)*; Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery: Hearing Before the H. Comm. on the Judiciary,* 112th Congress (2012); *The Obama Administration's Abuse of Power: Hearing Before the H. Comm. on the Judiciary,* 112th Cong. (2012); *Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law. of the H. Comm. on the Judiciary,* 112th Cong. (2012); *The Responsibly and Professionally Invigorating Development Act of 2012: Hearing on H.R. 4377 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2012); *The Office of Information and Regulatory Af-*

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however, is any evidence documenting these arguments. Indeed, Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush administrations, observes that no "hard evidence is offered for" the claim that President Obama "has unleashed a tidal wave of new regulations, which has created uncertainty among businesses and prevents them from investing and hiring."[58] Rather, Mr. Bartlett notes, this argument is "simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber."[59] Mr. Bartlett concluded his analysis with this observation, "In my opinion, regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment."[60]

The Majority's own witness at the legislative hearing on a nearly identical legislation considered in the 112th Congress clearly debunked the myth that regulations stymie job creation. Christopher DeMuth, who appeared on behalf of the American Enterprise Institute, a conservative think tank, stated in his prepared testimony that the "focus on jobs . . . can lead to confusion in regulatory debates" and that "the employment effects of regulation, while important, are indeterminate."[61] At this same hearing, Minority witness Professor Sidney Shapiro explained that "[a]ll of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment."[62]

If anything, regulations may promote job growth and put Americans back to work. For instance, the BlueGreen Alliance, notes:

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fairs: Federal Regulations and Regulatory Reform Under the Obama Administration: Hearing Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary, 112th Cong. (2012) [hereinafter OIRA Hearing]; *The Regulatory Freeze for Jobs Act of 2012: Hearing on H.R. 4078 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2012); *The Consent Decree Fairness Act and the Sunshine for Regulatory Decrees and Settlements Act: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2012) [hereinafter Consent Decrees Hearing]; *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary,* 112th Cong. (2011) [hereinafter H.R. 3010 Hearing]; *The Role of Social Security Administrative Law Judges: Hearing Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2011); *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2011) [hereinafter Formal Rulemaking Hearing]; *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *The Regulations From the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); [hereinafter REINS Act Legislative Hearing]; *The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011) [hereinafter the APA at 65 Hearing]; *Regulatory Flexibility Improvements Act of 2011—Unleashing Small Businesses to Create Jobs: Hearing on H.R. 527 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2011); *The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011).

[58] Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs,* N.Y. TIMES Economix Blog, Oct. 4, 2011, available at http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/?scp=4&sq=bartlett&st=cse.

[59] *Id.*

[60] *Id.*

[61] H.R. 3010 Hearing (prepared statement of Christopher DeMuth, American Enterprise Institute)

[62] *Id.* (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).

> Studies on the direct impact of regulations on job growth have found that most regulations result in modest job growth or have no effect, and economic growth has consistently surged forward in concert with these health and safety protections. The Clean Air Act is a shining example, given that the economy has grown 204% and private sector job creation has expanded 86% since its passage in 1970.[63]

Also in reference to the Clean Air Act, the White House Office of Management and Budget ("OMB") observed that 40 years of success with this measure "have demonstrated that strong environmental protections and strong economic growth go hand in hand."[64] Similarly, the Natural Resources Defense Council and the United Auto Workers cite the fact that increased fuel economy standards have already led to the creation of more than 155,000 U.S. jobs.[65]

The facts also indicate that regulatory uncertainty is not the problem. A July 2011 *Wall Street Journal* survey of business economists, found that the "main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies."[66] Similarly, a 2011 National Federation of Independent Business survey of its members likewise suggests that "poor sales"—not regulation—is the biggest problem.[67] The Main Street Alliance, an alliance of small businesses, similarly observed that a lack of demand, and not regulation, is the problem[68] In sum, there is no credible evidence that regulations depress job creation.[69]

If anything, H.R. 2122 will cause greater business uncertainty by substantially lengthening and adding to the complexity of the rulemaking process, which will result in less predictability[70] and leave

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[63] Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from David A. Forster, Executive Director, BlueGreen Alliance, at 2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[64] Executive Office of the President—Office of Management and Budget, Statement of Administration Policy on H.R. 2401, Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011 (Sept. 21, 2011).

[65] Natural Resources Defense Council *et al.,* Supplying Ingenuity: U.S. Suppliers of Clean, Fuel-Efficient Vehicle Technologies (2011), available at http://www.nrdc.org/transportation/autosuppliers/files/SupplierMappingReport.pdf.

[66] Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring,* WALL ST. J., July 18, 2011, available at http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html.]

[67] Press Release, Nat'l Federation of Independent Businesses, Small Business Confidence Takes Huge Hit: Optimism Index Now in Decline for Six Months Running (Sept. 13, 2011) ("Of those reporting negative sales trends, 45 percent blamed faltering sales, 5 percent higher labor costs, 15 percent higher materials costs, 3 percent insurance costs, 8 percent lower selling prices and 10 percent higher taxes and regulatory costs."), available at http://www.nfib.com/press-media/press-media-item?cmsid=58190.

[68] Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Jim Houser, Co-Chair, The Main Street Alliance, et al., at 1–2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[69] *See also* Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Minimal,* WASH. POST, Nov. 13, 2011, available at http://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gIQALRF5INXstory.html?hpid=z1 ("In 2010, 0.3 percent of the people who lost their jobs in layoffs were let go because of 'government regulations/intervention.' By comparison, 25 percent were laid off because of a drop in business demand. . . . Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job creation.").

[70] H.R. 3010 Hearing (statement of Prof. Sidney Shapiro, Wake Forest Law School) ("It currently takes 4 to 8 years for an agency to promulgate and enforce most significant rules, and the proposed procedures would likely add another two to 3 years to the process. Under H.R. 3010, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete. In the meantime, thousands of people would

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"stakeholders (including businesses large and small) less able to plan effectively for the future."[71] Just two examples of how it does this is that the bill: (1) adds more than "60 new procedural and analytical requirements to the agency rulemaking process;" and (2) expands the APA's informal rulemaking requirements by approximately tenfold.[72]

Those who claim that regulations stifle economic growth fail to remember that the *lack* of adequate regulation of the financial services industry led to the 2008 financial crisis and the ensuing Great Recession, the lingering effects of which many Americans still suffer from today. The Dodd-Frank Wall Street Reform Act[73] was designed, in part, to ensure that America's largest financial institutions could no longer jeopardize our Nation's economy through reckless conduct, to protect consumers through the establishment of a Consumer Financial Protection Bureau, and to stop any future need for congressional bailouts. Although it is essential that rules implementing the Act's provisions be promulgated, industry lobbyists have been working overtime to stop them from going into effect. As Representative Melvin L. Watt (D–NC), who sits on both the Judiciary and Financial Services Committees, explained:

> We are having a hard enough time getting the regulators to timely proceed with completing the rules, because a lot of the areas in which they are rulemaking are so very complicated and have so many nuances and implications. The last thing we want to do is slow down that process.
>
> And I hear all the time when I go home with my business community that they are looking for certainty. "Just tell us what the rules are so that we can start playing by them." And to the extent that we delay that certainty, we delay their ability to rely on what the rules of the road will be going forward.[74]

Accordingly, to ensure that the promulgation of these critical regulations would not be adversely impacted by H.R. 2122, Representative Watt offered an amendment that would have exempted from the bill any regulations issued to implement the Dodd-Frank Wall Street Reform Act. His amendment, however, failed by a party-line vote of 9 to 11.

B. The Benefits of Regulations More Than Outweigh Their Costs

Proponents of H.R. 2122 overstate the purported costs of regulation while completely ignoring its benefits. At nearly every hearing on various anti-regulatory bills and oversight issues during the current and prior Congress, Majority Members and witnesses have cited the same widely debunked study by economists Mark and Ni-

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die and tens of thousands more would be injured or become ill because of the lack of regulation.").

[71] Letter from 42 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 2 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[72] *Id.*

[73] Pub. L. No. 111–203 (2010).

[74] Unofficial Tr. of Markup of H.R. 2122, the Regulatory Accountability Act of 2013, by the H. Comm. on the Judiciary, 113th Cong. at 135 (July 24, 2013), available at http://judiciary.house.gov/hearings/Markups%202013/mark__07242013/07.24.13%20Markup%20Transcript.pdf.

cole Crain, which claims that Federal regulation imposes an annual cost of $1.75 trillion on business.[75]

The Crain study, however, has been extensively criticized for exaggerating the economic costs of Federal rulemaking. For example, the Center for Progressive Reform (CPR) notes that the study myopically fails to account for any benefits of regulation.[76] In fact, as CPR observed, OMB estimated in 2008 that major rules imposed $46 billion to $54 billion in costs, but also produced $122 billion to $656 billion in benefits.[77]

Moreover, the study's methodology is seriously flawed with respect to how it calculated economic costs. The study, which relied on international public opinion polling by the World Bank on how friendly a particular country was to business interests, ignored actual data on costs imposed by Federal regulation in the United States.[78] CRS conducted an extensive examination of the Crain study and criticized much of its methodology.[79] In fact, the authors of the study told CRS that it was "not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)"[80] CRS concluded that "a valid, reasoned policy decision can only be made after considering information on both costs and benefits" of regulation.[81] The Economic Policy Institute also issued a critique of the Crain study outlining additional concerns with the study's methodology and data.[82]

Although the proponents of H.R. 2122 emphasize the purported costs of regulations, regulations, in truth, routinely result in net benefits to society. OMB's 2012 annual report to Congress estimates that the annual benefits of Federal regulations for which agencies estimated and monetized both benefits and costs from October 1, 2001 through September 30, 2011 aggregate between $141 billion to $691 billion, while the estimated annual costs aggregate between $42.4 billion and $66.3 billion.[83] In sum, there is simply no credible evidence that the cost of regulations exceed their benefits.

II. H.R. 2122 PRIORITIZES PERCEIVED COST OVER CRITICAL PUBLIC HEALTH, SAFETY AND ENVIRONMENTAL PROTECTIONS

H.R. 2122 will undermine the government's ability to protect us from a wide range of harms, in complete disregard of the dev-

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[75] Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms, Rep. No. SBAHQ–08–M–0466 (Sept. 2010), available at http://archive.sba.gov/advo/research/rs371tot.pdf.

[76] Sidney Shapiro, *et al.,* Setting the Record Straight: The Crain and Crain Report on Regulatory Costs, Center for Progressive Reform White Paper #1103 (Feb. 2011).

[77] *Id.*

[78] *Id.*

[79] Curtis W. Copeland, Analysis of an Estimate of the Total Costs of Federal Regulations, Congressional Research Service Report for Congress, R41763 (Apr. 6, 2011).

[80] *Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to te author of the CRS report).

[81] *Id.*

[82] John Irons & Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited $1.75 Trillion Cost of Regulations Is Not Worth Repeating, Economic Policy Institute, July 19, 2011, available at http://w3.epi-data.org/temp2011/IssueBrief308.pdf.

[83] Office of Management and Budget, 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities at 3, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2012__cb/2012__cost__benefit__report.pdf.

astating impact that inadequate regulation has had on the health and economic well-being of Americans. For example, our Nation continues to struggle in the aftermath of the 2008 financial crisis and to deal with the ongoing costs of regulatory failure and underenforcement of current regulations. As Americans for Financial Reform observed, the crisis has cost the United States economy an estimated "trillions of dollars and millions of jobs, and led to millions of families losing their homes."[84] Likewise, the BP oil spill and Massey coal mine explosion provide further examples of the dangers of regulatory failure.

Notwithstanding these and other examples, H.R. 2122's supporters appear to suffer some form of collective amnesia about the dangers of regulatory failure. H.R. 2122 prioritizes minimizing business costs over protecting the health and safety of Americans in at least two ways. First, it imposes a "supermandate" that overrides numerous statutes prohibiting or limiting the authority of agencies to consider cost in promulgating public health and safety rules. Second, it goes well beyond the existing cost-benefit analysis requirements contained in EOs 12866 and 13563 to mandate expanded analytical requirements with much less agency discretion, threatening paralysis by analysis. Indeed, as David Goldston, the Director of Government Affairs at the Natural Resources Defense Council, observed at the legislative hearing on H.R. 2122, this bill "is a kind of anthology of bad ideas that have already proven to interfere with efforts to protect the public."[85]

A. H.R. 2122 Overrides Statutory Prohibitions or Limitations on Considering Costs in the Rulemaking Process

Regulations are critical to protecting all Americans from a vast array of harms, including dirty air and water, dangerous toys, reckless financial behavior, and unsafe workplaces. This is not an abstract notion. With respect to workplace safety, for instance, there were 4,383 fatal occupational injuries last year, according to the Bureau of Labor Statistics.[86] And, an analysis by the National Institute for Occupational Safety and Health, the American Cancer Society, and Emory University's School of Public Health estimates that after factoring in disease and injury data "there are a total of 55,200 US deaths annually resulting from occupational disease or injury (range 32,200–78,200)."[87]

This is why we believe that one of the most pernicious aspects of H.R. 2122 is its requirement that agencies consider regulatory costs and benefits of proposed and final rules regardless of the dictates of other laws, thereby establishing a "supermandate." As a result, it overrides provisions in numerous other statutes that prohibit or limit agency consideration of costs when promulgating

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[84] Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Americans for Financial Reform, at 2 (DATE) (on file with the H. Committee on the Judiciary, Democratic Staff).

[85] *The Regulatory Accountability Act of 2013: Hearing on H.R. 2122 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013) (prepared statement of David Goldston, the Director of Government Affairs at the Natural Resources Defense Council).

[86] Press Release, U.S. Dep't of Labor Bureau of Labor Statistics, National Census of Fatal Occupational Census of Fatal Occupational Injuries in 2012 (Preliminary Results), Aug. 13, 2013, available at http://www.bls.gov/news.release/pdf/cfoi.pdf.

[87] Kyle Steenland *et al.,* Dying for Work: The Magnitude of US Mortality from Selected Cases of Death Associated with Occupation, 43 Am. J. Industrial Medicine 461 (2003).

rules. These statutes include the Clean Air Act,[88] the Clean Water Act,[89] the Occupational Safety and Health Act,[90] and the Federal Mine Safety and Health Act.[91]

Various environmental groups warn that this is a "cynical attempt" to overturn these measures and the carefully crafted legislative bargains that they represent.[92] One such organization, American Rivers, notes that "[m]any of our nation's fundamental laws protecting our health, like the Clean Air Act and the Clean Water Act, would likely not have come into effect when their costs, the costs of keeping our air and water clean, were greater compared to less protective regulations."[93] As the ABA's Administrative Law Section observes:

> In addition to burdening the rulemaking process with analytical requirements that appear to be out of proportion to their likely payoffs, the bill's "rulemaking considerations" are troubling because of the way in which they would, in some cases, alter the substantive law. The APA would thus become, in several respects, an "Administrative Substance Act."[94]

In addition, the bill imposes other supermandates that compromise public health, workplace safety, and environmental protections. For example, new section 553(d) requires agencies to "adopt the least costly rule considered during the rule making . . . that meets relevant statutory objectives" and permits agencies to chose a more expensive option only if the additional benefits "justify its additional costs." As the AFL–CIO observed, this provision "would make protecting workers and the public secondary to limiting costs and impacts on business and corporations."[95]

To rectify the pernicious effects of the bill's supermandates, Ranking Member John Conyers, Jr. (D–MI) offered an amendment striking these provisions and clarifying that the bill's cost-benefit analysis requirements apply only to the extent permitted by existing law. He explained:

> My colleagues, this measure is an endangerment to the health and safety and wellbeing of all Americans, anywhere they may be. And it will force agency officials, were it to become law, to ignore congressional directives in these

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[88] Pub. L. No. 91–604, 84 Stat. 1676 (1970), as amended. The cost prohibition is codified at 42 U.S.C. Sec. 7142(d)(2) (2013).

[89] Pub. L. No. 95–217, 86 Stat. 816 (1977), as amended. The limitation on cost consideration is codified at 33 U.S.C. Sec. 1311(b) (2013).

[90] Pub. L. No. 91–596, 84 Stat. 1590, 84 Stat. 1590 (1970), as amended. The limitation on cost consideration is codified at 29 U.S.C. Sec. 655(b)(5) (2013).

[91] Pub. L. No. 95–164, 91 Stat. 1290 (1977), as amended. The limitation on cost consideration is contained in section 101(a)(6)(A) of the Act.

[92] Letter to House Members from American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Environment America, League of Conservation Voters & the Natural Resources Defense Council (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[93] Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Jim Bradley, Director of Government Relations, American Rivers (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[94] American Bar Ass'n—Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, the Regulatory Accountability Act, at 12–13 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff) (noting that '[m]uch, perhaps most, of the safety and health legislation now on the books would seemingly be replaced').]

[95] Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from William Samuel, Director, the American Federation of Labor and Congress of Industrial Organizations, at 1 (Nov. 1, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

> statutes to not consider cost in issuing regulations enforcing the critical, lifesaving protections required by these laws. Now, apparently the supporters of the bill believe that money should trump safety, a proposition that I adamantly oppose.[96]

Ranking Member Conyers' amendment would have ensured that prior congressional intent—as expressed in such laws as the Clean Air Act—would be preserved and thereby prevent agencies from weighing costs against saving lives. His amendment, however, failed by a vote of 11 to 13.

B. H.R. 2122 Compels Agencies To Prioritize Cost and Analysis Over Protecting Health and Safety By Imposing Onerous and Unnecessary Cost-Benefit Analysis Requirements, Resulting in Paralysis by Analysis

Although H.R. 2122's proponents claim that the bill simply codifies the cost-benefit requirements of the various executive orders that Presidents have issued over more than 30 years concerning cost-benefit analysis of agency rules, the bill actually does much more than that. For example, H.R. 2122 would force agencies to adopt the least costly rule absent a compelling need to protect public health and safety. Under EO 12866, in contrast, agencies must simply determine that the benefits of a proposed rule—including non-quantifiable benefits—justify the costs of the rule and that benefits are maximized. As U.S. PIRG observes:

> The new bill would in effect slow down the regulatory process by adding unending cost-benefit analyses, followed by court challenges. New analyses mandated by the legislation would require estimates of future direct and indirect costs that are impossible to forecast with any reliability. These new hurdles and the increased influence given to big business and corporate special interests would cause significant problems for Federal agencies such as the CDC and the FDA and would undermine their ability to fulfill their missions.[97]

In addition, the bill mandates all agencies to conduct a cost-benefit analysis for virtually every rule, and not just economically significant ones. This expanded scope would apply to more than 3,000 rules annually, including minor ones. For example, if the U.S. Coast Guard wanted to issue a rule establishing a safety zone for a fireworks display (something the Coast Guard does frequently), the bill would require the agency to do a cost-benefit analysis, and to show that the benefits "justify" the costs.

The bill's cost-benefit analysis mandate itself will result in a tremendous expenditure of taxpayer dollars to pay for agencies' greatly expanded analysis responsibilities. Even one of the Majority's witnesses at the legislative hearing on a nearly identical version of the bill considered in the last Congress acknowledged as much. He

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[96] Unofficial Tr. of Markup of H.R. 2122, the Regulatory Accountability Act of 2013, by the H. Comm. on the Judiciary, 113th Cong. at 124 (July 24, 2013), available at http://judiciary.house.gov/hearings/Markups%202013/mark__07242013/07.24.13%20Markup%20Transcript.pdf.

[97] Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Nasima Hossain, U.S. PIRG Public Health Advocate, at 2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff)

said cost-benefit analysis "summons the apparatus of cost (and benefit) estimation—which is itself costly." [98]

More than 50 administrative law academics also highlighted their concern about the additional costs that the bill's burdensome requirements will impose on agencies, which is particularly problematic in this time of severe budgetary pressures. [99]

In addition to expanding cost-benefit analysis requirements to include all rules and not just economically significant ones per the existing executive orders, H.R. 2122 also adds numerous analytical requirements to the APA's already substantial analytical requirements, threatening "paralysis by analysis." Moreover, H.R. 2122 expands the cost-benefit analysis requirement to include "major guidance" documents, i.e., documents that are not "rules" under current law. The bill also would require agencies to identify the costs and benefits of alternatives to rules that are ultimately proposed.

There is an additional concern with not only statutorily requiring cost-benefit analysis, but with specifying the factors to be considered in that analysis. While both Democratic and Republican administrations have agreed on the basic principle that agencies should engage in cost-benefit analysis of proposed and final rules, former OIRA Administrator Sally Katzen opposes codification of cost-benefit analysis requirements because it would impede an Administration's flexibility to respond to current conditions.[100]

C. H.R. 2122 Will Prevent Needed Public Health and Safety Rules from Being Promulgated Because of its Formal Rulemaking Requirement for High-Impact Rules

H.R. 2122's expanded use of formal rulemaking procedures will effectively halt agency rulemaking for so-called "high-impact" rules (defined in the bill as those with a $1 billion cost to the economy). The bill lacks any exception for proposed regulations protecting public health and the environment.

Proponents of formal rulemaking assert that it allows an opportunity for parties to cross-examine the agency, which is the best way to vet the agency's factual assertions and assure the public that only the best science underlies agency action.[101] Such an assertion, however, is itself unsupported by evidence. H.R. 2122's proponents offer no study or other data indicating that cross-examination and other facets of the formal rulemaking process are the most effective tools for making scientific and policy judgements. Indeed, Professor Matthew Stephenson of Harvard Law School challenged this assertion in testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law.[102] Additionally, Professor Stephenson noted that informal notice-and-comment rulemaking is already heavily proceduralized (as outlined above), making formal rulemaking procedures unnecessary. And, such an expansion of formal rulemaking would do nothing to improve the quality of agency

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[98] H.R. 3010 Hearing (prepared statement of Christopher DeMuth, American Enterprise Institute).

[99] Letter from 42 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 1 (Oct. 24, 2011).

[100] Cost-Benefit Hearing (statement of Sally Katzen, former OIRA Administrator).

[101] APA at 65 Hearing (statement of Jeffrey A. Rosen); Formal Rulemaking Hearing (statements of Noel J. Francisco and Edward W. Warren).

[102] Formal Rulemaking Hearing (statement of Matthew C. Stephenson).

decisions. Mandating formal rulemaking, as Ronald M. Levin, the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis, observed, "is a serious mistake." [103]

While adopting formal rulemaking procedures would not improve the quality of agency rules, the costs and delays associated with formal rulemaking would effectively bring agency rulemaking to a halt.[104] Formal rulemakings could take up to a decade and produce thousands of pages of documents, without any positive effect on the quality of the final decisions.[105] Additionally, by impeding agency rulemaking through more formal procedural requirements, Congress may: (1) impede desirable rule changes; (2) lead agencies to use other, less desirable forms of agency regulation such as ad hoc adjudication; (3) force agencies to write cruder, blunter rules, leaving the interpretation to courts; and (4) impede its own oversight of rulemaking by making it harder for agencies to change course in response to the views of the political branches, giving agencies a way to "run out the clock" on a President or a congressional majority, and shifting power within agencies away from political appointees to career staff.[106] As Professor Sidney Shapiro observed, "Almost no serious administrative law expert regards formal rulemaking as reasonable, and it has been all but relegated to the dustbin of history." [107] More than 40 other administrative law academics concur.[108]

By delaying the rulemaking process, this legislation presents serious public health and workplace safety concerns. As the AFL–CIO explained:

> These formal rulemaking procedures will make it more difficult for workers and members of the public to participate, and give greater access and influence to business groups that have the resources to hire lawyers and lobbyists to participte in this complex process. For agencies that already provide for public hearings, such as OSHA and MSHA, the bill would substitute formal rulemaking for the development of all new rules, overriding the effective public participation processes conducted by these agencies.[109]

As David Goldston, the Director of Government Affairs at the Natural Resources Defense Council, aptly noted, the short title of the bill should actually be the "'Regulatory Atrophy Act' because its primary effect would be to prevent the government from exer-

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[103] *The Regulatory Accountability Act of 2013: Hearing on H.R. 2122 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013) (prepared statement of Ronald M. Levin, the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis).

[104] Formal Rulemaking Hearing (statement of Matthew C. Stephenson).

[105] Stephen G. Breyer *et al.,* ADMINISTRATIVE LAW AND REGULATORY POLICY, at 582 (4th ed. 1999) (noting Food and Drug Administration formal rulemaking on peanut butter that took 10 years to conclude).

[106] Formal Rulemaking Hearing (statement of Matthew C. Stephenson).

[107] Hearing on H.R. 3010 (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).]

[108] Letter from 42 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 2 (Oct. 24, 2011) (noting that formal rulemaking 'runs directly contrary to the consensus of the administrative law community that the APA formal rulemaking procedure is unworkable and obsolete') (on file with H. Committee on the Judiciary, Democratic Staff).]

[109] Letter to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from William Samuel, Director, the American Federation of Labor and Congress of Industrial Organizations, at 2 (Nov. 1, 2011) (on file with H. Committee on the Judiciary, Democratic Staff).

cising its responsibility and duty to protect the public." [110] He continued, "The title is also misleading because it implies that the current system lacks checks and balances when, in reality, Congress and the courts already have ample authority to hold agencies to account, and the entire system gives industry and others numerous opportunities, formal and informal, to influence the development of regulations." [111]

III. H.R. 2122 FURTHER TILTS THE REGULATORY PROCESS IN FAVOR OF BUSINESS INTERESTS AND THOSE WHO WANT TO INTERFERE WITH REGULATIONS

H.R. 2122 will enable regulated entities to exert even more influence over Federal rulemaking than they already do. For instance, the bill's formal rulemaking provisions and expanded and less deferential standard of judicial review give additional opportunities for anti-regulatory interests to engage in dilatory tactics that can substantially slow down an already slow rulemkaing process.

A. H.R. 2122's Expanded Use of Formal Rulemaking Will Give an Unfair Advantage to Well-Funded Special Interests to Influence Rulemaking

As noted in the prior section, formal rulemaking is a grueling, time-consuming and litigation-intensive process. By mandating formal rulemaking, the bill will force agencies to expend extensive agency resources to litigate the validity of their proposed rulemakings against deep-pocketed regulated industries and well-funded anti-regulatory interests.

In effect, the bill would exacerbate the problems that already exist under current law by which "corporate and business lobbying of agencies far exceeds that by groups representing the public." [112] We accordingly share the concerns of the Union of Concerned Scientists, which notes, for example, that these provisions jeopardize "the respect and deference to the role of science in rulemaking" that exists under current law.[113] Rather than facilitating "thoughtful consideration based on facts," the bill would open "the floodgates to challenges that are not fact-based and that seek only to delay the rulemaking process, and to make it easier for special interests to contest rules in the courts." [114]

Subcommittee Ranking Member Steve Cohen (D–TN) sought to minimize the impact of H.R. 2122 on rules that prohibit or strengthen existing prohibitions on financial businesses owning non-financial businesses. He was reacting to then-recent press reports about financial service entities that own non-financial business which, in turn, engage in speculative activities that may raise

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[110] *The Regulatory Accountability Act of 2013: Hearing on H.R. 2122 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2013) (prepared statement of David Goldston, the Director of Government Affairs at the Natural Resources Defense Council).

[111] *Id.*

[112] H.R. 3010 Hearing (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).

[113] Letter to to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from Francesca T. Grifo, Senior Scientist and Director—Scientific Integrity Program, Union of Concerned Scientists (Nov. 3, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[114] *Id.*

prices for commodities, such as aluminum and oil.[115] As a result of such activities, consumers and other businesses pay more for products, such as the price of soda sold in aluminum cans. His amendment, however, failed by a party-line vote of 9 to 13.

B. H.R. 2122's Judicial Review Standard Risks Undermining Agency Rulemaking and Reducing Political Accountability for Policy Decisions Without Enhancing Due Process

H.R. 2122 would subject to judicial review agency compliance with numerous APA requirements as well as the bill's cost-benefit analysis requirements. By greatly expanding opportunities for judicial review, the legislation would present many more instances when a court could overrule agency action.

Even assuming that courts had the resources to review these types of agency decisions, expanded and less deferential judicial review would be troublesome. It would make rulemaking more costly and time-consuming for agencies by forcing them to adopt more detailed factual records and explanations, effectively imposing more procedural requirements on agency rulemaking. Also, agencies may be dissuaded from pursuing regulations in the first place. Additionally, criticism of the existing "hard look" arbitrary or capricious review standard for informal rulemaking may apply to a much greater degree to H.R. 2122's more formal move to expand the scope of judicial review.

In particular, H.R. 2122 would require that a court give less deference to agency decisions under many circumstances, and such a less deferential judicial review standard runs the risk that judges effectively will be making policy by allowing personal policy preferences to intrude in their review of an agency rule, whether consciously or not. Public Citizen, a nonprofit consumer advocacy organization representing consumer interests, observes:

> [B]y needless expanding the scope of judicial review, the legislation marks an unprecedented and dangerous move away from traditional judicial deference to a system where courts are encouraged to overturn highly technical, resource-intensive agency decisions and substitute their own policy preferences instead. This new and inappropriate role for the courts is a recipe for more activist judges, increased litigation, endless delays, and more rather than less uncertainty for regulated parties and the public.[116]

Much of H.R. 2122's judicial review standard appears to be old wine in new bottles. A similar legislative initiative was promoted during the 1980's by anti-regulatory interests in Congress. The view then, as now, among proponents of enhanced judicial review was that the existing standard of judicial review favored agency decisions too much whenever injured members of the public sought to reverse those decisions on appeal.[117] The enhanced judicial re-

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[115] *See, e.g.,* David Kocieniewski, *A Shuffle of Aluminum, But to Banks, Pure Gold,* N.Y. TIMES, July 21, 2013, at A1.

[116] Letter to to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr. from David Arkush, Director, & Amit Narang, Regulatory Policy Advocate, Public Citizen's Congress Watch, at 2 (on file with the H. Committee on the Judiciary, Democratic Staff).]

[117] *See* Morton Rosenberg, The Future of Public Participation in Informal Agency Rulemaking Under Pending Regulatory Reform Proposals, Congressional Research Service Report for Congress, at 44 (Dec. 7, 1982).

view standard proposed in that legislation would have required courts to independently decide all relevant questions of law, review agency determinations of jurisdiction and authority to determine whether they were based on statutory language or other evidence of legislative intent, not accord any presumption in favor of agency determinations of questions of law other than its jurisdiction and authority, and apply what was in effect a "substantial evidence" test for informal rulemaking.[118]

CRS concluded that the effect of this enhanced judicial review proposal would be "to abolish the judicially developed doctrine of deference, which was developed by the courts as an aid to reviewing agency decisions and which recognizes agency expertise and involvement in the legislative process."[119] CRS also noted that enhanced judicial review threatened to skew the agency factfinding process in favor of those with the resources to shape the agency record by making it more lengthy and costly.[120] Also, parties opposed to a rule could further add costs and delay to the rulemaking process by appealing agency determinations.[121] Finally, enhanced judicial review increases the risk of judicial activism, whereby judges would make policy from the bench by substituting their policy views for those of the agency.[122] Unfortunately, the same criticisms that applied to expanded judicial review considered and rejected more than a generation ago apply equally to H.R. 2122's judicial review provision.

C. H.R. 2122's Expansion of Opportunities to Challenge Agency Compliance With the Information Quality Act Gives More Opportunities for Business Interests To Undermine Rulemaking

New APA section 553(d)(4), as proposed by H.R. 2122, would permit any "member of the public"—that is, anyone, including an entity that has no legitimate interest in the rule at issue—to petition for a trial-type hearing for the purpose of determining whether a proposed rule complies with of the Information Quality Act ("IQA").[123] In support of such petition, section 553(d)(4) only requires the proponent to present a "prima facie case that evidence or other information upon which the agency bases the proposed rule fails to comply" with the IQA. Moreover, the bill makes agency compliance with the IQA subject to judicial review, including the decision whether to hold an agency hearing.

The IQA, also known as the Data Quality Act, was a Republican initiative buried in a voluminous appropriations bill. No hearings or legislative process preceded its enactment. The Act requires OMB to issue data quality guidelines to Federal agencies. Under these guidelines, all agencies subject to the Paperwork Reduction Act—a law that requires OMB to develop and oversee the implementation of policies, principles, standards, and guidelines applicable to the dissemination of public information by Federal agencies—are required to establish and follow data quality guidelines that: (1) ensure and maximize the quality, objectivity, utility and integrity of information, including statistical information prior to

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[118] *Id.* at 45.
[119] *Id.*
[120] *Id.* at 46–47.
[121] *Id.* at 47–48.
[122] *Id.* at 48–51.
[123] Pub. L. No. 106–554, Sec. 515 (2000).

dissemination; and (2) allow affected individuals and/or organizations to seek and obtain correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines. In addition, an agency must report to OMB regarding the number and nature of complaints received by the agency regarding agency compliance with OMB guidelines. More controversially, the IQA also requires Federal agencies to have a process by which outside parties can "seek and obtain correction of information maintained and disseminated by the agency that does not comply with" the IQA's requirements for information quality. Proponents of the IQA include the U.S. Chamber of Commerce and the Center for Regulatory Effectiveness, an industry-backed anti-regulatory "watch dog"group. Critics of the law, which include the Center for Progressive Reform, the Center for Effective Government (f/k/a OMB Watch), and Public Citizen, observe that the IQA is a mechanism for "regulating the regulators." [124]

The expanded opportunities to challenge agency compliance with the IQA is very problematic for several reasons. In addition to offering yet another way to slow down rulemaking both by challenging agencies' data and by challenging their compliance with the IQA, the IQA itself provides opportunities for regulated entities to challenge agencies' scientific findings to the extent that those findings are contrary to the economic interests of industry.

In sum, H.R. 2122 would permit anyone to request an IQA hearing, even if that person suffers no injury, i.e., lacks any legal standing. In addition, the bill fails to clarify what constitutes a "prima facie" case of agency non-compliance with the IQA, which will force agencies to err on the side of caution and hold IQA hearings, especially in light of the bill's provision making a decision not to hold a hearing subject to judicial review. Finally, judicial review would add an entirely new level of litigation to the rulemaking process.

D. H.R. 2122 Encourages a Regulatory Race to the Bottom

Section 2 of H.R. 2122 defines a major rule, in pertinent part, as a rule that has "significant adverse effects on . . . the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." The practical effect of this definition is that it will require agencies and the courts to consider the business and regulatory environments of other nations.

For example, a proposed rule that imposes heightened clean air requirements on American steel manufacturers would necessarily require consideration of whether this regulation—which could potentially result in higher compliance costs—could make American steel products less competitive in a country, such as China, that has a much less stringent regulatory regime. While the economic analysis under this requirement may be simple, its dangerous ramifications for public health cannot be underestimated. Chinese officials have only recently begun to acknowledge the health hazard risks presented by extensive air pollution that affects its cities, including its capital.[125]

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[124] Project on Scientific Knowledge and Public Policy, Information Quality Act, available at DefendingScience.org

[125] *See, e.g.,* Andrew Jacobs, *With Anger Over Dirty Air Rising, Beijing Tries Tours on Monitoring Center,* N.Y. TIMES, Nov. 9, 2011 ('Environmental officials who have resisted releasing sensitive data about air pollution here in the capital announced that they would take action to address increasing complaints that the government's monitoring system fails to report on the

The end result of H.R. 2122 is that the public health of Americans and the safety of the environment will be compromised so that American manufacturers can better compete with their foreign counterparts. This is a shortsighted regulatory "race to the bottom" that prioritizes profits over saving lives.

IV. H.R. 2122 USURPS CONGRESSIONAL INTENT BY SUBSTANTIALLY EXPANDING THE EXECUTIVE BRANCH'S CONTROL OVER RULEMAKING AND UNDERCUTTING CURRENT TRANSPARENCY REQUIREMENTS

H.R. 2122 substantially expands OIRA's control over all agency rulemaking and undercuts current transparency requirements under EO 12866. Although we do not impugn in any way the current Administration's integrity or current OIRA leadership, this extraordinary and unaccountable power over congressionally-mandated rulemaking in the hands of the wrong Administration will allow the Executive Branch to interfere and possibly derail such congressional directives.

A. H.R. 2122 Empowers OIRA To Exert a Choke Hold Over Rulemaking

As noted above, OIRA reviews significant proposed and final rules from Federal agencies before they are published in the Federal Register. As a result of OIRA's review, draft rules may be revised before publication, withdrawn before a review is completed, or returned to the agencies "because, in OIRA's analysis, certain aspects of the rule need to be reconsidered."[126] Currently, EO 12866 and EO 13563 govern the use of cost-benefit analysis by executive agencies in issuing rules, as well as OIRA review of such rules.

H.R. 2122's excessive concentration of OIRA control over rulemaking is troubling. During the Bush administration, "OIRA's increasingly aggressive role in controlling agency action" may have been "the biggest administrative law story of the new century."[127] By way of background, President George W. Bush issued EO 13422, which substantively amended EO 12866, on January 18, 2007.[128] The directive gave "the White House much greater control over the rules and policy statements that the government develops to protect public health, safety, the environment, civil rights and privacy."[129] Critics of the new executive order questioned whether it was an attempt to establish standards for rulemaking that were inconsistent with statutory requirements.[130] For example, a *New*

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most dangerous airborne particles emitted by the growing ranks of cars and trucks.'), available at http://www.nytimes.com/2011/11/10/world/asia/with-anger-over-dirty-air-rising-beijing-tries-tours-on-monitoring-center.html?ref=world.

[126] Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century, Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 109th Cong. 39 (2006) available at http://judiciary.house.gov/Media/PDFS/Printers/109th/31505.pdf [hereinafter 'Interim Report'].

[127] Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA,* 33 FORD. URB. L. REV. 1097, 1117 (2006).

[128] Exec. Ord. No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007).

[129] Robert Pear, *Bush Directive Increases Sway on Regulation,* N.Y. TIMES, Jan. 30, 2007, at A1.

[130] *See, e.g.,* Press Release, Public Citizen, New Executive Order Is Latest White House Power Grab (Jan. 18, 2007), at http://www.citizen.org/pressroom/release.cfm?ID=2361; Garrett Epps, The Power of King George, Salon.com (Feb. 1, 2007) (describing EO 13422 as a "power grab" by the Bush administration), at http://www.salon.com/opinion/feature/2007/02/01/presidential__power/.

York Times commentator noted that EO 13422 "will make it even easier for political appointees to overrule the professionals, tailoring government regulations to suit the interests of companies that support the G.O.P." [131]

EO 13422 revised EO 12866 in a number of ways. In particular, EO 13422 imposed greater specificity and market analysis requirements on agencies; heightened scrutiny of significant guidance documents that agencies issued from time to time to provide non-binding information regarding their regulations; increased emphasis on cost-benefit analysis by agencies, including requiring agencies to include reasonable estimates of the aggregate costs and benefits of all of the agencies regulations for each calendar year; and allowed for a greater role for political appointees in agency rulemaking.

These heightened requirements were in line with the Bush administration's view that OIRA should be a "gatekeeper for new rulemakings." [132] The OIRA Administrator during the Bush administration explained that one of his office's functions is "to protect people from poorly designed rules," and that OIRA review is a way to "combat the tunnel vision that plagues the thinking of single-mission regulators." [133]

This "return to the gatekeeper perspective of OIRA's role [had] implications for an array of OIRA's functions." [134] Under the Bush administration, "OIRA's increasingly aggressive role in controlling agency action" may have been "the biggest administrative law story of the new century." [135] Manifestations of OIRA's heightened role in the rulemaking process, as identified by the Government Accountability Office (GAO)[136] and CRS,[137] included the following:

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[131] Paul Krugman, Op-Ed., *The Green-Zoning of America,* N.Y. TIMES, Feb. 5, 2007, at A25.

[132] Curtis W. Copeland, "Changes to the OMB Regulatory Review Process by Executive Order 13422," CRS Report for Congress, RL 33862, at 56 (2007) (quoting Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Dec. 2002).

[133] John Graham, Administrator, OIRA, Remarks to the Board of Trustees, The Keystone Center, at Washington, DC (June 18, 2002), available at http://www.whitehouse.gov/omb/inforeg/keystone_speech061802.html.

[134] Interim Report at 56.

[135] Lisa Heinzerling, "Statutory Interpretation in the Era of OIRA," 33 Ford. Urb. L. Rev. 1097, 1117 (2006).

[136] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews,* GAO–03–929, Sept. 22, 2003.

[137] *The Rulemaking Process and the Unitary Executive Theory: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (prepared statement of Curtis W. Copeland, Specialist in American National Government, Congressional Research Service) (footnotes omitted). Additional instances of this heightened role include the following:

- the increased use of "informal" OIRA reviews in which agencies share preliminary drafts of rules and analyses before final decisionmaking at the agencies—a period when OIRA says it can have its greatest impact on the rules, but when OIRA says that some of the transparency requirements in Executive Order 12866 do not apply;
- extensions of OIRA review for certain rules for months or years beyond the 90-day time limit delineated in the executive order;
- using a general statutory requirement that OIRA provide Congress with "recommendations for reform" to request the public to identify rules that it believes should be eliminated or reformed;
- a leadership role for OIRA in the development of electronic rulemaking, which has led to the development of a centralized rulemaking docket, but which some observers believe can lead to increased presidential influence over the agencies;
- the development of an OMB bulletin on peer review that, in its original form, some believed could have led to a centralized system within OMB that could be vulnerable to political manipulation or control;
- the development of a proposed bulletin standardizing agency risk assessment procedures that the National Academy of Sciences concluded was "fundamentally flawed," and that OIRA later withdrew; and

- the development of a detailed economic analysis circular and what agency officials described as a perceptible "stepping up the bar" in the amount of support required from agencies for their rules, with OIRA reportedly more often looking for regulatory benefits to be quantified and a cost-benefit analysis for every regulatory option that the agency considered, not just the option selected;
- the issuance of 21 letters returning rules to the agencies between July 2001 and March 2002—three times the number of return letters issued during the last 6 years of the Clinton administration;[138]
- the issuance of 13 "prompt letters" between September 2001 and December 2003 suggesting that agencies develop regulations in a particular area or encouraging ongoing efforts. However, OIRA issued two prompt letters in 2004, none in 2005, one in 2006, and none in 2007[.]

According to CRS, these and other initiatives "represent[ed] the strongest assertion of presidential power in the area of rulemaking in at least 20 years." [139] Not surprisingly, President Obama, as one of his first official acts after assuming office, revoked EO 13422 on January 30, 2009.[140]

H.R. 2122, in part, reflects the Bush administration view that OIRA should act as a rulemaking "gatekeeper" by expanding cost-benefit analysis requirements and OIRA review authority in some of the ways outlined in EO 13422. In short, greater presidential control over rulemaking, in the wrong Administration's hands, could undermine important health, safety, consumer protection, financial and other regulations. The Democratic staff of the House Judiciary Committee prepared a detailed analysis of the Bush administration's control of the rulemaking process and concluded that such control was "to the detriment of the public interest and has served to circumvent legislative intent." [141]

Notwithstanding the serious concerns presented regarding greater presidential control over rulemaking, section 3 of H.R. 2122 would require all agencies—including independent regulatory agencies—to consult with OIRA before they could publish a proposed or final rule. This requirement represents an unprecedented delegation of power to OIRA and the President as it will effectively allow OIRA to control all rulemaking activity. Moreover, this provision would undermine the independence of independent regulatory

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- the development of a "good guidance practices" bulletin that standardizes certain agency guidance practices.

Id.

[138] However, OIRA returned only two rules in 2003, one rule in 2004, one rule in 2005, no rules in 2006, and one rule in 2007. OIRA officials indicated that the pace of return letters declined after 2002 because agencies had gotten the message about the seriousness of OIRA reviews.

[139] *The Rulemaking Process and the Unitary Executive Theory: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (prepared statement of Curtis W. Copeland, Specialist in American National Government, Congressional Research Service).

[140] Exec. Ord. No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009).

[141] H. Comm. on the Judiciary Majority Staff, Reining in the Imperial Presidency—Lessons and Recommendations Relating to the Presidency of George W. Bush, 111th Cong., at 186 (Mar. 2009).

agencies that Congress created to be independent of the President.[142]

This requirement is particularly curious in light of the fact that many of the proponents of H.R. 2122 are also, somewhat hypocritically, proponents of H.R. 367, the "Regulations from the Executive in Need of Scrutiny Act of 2013" or the "REINS Act,"[143] which requires, among other things, that Congress approve all major rules before they can go into effect. Therefore, proponents of H.R. 367 are seeking to have Congress regain control from the Executive Branch over the rulemaking process, while in H.R. 2122, they seek to give the Executive Branch even more power over the rulemaking process.

Rather than learning from prior mistakes, the proponents of H.R. 2122, in effect, seek to revitalize and codify the Bush administration's view that OIRA should act as a rulemaking "gatekeeper" by mandating OIRA review authority in some of the same ways specified in the Bush administration's overruled EO 13422. As a result, H.R. 2122 ensures greater presidential control over rulemaking, which, in the wrong Administration's hands, could undermine important health, safety, consumer protection, financial and other regulations.

B. H.R. 2122 Undercuts Current Transparency Requirements

Another problematic provision of H.R. 2122 gives the President and OIRA the discretion as to what information must be made available to the public in connection with certain rulemaking processes. As a result, the bill would reduce—not strengthen—current requirements for OIRA transparency. For example, EO 12866 currently requires OIRA to "make available to the public all documents exchanged between OIRA and the agency during the review by OIRA." The bill, however, would allow the President and the OIRA Administrator to decide—at their sole discretion—what information that OIRA provides to the agency will be disclosed to the public. Also, the bill would allow the President or the OIRA Administrator to choose what documents and information communicated by OIRA should be in the public rulemaking record.

C. In Extending Cost-Benefit Analysis Requirements to Independent Regulatory Agencies, H.R. 2122 Usurps the Congressionally Mandated Independence of Such Agencies

One area where there may a limited degree of consensus is with respect to the question of whether modest cost-benefit analysis requirements should apply to independent regulatory agencies. Such limited consensus, however, does not extend to OIRA review of independent regulatory agencies. For instance, EO 12866 (and EO 13563, by reference) specifically excludes agencies that are "considered to be independent regulatory agencies" from its requirements, including the requirement to consider the costs and benefits of regulation.[144] Certain agencies are considered "independent" because the President has limited authority to remove their leaders (usu-

[142] Certain agencies are considered "independent" because the President has limited authority to remove their leaders (usually, heads of such agencies can only be removed for cause, rather than at the President's pleasure). Stephen G. Breyer, *et al.*, ADMINISTRATIVE LAW AND REGULATORY POLICY, at 100 (4th ed. 1999).

[143] H.R. 367, 113th Cong. (2013).

[144] Exec. Ord. No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

ally, heads of such agencies can only be removed for cause, rather than at the President's pleasure).[145] Such agencies are usually styled "commissions" or "boards" (e.g., the Securities and Exchange Commission, the Federal Trade Commission, the National Labor Relations Board.) Some of these independent agencies voluntarily choose to comply with the requirements of EO 12866 and EO 13563, but none are compelled to do so. While not all observers support the extensive reliance on cost-benefit analysis in agency rulemaking, to the extent that agencies already engage in such analysis, it would seem logical to extend those same requirements to other agencies.

H.R. 2122, however, does not protect the independence of such agencies. Rather, it would require them to comply with mandatory guidelines issued by OMB and OIRA, thereby bringing them under the President's control. Such a move would contravene Congress's intent in making them "independent" in the first place.

H.R. 2122 SECTION–BY–SECTION EXPLANATION

A description of the bill's principal substantive provisions follows. Section 2 of H.R. 2122 amends section 551 of title 5 of the U.S. Code, which defines various terms applicable to the Administrative Procedure Act (APA) to add new definitions. For the definition of "major rule," section 2 sets forth four alternative definitions, each of which is potentially vague and subject to interpretation because each definition applies where a rule is "likely to impose" some effect. A major rule, under new section 551(15), is any rule determined by OIRA that is "likely to impose":

> (1) an annual cost on the economy of $100 million or more, adjusted annually for inflation;
>
> (2) a major increase in costs or prices for consumers, individual industries, Federal, state, local or tribal government agencies, or geographic regions (it is unclear what a "major increase" means in this context);
>
> (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and expert markets (this has the potential to undo a broad range of safety regulations); or
>
> (4) significant costs on multiple sectors of the economy (again, "significant costs" is a vague term).

Section 2 also defines a "high-impact rule" as any rule that OIRA determines is likely to impose an annual cost on the economy of $1 billion or more, adjusted for inflation

In addition, section 2 defines "guidance" as an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue. Section 2 also defines "major guidance" as guidance that OIRA finds is "likely to lead to" any of the four impacts set forth for the definition of a major rule. Further, section 2 includes definitions for

[145] Stephen G. Breyer *et al.,* ADMINISTRATIVE LAW AND REGULATORY POLICY, at 100 (4th ed. 1999).

the Information Quality Act (IQA) (new section 551(19)) and OIRA (new section 551(20)).

Subsection 3 amends section 553, which sets forth the requirements for informal notice-and-comment rulemaking under the APA, to add an extensive series of new requirements. First, new subsection (b) requires an agency to make all preliminary and final determinations based on evidence. It is not clear what type of evidentiary standard would apply. Second, the agency must, in addition to other applicable considerations, consider the following:

> (1) The legal authority under which the rule may be proposed, such as whether it is required by statute and, if so, whether it is due by a specific date and whether the agency has discretion to commence a rulemaking (new section 553(b)(1)).
>
> (2) Other statutory considerations applicable to whether the agency can or should propose a rule or undertake other agency action (new section 553(b)(2)). It is unclear what "other agency action" would encompass.
>
> (3) The specific nature and significance of the problem the agency may address with a rule, including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction, and whether the problem warrants new agency action and any countervailing risks posed by such new action (new section 553(b)(3)). Again, these criteria are very vague.
>
> (4) Whether existing rules have created or contributed to the problem the agency may address with a rule and whether such rules could be amended or rescinded to address the problem in whole or in part (new section 553(b)(4)).
>
> (5) Any reasonable alternatives in lieu of a new rule or other response identified by the agency or "interested persons," including not only responses that mandate particular conduct or manners of compliance, but also the alternative of no Federal response; amending or rescinding existing rules; potential regional, state, local or tribal regulatory action or other responses that could be taken in lieu of agency action; and potential responses that specify performance objectives rather than conduct or manners of compliance, establish economic incentives to encourage desired behavior, provide information upon which choices can be made by the public, or incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance (new section 553(b)(5)). Essentially, this directs the agency to consider alternatives to promulgating a new rule. Note that "interested persons" can include literally anyone.

Third, new section 553(b)(6) acts as a "supermandate" by overriding all existing law to require the agency to consider: (1) the "potential" costs and benefits associated with "potential" alternatives and other responses set forth above, including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs (in-

cluding an estimate of the net gain or loss in domestic jobs), economic growth, innovation, and economic competitiveness (new section 553(b)(6)(A)); (2) means to increase the cost-effectiveness of any Federal response (new section 553(b)(6)(B)); and (3) incentives for innovation, consistency, predictability, lower costs of enforcement and compliance—for governmental and regulated entities, and the public—and flexibility (new section 553(b)(6)(C)).

Fourth, new section 553(c)(1) requires advance notice of proposed rulemaking for major and high-impact rules as well as rules involving novel legal or policy issues. The bill, however, does not define what would constitute a "novel legal or policy" issue. Not later than 90 days before a notice of proposed rulemaking (NPRM) is published in the Federal Register (the current starting point for notice-and-comment rulemaking), an agency must published advance notice of such rulemaking (ANPRM) in the Federal Register. The ANPRM must include a written statement, "at a minimum," identifying all of the following:

> (1) the nature and significance of the problem the agency may address with a rule, including data and other evidence and information on which the agency expects to rely for the proposed rule (new section 553(c)(1)(A)(i));
>
> (2) the legal authority under which a rule may be proposed, such as whether it is required by statute and, if so, whether it is due by a specific date and whether the agency has discretion to commence a rulemaking (new section 553(c)(1)(A)(ii);
>
> (3) preliminary information available to the agency concerning the other considerations specified in new section 553(b) (new section 553(c)(1)(A)(iii); and
>
> (4) with respect to a rule that involves a novel legal or policy issue arising out of statutory mandates, the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule.

In addition, the notice must solicit data, views or argument from interested persons concerning the information and issues addressed in the ANPRM and provide for a period of not less than 60 days for such persons to submit such feedback to the agency (new section 553(c)(1)(B)-(C)).

Fifth, new section 553(d) requires the agency, after complying with new section 553(c) (if applicable) and in consultation with OIRA, to publish a NPRM containing the following:

> (1) a statement of the time, place, and nature of public rulemaking proceedings (new section 553(d)(1)(A));
>
> (2) reference to the legal authority under which the rule is proposed (new section 553(d)(1)(B));
>
> (3) the terms of the proposed rule (new section 553(d)(1)(C));
>
> (4) a description of the information known to the agency on the subject and issues of the proposed rule, including—"but not limited to"—a summary of information known to the agency concerning the items specified in section 553(b);

a summary of additional information the agency provided to and obtained from interested persons under subsection 553(c); a summary of any preliminary risk assessment or regulatory impact analysis performed by the agency; and information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination to propose the rule (new section 553(d)(1)(D));

(5) a reasoned preliminary determination of need for the rule based on information described in the preceding paragraph; and whether the rule is required by statute (new section 553(d)(1)(E));

(6) a reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the rule, including all costs described in section 553(b)(6);

(7) a discussion of alternatives to the proposed rule and other alternative responses considered by the agency under new section 553(b);

(8) a discussion of the costs and benefits of those alternatives (including all costs to be considered under section 553(b)(6);

(9) a discussion of whether those alternatives meet relevant statutory objectives;

(10) a discussion of why the agency did not propose any of those alternatives (new section 553(d)(1)(G)); and

(11) a statement of whether existing rules have created or contributed to the problem that the agency seeks to address with the rule, and, if so, whether or not the agency proposes to amend or rescind any of these rules (new section 553(d)(1)(H)).

Note that the requirements set forth in items (4) through (11) are in addition to the current NPRM requirements.

Sixth, all information considered by the agency and "steps to obtain information by the agency" in connection with its determination to propose the rule must be placed in the docket for the proposed rule and made available to the public (new section 553(d)(1)).

Seventh, if the agency undertakes procedures under new section 553(c) and then determines not to propose a rule, the agency must then publish a notice of determination of other agency course of action. This notice must include the information required by new section 553(d)(1)(D) and a description of the alternative response the agency determined to adopt. If in its determination of other agency course the agency determines to amend or rescind an existing rule, the agency is not required to undertake additional proceedings under new section 553(c) before it publishes a NPRM to amend or rescind the existing rule (new section 553(d)(2))(B)).

Eighth, all information considered by the agency and "steps to obtain information by the agency" in connection with its determination of other agency course must be placed in the docket for the proposed rule and made available to the public (new section 553(d)(2)).

Ninth, after issuing the NPRM, the agency must provide interested persons an opportunity to participate in the rulemaking through submissions of written data, views, or arguments with or without opportunity for oral presentation. The agency must provide not less than 60 days for the submission of such material and 120 days if the rule is major or high impact. An opportunity for oral presentation must be provided if a hearing is required under section 553(d)(4)(B) or 553(e) (new section 553(d)(3)(A)). With regard to rules required by statute or required to be made on the record after opportunity for agency hearing, sections 556 and 557 must apply and the following provisions do not apply: section 553(d)(4), 553(e) (pertaining to receiving comment outside of the procedures of sections 556 and 557), and 553(e)(6) (pertaining to the petition procedures) (new section 553(d)(3)(B)).

Tenth, within 30 days of publication of a NPRM, a member of the public may petition for a hearing in accordance with section 556 to determine any evidence or other information upon which the agency bases the proposed rule fails to comply with the IQA (new section 553(d)(4)(A). This means that anyone, even someone who would not qualify as an interested person, could demand this relief (new section 553(d)(4)(A)). Upon review of the petition, the agency may exclude from the rulemaking the evidence or information that is the subject of the petition. The agency may also withdraw the proposed rule. In addition, the agency must promptly publish any such determination (new section 553(d)(4)(B)(i)).

Eleventh, if the petition is not resolved per the above, then the agency must grant any such petition that presents a *prima facie* case that evidence or other information upon which the agency bases the proposed rule fails to comply with the IQA and hold the requested hearing not later than 30 days after receipt of the petition, provide a reasonable opportunity for cross-examination at the hearing, and decide the issues presented by the petition no later than 60 days after receipt of the petition. The agency may deny a petition that does not present a *prima facie* case. (new section 553(d)(4)(B)(ii)).

Twelfth, judicial review is not available with respect to the agency's disposition of issues considered under new section 553(d)(4)(B)(ii) until there is judicial review of the agency's final action. In addition, the provision prohibits judicial review of an agency's determination to withdraw a proposed rule under new section 553(d)(4)(B)(i) (new section 553(d)(3)(C). Nevertheless, the failure to petition for a hearing under new section 553(d)(4) does not preclude judicial review of any claim based on the IQA under chapter 7 (new section 553(d)(3)(D).

Thirteenth, the agency, with respect to high-impact rules, must hold a hearing in accordance with sections 556 and 557, following a NPRM, receipt of comments on the proposed rule, and any hearing held under section 553(d)(4), unless such hearing is waived by all participants in the rulemaking other than the agency (new section 553(e)). The agency must provide a reasonable opportunity for cross-examination at the hearing. The hearing is limited to the following issues of fact, except that participants at the hearing other than the agency may waive determination of any such issue: (1) whether the agency's asserted factual predicate for the rule is supported by the evidence; (2) whether there is an alternative to the

proposed rule that would achieve the relevant statutory objectives at a lower cost (including all costs considered under section 553(b)(6)); (3) if there is more than one alternative, which would achieve the relevant statutory objectives at the lowest cost; (4) whether, if the agency proposes to adopt a rule that is more costly than the least costly alternative, the additional benefits of the more costly rule exceed the additional costs of the more costly rule [how does one define cost here?]; (5) whether the evidence and other information upon which the agency bases the proposed rule meets the requirements of the IQA; and (6) upon petition by an interested person who has participated in the rulemaking other issues relevant to the rulemaking, unless the agency determines that consideration of the rule would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rulemaking. The agency must grant or deny this petition within 30 days of receipt.

Fourteenth, not later than 45 days before any hearing held under new section 553(e) or sections 556 and 557, the agency must publish in the Federal Register a notice specifying the proposed rule to be considered at such hearing, the issues to be considered at the hearing, time/place, except that such notice may be issued not later than 15 days before a hearing under section 553(d)(4)(B).

Fifteenth, an agency may only adopt a rule following consultation with OIRA to facilitate compliance with applicable rulemaking requirements (new section 553(f)(1)).

Sixteenth, an agency may adopt a rule only on the basis of best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule (new section 553(f)(2)).

Seventeenth, except as provided in new section 553(f)(3)(B), the agency must adopt the least costly rule considered during the rulemaking, including all costs pursuant to section 553(b)(6) (new section 553(f)(3)(A)). The agency may adopt a more costly rule only if its additional benefits justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule (new section 553(f)(3)(B)).

Eighteenth, when the agency adopts a final rule, it must publish a NFRM that includes: (1) a concise, general statement of the rule's basis and purpose (new section 553(f)(4)(A)); (2) the agency's reasoned final determination of need for a rule, including whether it is required by statute (new section 553(f)(4)(B)); (3) the agency's reasoned final determination that the rule's benefits meet the relevant statutory objectives and justify the rule's costs (new section 553(f)(4)(C)); (4) the agency's reasoned final determination not to adopt any of the alternatives to the rule (new section 553(f)(4)(D)); (5) the agency's reasoned final determination that existing rules have not created or contributed to the problem that the agency seeks to address with the rule or that existing rules have created or contributed to the problem, and if so, why amendment or rescission of such existing rules is not alone sufficient to respond to the problem and whether and how the agency intends to amend or rescind the existing rule separate from adoption of the rule (new section 553(f)(4)(E)); (6) the agency's reasoned final determination that the evidence and other information upon which the agency bases

the rule complies with IQA (new section 553(f)(4)(F)); and (7) for any major or high-impact rule, the agency's plan for review of the rule no less than every 10 years to determine whether, based on evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives (new section 553(f)(4)(G)). As required elsewhere, all information considered by the agency must be placed in the docket for the rule.

Unless notice or hearing is otherwise required by statute, the requirements of new section 553(c) through (e) do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice (new section 553(g)(1)). When the agency for good cause, based on evidence, finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that compliance with subsection (c), (d) or (e) or requirements to render final determinations under subjection (f) before the issuance of an interim rule is impracticable or contrary to the public interest (including national security), such provisions/requirements do no apply to the agency's adoption of an interim rule new section 553(g)(2)(A)). If an agency, in compliance with subsection (A), adopts an interim rule, it must commence proceedings that comply fully with subsections (c) through (f) immediately upon publication of the interim rule and must complete compliance within 270 days from publication of the interim rule or 18 months for a major or high-impact rule and take final action to adopt a final rule or rescind the interim rule. If the agency fails to take timely final action, the interim rule will cease to have the effect of law (new section 553(g)(2)(B)).

Other than in cases involving national security, the agency's publication of an interim rule not in compliance with subsection (c) through (e) or requirements to render final determinations under subsection (f), an interested party may seek immediate judiciary review under chapter 7 of the agency's determination to adopt such interim rule. The record on review must include all documents and information considered by the agency and any additional information presented by a party that the court determines necessary to consider to assure justice (new section 553(g)(2)(C)). Note it pertains to an interested party, not a person. This could allow parties to overwhelm courts with submissions that would force them to sort through and determine whether they would assure justice ("justice" being a vague term in this context).

Nineteenth, when a hearing is required under subsection (e) or is otherwise required by statute or at the agency's discretion before the adoption of a rule, the agency must comply with the formal rulemaking requirements of sections 556 and 557 in addition to subsection (f) in adopting the rule and in providing notice of the rule's adoption (new section 553(h)).

Twentieth, the required publication or service of a substantive final or interim rule must be made within 30 days before the rule's effective date, unless: (1) a substantive rule grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule (new section 553(i)).

Twenty-first, each agency must give an interested person the right to petition for the issuance, amendment, or repeal of a rule (new section 553(j)). This appears to be extremely broad.

Twenty-second, OIRA has authority to establish guidelines for the assessment, including quantitative and qualitative, of the costs and benefits of potential, proposed, and final rules, other economic issues, or issues related to risk that are relevant to rulemaking under section 553 and other sections of this title (new section 553(k)(1)(A)). It is unclear what "other economic issues" would include.

Twenty-third, to ensure that agencies use the best available techniques to quantify and evaluate anticipated present and future benefits, costs, other economic issues, and risks as accurately as possible, OIRA must regularly update these guidelines (new section 553(k)(2)(B)).

Twenty-fourth, OIRA also has the authority to issue guidelines to promote coordination, simplification, and harmonization of agency rules. Such guidelines must assure that each agency avoids regulations that are inconsistent or incompatible with or duplicative of its other regulations and those of other Federal agencies. These guidelines should ensure that agencies draft their regulations to be simple and easy to understand with the goal of minimizing the potential for uncertainty and litigation (new section 553(k)(2)).

Twenty-fifth, OIRA, to ensure consistency in rulemaking, must issue guidelines and otherwise ensure that rulemakings conducted under procedures specified in provisions of law other than those of subchapter II of title 5 conform to the fullest extent allow by law with the procedures set forth in section 553 (new section 553(k)(3)(A)).

Twenty-sixth, OIRA must issue guidelines for the conduct of hearings under subsections 553(d)(4) and (e), including provisions that assure a reasonable opportunity for cross-examination. Each agency must adopt regulations for conducting hearings consistent with these guidelines (new section 553(k)(3)(B)).

Twenty-seventh, OIRA must issue guidelines pursuant to the IQA to apply in rulemaking proceedings under sections 553, 556, and 557. Such guidelines and OIRA's specific determinations regarding agency compliance with such guidelilnes shall be entitled to judicial deference (new section 553(k)(4)).

Twenty-eighth, the agency must include in the rulemaking record all documents and information considered by the agency during the proceeding, including at the discretion of the President or OIRA documents and information communicated by OIRA during consultation with the agency (new section 553(l)).

New section 553(m) recognizes an exception for certain provisions with respect to monetary policy rulemakings by the Federal Reserve or Federal Open Market Committee.

Section 4 of the bill imposes an extensive series of new obligations on an agency before it can issue major guidance (as opposed to a rule). First, before an agency may issue any major guidance, it must make a reasonable determination and document it assuring that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions (new section 553a(a)(1)(A)).

Second, the agency must identify the costs and benefits (including all costs considered during the rulemaking under section 553(b)) of conduct conforming to such guidance and assures that such benefits justify such costs (new section 553a(a)(1)(B)).

Third, the agency must describe alternatives to such guidance and their costs and benefits (including all costs to be considered during the rulemaking under section 553(b)) and explain why the agency rejected those alternatives (new section 553a(a)(1)(C)). This would force an agency to potentially do countless cost-benefit analyses.

Fourth, the agency must confer with OIRA to assure that the guidance is reasonable, understandable, consistent with relevant statutory and regulatory provisions, and requirements or practices of other agencies, does not produce costs that are unjustified by the guidance's benefits, and otherwise appropriate (new section 553a(a)(2)).

Fifth, the agency guidance must state in a plain, prominent and permanent manner that it is not legally binding (new section 553a(b)(2)).

Sixth, the guidance must be made available by the issuing agency to interested persons and the public at the time it is issued (new section 553a(b)(3)).

Seventh, OIRA has authority to issue guidelines for use by agencies in the issuance of major guidance and other guidance that must assure each agency avoids issuing guidance documents that are inconsistent or incompatible with or duplicative of its other regulations and those of other agencies. The agency must draft its guidance documents to be simple and easy to understand in order to minimize the potential for uncertainty and litigation.

Section 5 of the bill sets forth a comprehensive regime of new requirements for hearings.

New section 556(e)(1) appears to be identical to current section 556(e). It provides that the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision in accordance with section 557, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

New section 556(e)(2) overrides paragraph (1) with respect to a proceeding held under section 556 pursuant to section 553(d)(4) or 553(e), the record for decision must include any information that is part of the record of proceedings under section 553. When an agency conducts rulemaking under sections 556 and 557 directly after concluding proceedings on an ANPR under section 553(c), the matters to be considered and determinations to be made must include, among other relevant matters and determinations, the matters and determinations described in subsections (b) and (f).

Upon receipt of a petition for a hearing under this section, an agency pursuant to new subsection 556(g) must grant the petition in the case of any major rule, unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rulemaking. The agency must publish its decision

to grant or deny the petition when it renders the decision, including an explanation of the grounds for such decision. The information contained in the petition must be included in the administrative record. Subsection (g), however, does not apply to monetary policy rulemakings proposed or implemented by the Federal Reserve or Federal Open Market Committee.

Section 6 of the bill amends section 704 of the APA, which specifies what agency actions are reviewable by a court. Section 6 adds a new provision to section 704 that broadens the types of actions reviewable. Except for cases involving national security, an interested party may seek immediate judicial review of the agency's determination to adopt an interim rule on an interim basis upon the agency's publication of such rule without compliance with section 553(c), (d), or (e) or requirements to render final determinations under section 553(f). Review is limited to whether the agency abused its discretion to adopt the interim rule without compliance with section 553(c), (d), or (e) or without rendering final determinations under section 553(f).

Section 7 of the bill amends section 706 of the APA, which sets forth the scope of judicial review. Current section 706(a)(2)(A) provides that a court, in appropriate circumstances, must "hold unlawful and set aside action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Section 7(2) would require such action if the agency action, findings or conclusions violated the Information Quality Act. Section 7(3) adds a new provision that prohibits a court from deferring to the agency's interpretation of an agency rule if the agency's (1) interpretation of an agency rule did not comply with the procedures of sections 553, 556 and 557; (2) determination of the costs and benefits or economic or risk assessment of the action failed to conform to guidelines on such determinations and assessments established by OIRA pursuant to section 553(k); or (3) determinations under interlocutory review pursuant to sections 553(g)(2)(C) and 704(b). In addition, section 7 requires a court to review agency denials of petitions under section 553(e)(6) (pertaining to petitions by interested persons raising other issues) or any other petition for a hearing under sections 556 and 557 for abuse of agency discretion.

Section 8 of the bill amends the definitions pertinent to judicial review of agency actions to add a definition of "substantial evidence." It defines this term to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied on by the agency to support its decision.

Section 9 of the bill provides that its amendments to sections 553, 556, 704, 701, and 706(b) and (c) do not apply to any rulemakings pending or completed on the date of enactment.

CONCLUSION

The cumulative weight of the changes to the APA made by H.R. 2122 threatens to bring rulemaking to a halt. Most academic administrative law experts believe that the bill's revisions to current law, taken as a whole, will pour "sand in the gears" of the rulemaking process. Although Congress legislatively directs agencies to issue rules to protect the American public from a wide spectrum of

harms, H.R. 2122 would effectively contravene such directives by making it almost impossible for agencies to promulgate rules.

H.R. 2122 garners our strong opposition for numerous reasons. First, it is based on the false and unsupported assertions that regulations stifle economic growth and job creation. Such claims ignore the overwhelming evidence that regulations result in net benefits to society, including spurring economic activity. Second, H.R. 2122's numerous and ill-conceived changes to the APA would have the cumulative effect of halting agency rulemaking in its tracks and undermining agencies' ability to protect the American people from a wide range of harms. They also would permit the Executive Branch to circumvent Congress's intent in delegating rulemaking authority to agencies through various statutes. Third, H.R. 2122 prioritizes cost considerations over public health, workplace safety, environmental protection, and other values by overriding substantive law and imposing an unworkable cost-benefit analysis regime on agencies. Fourth, the bill dangerously concentrates unaccountable political power over rulemaking in OIRA's hands. Fifth, H.R. 2122 tilts the rulemaking playing field in favor of business interests by resurrecting the long-discredited and time-consuming formal rulemaking process, providing for expanded and less deferential judicial review, increasing opportunities to challenge agency compliance with the IQA, and encouraging the United States to engage in a regulatory "race to the bottom" with countries that lack protective regulatory regimes.

The Congressional Budget Office estimates that agencies will need to expend $20 million annually to (cover the governmentwide costs of additional personnel, contractor costs, and other administrative expenses associated with meeting the new requirements under the legislation.[146]

For these reasons, we respectfully dissent and urge our colleagues to oppose H.R. 2122.

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[146] Congressional Budget Office, Cost Estimate for H.R. 2122, the Regulatory Accountability Act of 2013, at 1, 4 (Aug. 1, 2013), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr2122.pdf.