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

IN THE SENATE OF THE UNITED STATES

AUGUST 6, 2015

Mr. PORTMAN (for himself, Mr. KING, Ms. COLLINS, Mr. CORNYN, Ms. AYOTTE, Mr. JOHNSON, and Mr. PERDUE) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Accountability Act of 2015".

SEC. 2. DEFINITIONS.

Section 551 of title 5, United States Code, is amended—

(1) in paragraph (13), by striking ''and'' at the end;

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

(3) by adding at the end the following:

''(15) 'guidance' means an agency statement of general applicability, other than a rule, that is not intended to have the force and effect of law but that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue;

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

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

''(A) a cost on the economy in any 1 year 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; or

"(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;

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

"(A) a cost on the economy in any 1 year 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; or

"(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; and

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

SEC. 3. RULEMAKING.

Section 553 of title 5, United States Code, is amended—

(1) in subsection (a), by striking ''(a) This section applies'' and inserting ''(a) APPLICABILITY.—This section applies''; and

(2) by striking subsections (b) through (e) and inserting the following:

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

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

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

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

''(4) A reasonable number of alternatives for a new rule, including any substantial alternatives or other responses identified by interested persons.

"(5) For any major rule or high-impact rule, the potential costs and benefits associated with potential alternative rules and other responses considered under paragraph (4), including an analysis of—

"(A) the nature and degree of risks addressed by the rule and the countervailing risks that might be posed by agency action;

"(B) direct, indirect, and cumulative costs and benefits; and

"(C) estimated impacts on jobs, competitiveness, and productivity.

"(c) INITIATION OF RULEMAKING.—

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

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

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

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

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

"(iii) invite interested persons to propose alternatives for accomplishing the objectives of the agency in the most effective manner and with the lowest cost; and

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

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

"(d) NOTICE OF PROPOSED RULEMAKING.—

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

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

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

"(C) the text of the proposed rule;

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

"(E) for any major rule or high impact-rule—

"(i) a reasoned preliminary determination that the benefits of the proposed rule justify the costs of the proposed rule; and

"(ii) a discussion of—

"(I) the costs and benefits of alternatives considered by the agency under subsection (b), as determined by the agency at its discretion or provided under subsection (c) by a proponent of an alternative;

"(II) whether those alternatives meet relevant statutory objectives; and

"(III) the reasons why the agency did not propose any of those alternatives.

"(2) ACCESSIBILITY.—Not later than the date of publication of the notice of proposed rulemaking by an agency under paragraph (1), all data, studies, models, and other information considered by the

agency, and actions by the agency to obtain information, in connection with the determination of the agency to propose the rule, shall be placed in the docket for the proposed rule and made accessible to the public.

"(3) PUBLIC COMMENT.—

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

"(i) if a public hearing is convened under subsection (e), reasonable opportunity for oral presentation shall be provided at the public hearing under the requirements of subsection (e); and

"(ii) when, other than under subsection (e), a rule is 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 the petition procedures of subsection (e) shall not apply.

"(B) The agency shall provide not less than 60 days, or 90 days in the case of a proposed major rule or proposed high-impact rule, for interested persons to submit written material, data, views, or arguments.

"(4) EXPIRATION OF NOTICE.—

"(A) Except as provided in subparagraph (B), a notice of proposed rulemaking shall, 2 years after the date on which the notice is published in the Federal Register, be considered as expired and may not be used to satisfy the requirements of this subsection.

"(B) An agency may, at the sole discretion of the agency, extend the expiration of a notice of proposed rulemaking under subparagraph (A) for a 1-year period by publishing a supplemental notice in the Federal Register explaining why the agency requires additional time to complete the rulemaking.

"(e) PUBLIC HEARING FOR HIGH-IMPACT RULES.—

"(1) PETITION FOR PUBLIC HEARING.—

"(A)(i) Before the close of the comment period for any proposed high-impact rule, any interested person may petition the agency to

hold a public hearing in accordance with this subsection.

"(ii) Not later than 30 days after receipt of a petition made pursuant to clause (i), the agency shall grant the petition if the petition shows that—

"(I) the proposed rule is based on conclusions with respect to 1 or more specific scientific, technical, economic or other complex factual issues that are genuinely disputed; and

"(II) the resolution of those disputed factual issues would likely have an effect on the costs and benefits of the proposed rule.

"(B) If the agency denies a petition under this subsection in whole or in part, it shall include in the rulemaking record an explanation for the denial sufficient for judicial review, including—

"(i) findings by the agency that there is no genuine dispute as to the factual issues raised by the petition; or

"(ii) a reasoned determination by the agency that the factual issues raised by the

petition, even if subject to genuine dispute, will not have an effect on the costs and benefits of the proposed rule.

"(2) NOTICE OF HEARING.—Not later than 45 days before any hearing held under this subsection, the agency shall publish in the Federal Register a notice specifying the proposed rule to be considered at the hearing and the factual issues to be considered at the hearing.

"(3) HEARING PROCEDURE.—

"(A) A hearing held under this subsection shall be limited to the specific factual issues raised in the petition or petitions granted in whole or in part under paragraph (1) and any other factual issues the resolution of which the agency, in its discretion, determines will advance its consideration of the proposed rule.

"(B)(i) Except as otherwise provided by statute, the proponent of the rule has the burden of proof in a hearing held under this subsection. Any documentary or oral evidence may be received, but the agency as a matter of policy shall provide for the exclusion of immaterial or unduly repetitious evidence.

"(ii) To govern hearings held under this subsection, each agency shall adopt rules that provide for—

"(I) the appointment of an agency official or administrative law judge to preside at the hearing;

"(II) the presentation by interested parties of relevant documentary or oral evidence, unless the evidence is immaterial or unduly repetitious;

"(III) a reasonable and adequate opportunity for cross-examination by interested parties concerning genuinely disputed factual issues raised by the petition, provided that in the case of multiple interested parties with the same or similar interests, the agency may require the use of common counsel where the common counsel may adequately represent the interests that will be significantly affected by the proposed rule; and

"(IV) the provision of fees and costs under the circumstances described in section 6(c)(4) of the Toxic Substances Control Act (15 U.S.C. 2605(c)(4)).

"(C) The transcript of testimony and exhibits, together with all papers and requests filed in the hearing, shall constitute the exclusive record for decision of the factual issues addressed in a hearing held under this subsection.

"(4) PETITION FOR PUBLIC HEARING FOR MAJOR RULES.—In the case of any major rule, any interested person may petition for a hearing under this subsection on the grounds and within the time limitation set forth in paragraph (1). The agency may deny the petition if the agency reasonably determines that a hearing would not advance the consideration of the proposed rule by the agency or would, in light of the need for agency action, unreasonably delay completion of the rulemaking. The petition and the decision of the agency with respect to the petition shall be included in the rulemaking record.

"(5) JUDICIAL REVIEW.—

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

"(B) There shall be no judicial review of the disposition of a petition by an agency under

this subsection until judicial review of the final action of the agency.

"(f) FINAL RULES.—

"(1) COST OF MAJOR OR HIGH-IMPACT RULE.—

"(A) Except as provided in subparagraph (B), in a rulemaking for a major rule or high-impact rule, the agency shall adopt the least costly rule considered during the rulemaking 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—

"(i) the additional benefits of the more costly rule justify its additional costs; and

"(ii) the agency explains why the agency adopted a rule that is more costly than the least costly alternative, based on interests that are within the scope of the statutory provision authorizing the rule.

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

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

"(B) a reasoned determination by the agency regarding the considerations specified in subsection (b);

"(C) in a rulemaking for a major rule or high-impact rule, a reasoned determination by the agency that the benefits of the rule advance the relevant statutory objectives and justify the costs of the rule;

"(D) in a rulemaking for a major rule or high-impact rule, a reasoned determination by the agency that—

"(i) no alternative considered would achieve the relevant statutory objectives at a lower cost than the rule; or

"(ii) the adoption by the agency of a more costly rule complies with subparagraph (B); and

"(E) a response to each significant issue raised in the comments on the proposed rule.

"(3) INFORMATION QUALITY.—If an agency rulemaking rests upon scientific, technical, or economic information, the agency shall adopt a rule

only on the basis of the best available scientific, technical, or economic information.

"(4) ACCESSIBILITY.—Not later than the date of publication of the rule, all data, studies, models, and other information considered by the agency, and actions by the agency to obtain information in connection with its adoption of the rule, shall be placed in the docket for the rule and made accessible to the public.

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

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

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

"(g) APPLICABILITY OF THIS SECTION.—

"(1) IN GENERAL.—Except as otherwise provided by law, this section does not apply to guidance or rules of agency organization, procedure, or practice.

"(2) ADOPTION OF INTERIM RULES.—

"(A) If an agency for good cause finds, and incorporates the finding and a brief statement of reasons for the finding in the rule issued, that compliance with subsection (c), (d), or (e) or requirements to render final determinations under subsection (f) before the issuance of an interim rule is unnecessary, such subsections and requirements under subsection (f) shall not apply and the agency may issue a final rule.

"(B) If an agency for good cause finds, and incorporates the finding and a brief statement of reasons for the finding in the rule issued, that compliance with subsection (c), (d), or (e) or requirements to render final deter-

minations under subsection (f) before the issuance of an interim rule is impracticable or contrary to the public interest, such subsections and requirements under subsection (f) shall not apply to the adoption of an interim rule by the agency.

"(C) If, following compliance with subparagraph (B), an agency adopts an interim rule, the agency shall commence proceedings that fully comply with subsections (c) through (f) immediately upon publication of the interim rule. Not 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 rulemaking in accordance with subsections (c) through (f) and take final action to adopt a final rule or rescind the interim rule. If the agency fails to take timely final action under this subparagraph, the interim rule shall cease to have the effect of law.

"(h) DATE OF PUBLICATION OF RULE.—A rule shall be published not less than 30 days before the effective date of the rule, except—

"(1) for a rule that grants or recognizes an exemption or relieves a restriction;

1 ''(2) for guidance; or

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

4 ''(i) RIGHT TO PETITION AND REVIEW OF RULES.—

5 ''(1) Each agency shall give interested persons
6 the right to petition for the issuance, amendment, or
7 repeal of a rule.

8 ''(2) Each agency shall, on a continuing basis,
9 invite interested persons to submit, by electronic
10 means, suggestions for rules that warrant retrospec-
11 tive review and possible modification or repeal.

12 ''(j) RULEMAKING GUIDELINES.—

13 ''(1) ASSESSMENT OF RULES.—

14 ''(A) The Administrator of the Office of
15 Information and Regulatory Affairs (in this
16 subsection referred to as the 'Administrator')
17 shall establish guidelines for the assessment, in-
18 cluding quantitative and qualitative assessment,
19 of—

20 ''(i) the costs and benefits of proposed
21 and final rules;

22 ''(ii) other economic issues that are
23 relevant to rulemaking under this section
24 or other sections of this title; and

"(iii) risk assessments that are relevant to rulemaking under this section and other sections of this title.

"(B) The rigor of cost-benefit analysis required by the guidelines established under subparagraph (A) shall be commensurate, as determined by the Administrator, with the economic impact of the rule. Guidelines for risk assessment shall include criteria for selecting studies and models, evaluating and weighing evidence, and conducting peer reviews.

"(C) The Administrator shall regularly update guidelines established under subparagraph (A) to enable agencies to use the best available techniques to quantify and evaluate present and future benefits, costs, other economic issues, and risks as objectively and accurately as practicable.

"(2) SIMPLIFICATION OF RULES.—The Administrator may issue guidelines to promote coordination, simplification, and harmonization of agency rules during the rulemaking process. The guidelines shall advise each agency to avoid regulations that are inconsistent or incompatible with, or duplicative of, other regulations of the agency and those of

other Federal agencies, and to draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from the uncertainty.

"(3) CONSISTENCY IN RULEMAKING.—

"(A) To promote consistency in Federal rulemaking, the Administrator shall—

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

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

"(B) Each agency shall adopt regulations for the conduct of hearings consistent with the guidelines issued under this paragraph.

"(k) EXEMPTION FOR MONETARY POLICY.—Nothing in subsection (b)(5), (d)(1)(E), (e), (f)(1), (f)(2)(C), or (f)(2)(D) shall apply to a rulemaking that concerns monetary policy proposed or implemented by the Board of Gov-

ernors of the Federal Reserve System or the Federal Open Market Committee.''.

SEC. 4. SCOPE OF REVIEW.

Section 706 of title 5, United States Code, is amended—

(1) by striking ''To the extent necessary'' and inserting ''IN GENERAL.—To the extent necessary''; and

(2) by adding at the end the following:

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

''(c) STATEMENT OF POLICY.—Agency guidance that does not interpret a statute or regulation shall be reviewable only under subsection (a)(2)(D).

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

''(e) STANDARD OF REVIEW.—A court shall review—

''(1) the denial of a petition by an agency under section 553(e) for whether the denial was based on substantial evidence; and

"(2) any petition for review of a high-impact rule under the substantial evidence standard, regardless of whether a hearing was held under section 553(e).".

SEC. 5. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR GUIDANCE; PRESIDENTIAL AUTHORITY TO ISSUE GUIDELINES FOR ISSUANCE OF GUIDANCE.

Section 553 of title 5, United States Code, as amended by this Act, is further amended by adding at the end the following:

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

"(1) Agency guidance shall—

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

"(B) state that it is not legally binding; and

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

"(2) Before issuing any major guidance, an agency shall—

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

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

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

"(B) confer with the Administrator of the Office of Information and Regulatory Affairs on the issuance of the major 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 benefits of the major guidance, and is otherwise appropriate.

"(3) The Administrator of the Office of Information and Regulatory Affairs shall issue updated guidelines for use by the agencies in the issuance of guidance documents. The guidelines shall advise each agency not to issue guidance documents that

are inconsistent or incompatible with, or duplicative of, other regulations of the agency and those of other Federal agencies, and to draft its guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from the uncertainty.''.

SEC. 6. ADDED DEFINITION.

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

(1) in paragraph (1)(H), by striking ''and'' at the end;

(2) in paragraph (2), by striking the period at the end and inserting ''; and''; and

(3) by adding at the end the following:

''(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.''.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act to sections 553, 556, 701(b), 704, 706(b)(4), 706(b)(5), and 706(c) of title

1 5, United States Code, shall not apply to any rulemakings
2 pending or completed on the date of enactment of this Act.

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