

Calendar No. 613

114TH CONGRESS
2D SESSION**S. 1818****[Report No. 114–342]**

To amend title 5, United States Code, to reform the rule making process
of agencies.

IN THE SENATE OF THE UNITED STATES

JULY 21, 2015

Mr. LANKFORD (for himself, Ms. HEITKAMP, Ms. AYOTTE, and Mrs. ERNST)
introduced the following bill; which was read twice and referred to the
Committee on Homeland Security and Governmental Affairs

SEPTEMBER 6, 2016

Reported by Mr. JOHNSON, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To amend title 5, United States Code, to reform the rule
making process of agencies.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “*Principled Rulemaking*
5 *Act of 2015*”.

1 **SEC. 2. DEFINITIONS.**

2 In this Act—

3 (1) the terms “agency”, “rule”, and “rule mak-
4 ing” have the meanings given those terms in section
5 551 of title 5, United States Code; and

6 (2) the term “regulatory action” means any
7 substantive action by an agency (normally published
8 in the Federal Register) that promulgates or is ex-
9 pected to lead to the promulgation of a final regula-
10 tion, including notices of inquiry, advance notices of
11 proposed rule making, and notices of proposed rule
12 making.

13 **SEC. 3. RULE MAKING CONSIDERATIONS.**

14 Section 553 of title 5, United States Code, is amend-
15 ed by adding at the end the following:

16 “(f) RULE MAKING CONSIDERATIONS.—

17 “(1) IN GENERAL.—An agency shall only pro-
18 mulgate a rule under this section that is—

19 “(A) required by law;

20 “(B) necessary to interpret a law; or

21 “(C) made necessary by compelling public
22 need, such as a material failure of the private
23 markets to protect or improve the health and
24 safety of the public, the environment, or the
25 wellbeing of the people of the United States.

1 “(2) CONSIDERATIONS.—Before promulgating a
2 rule under this section, an agency shall—

3 “(A) identify and assess the significance of
4 the problem that the agency intends to address
5 with the rule, including, where applicable, the
6 failures of private markets or public institutions
7 that warrant new agency action;

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

14 “(C) examine whether existing rules or
15 other laws—

16 “(i) have created or contributed to the
17 problem identified under subparagraph
18 (A); and

19 “(ii) should be modified to achieve the
20 intended regulatory objective more effec-
21 tively;

22 “(D) identify and assess available alter-
23 natives to direct regulation, including by pro-
24 viding—

1 “(i) economic incentives to encourage
2 the desired behavior, such as user fees or
3 marketable permits; or

4 “(ii) information upon which choices
5 may be made by the public;

6 “(E) consider, to the extent reasonable, the
7 degree and nature of the risks posed by various
8 substances or activities within the jurisdiction
9 of the agency;

10 “(F) if after determining that a rule is the
11 best available method of achieving the regu-
12 latory objective, design the rule in the most
13 cost-effective manner to achieve the regulatory
14 objective;

15 “(G) in carrying out subparagraph (F),
16 consider—

17 “(i) incentives for innovation, consist-
18 ency, predictability, flexibility, distributive
19 impacts, and equity; and

20 “(ii) the costs of enforcement and
21 compliance to the Federal Government,
22 regulated entities, and the public;

23 “(H) assess the costs and the benefits of
24 the intended rule and, recognizing that some

1 costs and benefits (including quantifiable and
2 qualitative measures) are difficult to quantify—

3 “(i) propose or adopt a rule only upon
4 a reasoned determination that the benefits
5 of the intended rule justify the costs of the
6 rule; and

7 “(ii) select approaches that maximize
8 net benefits, unless a statute requires an-
9 other regulatory approach;

10 “(I) base decisions on the best reasonably
11 obtainable scientific, technical, economic, and
12 other information concerning the need for, and
13 consequences of, the intended rule;

14 “(J) identify and assess alternative forms
15 of regulation and, to the extent feasible, specify
16 performance objectives, and not the behavior or
17 manner of compliance that regulated entities
18 are required to adopt;

19 “(K) seek views of appropriate State, local,
20 and tribal officials before imposing regulatory
21 requirements that may significantly or uniquely
22 affect those governmental entities;

23 “(L) assess the effects of rules on State,
24 local, and tribal governments, including specifi-
25 cally the availability of resources to carry out

1 those mandates, and seek to minimize those
2 burdens that uniquely or significantly affect
3 those governmental entities, consistent with
4 achieving the regulatory objective of the agency;

5 “(M) as appropriate, seek to harmonize
6 agency action with related State, local, and trib-
7 al regulatory and other governmental functions;

8 “(N) avoid the promulgation of a rule that
9 is inconsistent, incompatible, or duplicative with
10 other rules of the agency or those of other
11 agencies;

12 “(O) tailor the rule—

13 “(i) to impose the least burden on so-
14 ciety, including individuals, businesses of
15 differing sizes, and other entities, including
16 small communities and governmental enti-
17 ties; and

18 “(ii) in a manner that is consistent
19 with obtaining the regulatory objective,
20 taking into account, and to the extent
21 practicable, the costs of cumulative rules;
22 and

23 “(P) in order to minimize the potential for
24 uncertainty and litigation arising from such un-

1 certainty, draft the rule in a manner that is
2 simple and easy to understand.”.

3 **SEC. 4. PUBLIC PARTICIPATION.**

4 (a) ~~IN GENERAL.~~—To promote an open exchange
5 with the public, each agency shall, consistent with section
6 ~~553~~ of title 5, United States Code, and other applicable
7 requirements, issue rules through a process that involves
8 public participation, including—

9 (1) providing the public with an opportunity to
10 participate in the regulatory process; and

11 (2) to the extent feasible—

12 (A) affording the public a meaningful op-
13 portunity to submit comments through the
14 Internet on any proposed rule for a period of
15 not less than 60 days;

16 (B) providing, for both proposed and final
17 rules, timely online access to the rule making
18 docket of the agency on an easily accessible
19 Federal website, including relevant scientific
20 and technical findings, in an open, searchable,
21 and downloadable format; and

22 (C) providing an opportunity for public
23 comment on all pertinent parts of the proposed
24 rule making docket of the agency, including rel-
25 evant scientific and technical findings.

1 (b) ~~COMMENTS FROM AFFECTED PARTIES.~~—Before
 2 issuing a notice of proposed rule making, each agency
 3 shall, when feasible and appropriate, seek the views of
 4 those who are likely to be affected by the rule, including
 5 those who are likely to benefit from and those who are
 6 potentially subject to the rule.

7 **SEC. 5. INTEGRATION AND INNOVATION.**

8 In developing regulatory actions and identifying ap-
 9 propriate approaches, each agency shall—

- 10 (1) attempt to promote coordination, simplifica-
 11 tion, and harmonization; and
 12 (2) seek to identify, as appropriate, means to
 13 achieve regulatory goals that are designed to pro-
 14 mote innovation.

15 **SEC. 6. FLEXIBLE APPROACHES.**

16 Where relevant, feasible, and consistent with regu-
 17 latory objectives, and to the extent permitted by law, each
 18 agency shall identify and consider regulatory approaches
 19 that—

- 20 (1) reduce burdens and maintain flexibility and
 21 freedom of choice for the public;
 22 (2) include warnings, appropriate default rules,
 23 and disclosure requirements; and
 24 (3) provide information to the public in a form
 25 that is clear and intelligible.

1 **SEC. 7. SCIENCE.**

2 ~~Each agency shall ensure the objectivity of any sci-~~
 3 ~~entific and technological information and processes used~~
 4 ~~to support each regulatory action of the agency.~~

5 **SECTION 1. SHORT TITLE.**

6 *This Act may be cited as the “Principled Rulemaking*
 7 *Act of 2015”.*

8 **SEC. 2. DEFINITIONS.**

9 *In this Act—*

10 *(1) the terms “agency”, “rule”, and “rule mak-*
 11 *ing” have the meanings given those terms in section*
 12 *551 of title 5, United States Code; and*

13 *(2) the term “regulatory action”—*

14 *(A) means any substantive action by an*
 15 *agency (normally published in the Federal Reg-*
 16 *ister) that promulgates or is expected to lead to*
 17 *the promulgation of a final regulation, including*
 18 *notices of inquiry, advance notices of proposed*
 19 *rule making, and notices of proposed rule mak-*
 20 *ing; and*

21 *(B) does not include an action by an agen-*
 22 *cy involving—*

23 *(i) a military or foreign affairs func-*
 24 *tion of the United States; or*

1 (ii) a matter relating to agency man-
 2 agement or personnel or to public property,
 3 loans, grants, benefits, or contracts.

4 **SEC. 3. RULE MAKING CONSIDERATIONS.**

5 Section 553 of title 5, United States Code, is amended
 6 by adding at the end the following:

7 “(f) **RULE MAKING CONSIDERATIONS.**—

8 “(1) **IN GENERAL.**—An agency shall only pro-
 9 mulgate a rule under this section that is—

10 “(A) required by law;

11 “(B) necessary to interpret a law; or

12 “(C) as permitted by law, made necessary
 13 by public need, to protect or improve the health
 14 and safety of the public, the environment, or the
 15 wellbeing of the people of the United States.

16 “(2) **CONSIDERATIONS.**—Before promulgating a
 17 rule under this section, an agency shall—

18 “(A) identify and assess the significance of
 19 the problem that the agency intends to address
 20 with the rule;

21 “(B) consider the legal authority under
 22 which the rule may be proposed, including
 23 whether a rule making is required by statute,
 24 and if so, whether by a specific date, or whether

1 *the agency has discretion to commence a rule*
2 *making;*

3 “(C) *where practicable, examine whether ex-*
4 *isting rules or other laws, including the cumu-*
5 *lative effect of existing rules or other laws—*

6 “(i) *have created or contributed to the*
7 *problem identified under subparagraph (A);*
8 *and*

9 “(ii) *should be modified to achieve the*
10 *intended regulatory objective more effec-*
11 *tively;*

12 “(D) *as permitted by statute, identify and*
13 *assess available alternatives to direct regulation,*
14 *including by providing—*

15 “(i) *economic incentives to encourage*
16 *the desired behavior, such as user fees or*
17 *marketable permits; or*

18 “(ii) *information to the public in a*
19 *form that is clear and intelligible;*

20 “(E) *consider, to the extent reasonable, the*
21 *degree and nature of the risks posed by various*
22 *substances or activities within the jurisdiction of*
23 *the agency;*

1 “(F) after determining that a rule is the
 2 best available method of achieving the regulatory
 3 objective—

4 “(i) assess the costs and benefits of the
 5 intended rule and, recognizing that some
 6 costs and benefits (including quantifiable
 7 and qualitative measures) are difficult to
 8 quantify, design the rule to maximize net
 9 benefits while justifying the costs, unless a
 10 statute requires another regulatory ap-
 11 proach; and

12 “(ii) as permitted by statute—

13 “(I) consider, when developing the
 14 rule—

15 “(aa) incentives for innova-
 16 tion, consistency, predictability,
 17 flexibility, distributive impacts,
 18 and equity on the regulated enti-
 19 ties and the public; and

20 “(bb) the cost of enforcement
 21 and compliance to the Federal
 22 Government, regulated entities,
 23 and the public; and

24 “(II) select approaches that reduce
 25 burdens and maintain flexibility and

1 *freedom of choice for regulated entities*
2 *and the public;*

3 “(G) base decisions on the best reasonably
4 *obtainable and publically accessible scientific,*
5 *technical, economic, and other information con-*
6 *cerning the need for, and consequences of, the in-*
7 *tended rule;*

8 “(H) identify and assess alternative forms
9 *of regulation and, to the extent feasible, specify*
10 *performance objectives, and not the behavior or*
11 *manner of compliance that regulated entities are*
12 *required to adopt;*

13 “(I) seek views of appropriate State, local,
14 *and tribal officials before imposing regulatory*
15 *requirements that may significantly or uniquely*
16 *affect those governmental entities;*

17 “(J) assess the effects of rules on State,
18 *local, and tribal governments and the private*
19 *sector, including specifically the availability of*
20 *resources to carry out those mandates, and seek*
21 *to minimize those burdens that uniquely or sig-*
22 *nificantly affect those governmental entities, con-*
23 *sistent with achieving the regulatory objective of*
24 *the agency;*

1 “(K) as appropriate, seek to harmonize
2 agency action with related State, local, and trib-
3 al regulatory and other governmental functions;

4 “(L) avoid the promulgation of a rule that
5 is inconsistent, incompatible, or duplicative with
6 other rules of the agency or those of other agen-
7 cies;

8 “(M) tailor the rule—

9 “(i) to maximize benefits while impos-
10 ing the least possible burden on society, in-
11 cluding individuals, businesses of differing
12 sizes, and other entities, including small
13 communities and governmental entities; and

14 “(ii) in a manner that is consistent
15 with obtaining the regulatory objective, tak-
16 ing into account, and to the greatest extent
17 practicable, the costs of cumulative rules;
18 and

19 “(N) in order to minimize the potential for
20 uncertainty and litigation arising from such un-
21 certainty—

22 “(i) draft the rule in a manner that is
23 simple and easy to understand; and

24 “(ii) include information to assist with
25 compliance with the rule, such as warnings,

1 *appropriate default rules, and disclosure re-*
 2 *quirements.*

3 “(3) *EXCEPTIONS.—This subsection shall not*
 4 *apply—*

5 *“(A) to interpretative rules, general state-*
 6 *ments of policy, or rules of agency organization,*
 7 *procedures, or practice;*

8 *“(B) if the Administrator of the Office of*
 9 *Information and Regulatory Affairs waives the*
 10 *requirements of this subsection for good cause; or*

11 *“(C) if the statute on which a proposed rule*
 12 *is based specifically exempts a rule from any of*
 13 *the procedures under this subsection.*

14 “(4) *JUDICIAL REVIEW.—*

15 *“(A) IN GENERAL.—Compliance by an*
 16 *agency with the provisions of this subsection*
 17 *shall be subject to judicial review only—*

18 *“(i) in connection with review of final*
 19 *agency action; and*

20 *“(ii) in accordance with this para-*
 21 *graph.*

22 “(B) *DETERMINATIONS BY ADMINIS-*
 23 *TRATOR.—Any determination, action, or inac-*
 24 *tion of the Administrator of the Office of Infor-*

1 *mation and Regulatory Affairs under this sub-*
 2 *section shall not be subject to judicial review.*

3 “(C) *REVIEW WITH FINAL RULE.*—*Compli-*
 4 *ance by an agency with the provisions of this*
 5 *subsection shall only be subject to judicial review*
 6 *in connection with review of the final rule to*
 7 *which an analysis, assessment, or other consider-*
 8 *ation under paragraph (2) applies.*

9 “(D) *RULE MAKING RECORD.*—*Each consid-*
 10 *eration by an agency under paragraph (2) shall*
 11 *be—*

12 “(i) *included as part of the rule mak-*
 13 *ing record for the rule; and*

14 “(ii) *to the extent relevant, considered*
 15 *by a court only in determining whether,*
 16 *under the statute granting the rule making*
 17 *authority to the agency, the final rule is—*

18 “(I) *arbitrary, capricious, or an*
 19 *abuse of discretion; or*

20 “(II) *unsupported by substantial*
 21 *evidence where the standard is other-*
 22 *wise provided by law.*

23 “(E) *SET ASIDE.*—*If an agency fails to*
 24 *comply with the requirements under paragraph*
 25 *(2), a court may, giving due account to preju-*

1 *dicial error, hold unlawful and set aside the*
 2 *agency action.”.*

3 **SEC. 4. PUBLIC PARTICIPATION.**

4 *(a) IN GENERAL.—To promote an open exchange with*
 5 *the public, each agency shall, consistent with section 553*
 6 *of title 5, United States Code, and other applicable require-*
 7 *ments, issue rules through a process that involves public*
 8 *participation, including—*

9 *(1) providing the public with a meaningful op-*
 10 *portunity to participate in the regulatory process;*
 11 *and*

12 *(2) to the greatest extent feasible—*

13 *(A) affording the public a meaningful op-*
 14 *portunity to submit comments through the Inter-*
 15 *net on any proposed rule for a period of not less*
 16 *than 60 days;*

17 *(B) providing, for both proposed and final*
 18 *rules, timely online access to the rule making*
 19 *docket of the agency on an easily accessible Fed-*
 20 *eral website, including relevant scientific and*
 21 *technical findings, in an open, searchable, and*
 22 *downloadable format; and*

23 *(C) providing an opportunity for public*
 24 *comment on all pertinent parts of the proposed*

1 *rule making docket of the agency, including rel-*
 2 *evant scientific and technical findings.*

3 **(b) COMMENTS FROM AFFECTED PARTIES.**—*Before*
 4 *issuing a notice of proposed rule making, each agency shall,*
 5 *when feasible and appropriate, seek the views of those who*
 6 *are likely to be affected by the rule, including those who*
 7 *are likely to benefit from and those who are potentially sub-*
 8 *ject to the rule.*

9 **SEC. 5. INTEGRATION AND INNOVATION.**

10 *In developing regulatory actions and identifying ap-*
 11 *propriate approaches, each agency shall—*

12 *(1) attempt to promote coordination, simplifica-*
 13 *tion, and harmonization; and*

14 *(2) seek to identify, as appropriate, means to*
 15 *achieve regulatory goals that are designed to promote*
 16 *innovation.*

17 **SEC. 6. SCIENCE.**

18 *When issuing a rule under section 553, each agency*
 19 *shall ensure that any scientific and technological informa-*
 20 *tion and processes, including models, used to support any*
 21 *regulatory action of the agency is the best available, by tak-*
 22 *ing into consideration whether the scientific and techno-*
 23 *logical information and processes used are objective, peer-*
 24 *reviewed, reproducible, and publically available.*

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