

ALL ECONOMIC REGULATIONS ARE TRANSPARENT ACT
OF 2015

JULY 29, 2015.—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. 1759]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1759) to amend title 5, United States Code, to provide for the publication, by the Office of Information and Regulatory Affairs, of information relating to rulemakings, and for other purposes, 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. 1759, the “All Economic Regulations are Transparent Act of 2015” (ALERT Act of 2015), responds to Executive Branch transparency shortcomings regarding publication of information on new Federal regulations in development. The legislation updates and strengthens requirements currently found in the Regulatory Flexibility Act¹ and Executive Order 12866, facilitating better public information about pending new regulations. It does so by requiring: the provision of more detailed information about the nature and expected timing and costs of planned, new regulations; the monthly, online posting of that information; and, that at least 6 months of such online publications occur before a new regulation may become effective, subject to specified good-cause exceptions.

Background and Need for the Legislation

I. EXISTING REQUIREMENTS AND SHORTCOMINGS IN TRANSPARENCY FOR REGULATIONS IN DEVELOPMENT

There is consensus that transparency in the Federal regulatory process is essential to public participation in the rulemaking process and public understanding of new proposed and final rules. In recent years, however, as regulatory activity by the Federal Government has increased, important features of Federal regulatory transparency for the government’s overall regulatory efforts have been diminished.

The primary regulatory transparency tools implemented by the Executive Branch are the government-wide, semi-annual Unified Agenda of Regulatory and Deregulatory Actions and annual, agency-specific Regulatory Plans. The latter are required by the Regulatory Flexibility Act (RFA), and both are required under Executive Order 12866.² These tools were conceived as means to provide notice of and transparency into both the nearer-term and the longer-term regulatory activity planned by the various agencies of the Federal Government.

Historically, however, the Unified Agenda has not provided significant detail about planned regulations, such as precise information on how much planned regulations are expected to cost the economy. Adding to this difficulty, moreover, the Obama administration has repeatedly failed to publish even currently required information by the deadlines prescribed in the RFA and E.O. 12866; indeed, in one case, the Administration entirely failed to issue a Unified Agenda publication.³ Meanwhile, the Administration’s successive administrators of the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) have both sought to restrict the amount of information provided in the Unified Agenda.⁴ Executive Order 12866, for example, requires infor-

¹ 5 U.S.C. sec. 602.

² Traditionally, the Unified Agenda has been issued in April and October of each year, and the Executive Order requires that the Regulatory Plans be issued with the October agenda.

³ The Administration never issued the Spring 2012 Unified Agenda. The Fall 2012 edition, to add insult to injury, was issued only in late December 2012, well after its October 2012 deadline. In 2013, the Spring Unified Agenda was not issued until July 2013, months after its April 2013 deadline, and the Fall Unified Agenda was only issued in late November 2014 and not published in the Federal Register until January 2014.

⁴ See, e.g., Clyde Wayne Crews, *Big Sexy Holiday Fun with the Unified Agenda of Federal Regulations*, Forbes (Dec. 2, 2013) (available at: <http://www.forbes.com/sites/waynecrews/2013/12/02/big-sexy-holiday-fun-with-the-unified-agenda-of-federal-regulations>).

mation for the Unified Agenda to be provided for “all regulations under development or review.”⁵ Nevertheless, the Administration’s first OIRA Administrator, Cass Sunstein, issued a memorandum in June 2012 that encouraged agencies to reduce the number of rules included on the agenda, removing rules that were listed as “long term” or rules that were not expected to advance within the next year.⁶ Administrator Sunstein’s successor, current Administrator Howard Shelanski, issued a similar memorandum in 2013.⁷

In addition, a study recently commissioned by the Administrative Conference of the United States set forth a number of findings indicating the need for reform of the Unified Agenda. These include, among others, that:

- “a number of ‘significant’ rules . . . were published in the first half of 2014 without the Unified Agenda indicating that they were about to be issued;”
- “[a]bout two-thirds of the significant proposed and final rules published during this period by independent regulatory agencies had no prior proposed or final rule stage entries.”
- “[m]ore than one-third of the significant final rules published by Cabinet departments and independent agencies during the first half of 2014 had no ‘final rule stage’ entry in the preceding agenda giving the public at least 2 months notice of the upcoming rule.”
- “[a]lmost half of the ‘economically significant’ proposed and final rules that were predicted by the Spring 2013 edition of the agenda . . . were not published during the following 16 months;”
- “[t]he Unified Agenda sometimes did not provide accurate information about the nature of agencies’ significant rules (e.g., indicating that a forthcoming rule was not significant when the published rule indicated that it was significant);”
- “[t]he significant rules that were published in the first half of 2014 frequently did not mention whether or not they were ‘major’ under the Congressional Review Act, but when they did, the preceding agenda entries for those rules were ‘undetermined’ or wrong nearly 20% of the time;”
- “many entries have appeared at the same stage of the agenda for years without any rulemaking action;” and
- “[s]ome of the agenda entries indicated that proposed or final rules would be published within the next few months, even though the rules had already been published—sometimes months before the agenda was published.”⁸

The report also recalled the American Bar Association’s Section of Administrative Law and Regulatory Practice’s 2013 endorsement

⁵ Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Sept. 30, 1993).

⁶ Memorandum from OIRA Admin. Cass Sunstein, *Fall 2012 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions* (Jun. 13, 2012).

⁷ Memorandum from OIRA Admin. Howard Shelanski, *Fall 2013 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions* (Aug. 7, 2013).

⁸ Curtis W. Copeland, *The Unified Agenda: Proposals for Reform* at 6, 107–08 (April 13, 2015) (available at <https://www.acus.gov/report/final-unified-agenda-report>).

of a more real-time, online footing for the Unified Agenda, and stated that “[most] of the senior agency employees interviewed for [the] report indicated that some type of real-time agenda would be preferable to the current semiannual publication schedule.”⁹

Responding to the need for improvements in regulatory transparency and the Unified Agenda process, the ALERT Act modernizes and expands historical transparency tools and also provides a meaningful consequence for an administration’s failure to provide information as required by legal deadlines. To do this, it:

- requires agencies to submit monthly regulatory updates to OIRA covering all rules expected to be proposed or released in the upcoming year; requires OIRA to publish this information on the Internet each month and formally publish it once a year; and, requires agency updates to include for each rule a summary of the rule, the objective of the rule, the rule’s legal basis, whether comments will be requested on the proposed rule, the stage of the rulemaking process, and whether the rule is subject to a regulatory review under 5 U.S.C. 610;
- requires, if a notice of proposed rulemaking has been issued for a rule and the rule is expected to be finalized during the following year, that monthly updates include: a schedule for completing the rulemaking; an estimate of the rule’s costs; and, any estimate of the economic effects of the rule that the agency has considered, including jobs impacts;
- imposes strengthened annual publishing requirements for information about regulatory activity over the past year, including: the number of rules issued; any deregulatory actions; information received in the monthly updates; the total cost of all rules proposed or finalized, and the number of rules for which cost estimates were not available; cost-benefit analyses performed; the number of OIRA reviews conducted; the number of rules submitted to the Government Accountability Office under the Congressional Review Act; and, the number of rules for which a resolution of disapproval was introduced in the either the House of Representatives or the Senate under that Act; and
- requires that a rule must be noticed in monthly online updates for at least 6 months before it can become effective, subject to exceptions for rules for which the agency did not conduct notice-and-comment rulemaking or the President determines should take effect because the rule is needed to respond to an emergency, enforce criminal laws or protect national security, or is issued pursuant to a statute implementing an international trade agreement.

Through these reforms, the ALERT Act provides a “one-stop shop” for all parties affected by or interested in new Federal rulemaking, at which they can find concise but robust, real-time information about what new regulations are coming, when they are coming, and what impacts they can be expected to have.

⁹*Id.* at 98–99, 103.

II. PRIOR LEGISLATIVE HISTORY

The ALERT Act was first introduced during the 113th Congress as H.R. 2804. The Unified Agenda and transparency issues addressed by the bill have been considered by the Subcommittee on Regulatory Reform, Commercial and Antitrust Law and its predecessor, the Subcommittee on Courts, Commercial and Administrative Law, during numerous oversight hearings concerning in whole or in part the Federal regulatory process and the Office of Information and Regulatory Affairs. The Committee on Oversight and Government Reform, which had the primary referral of H.R. 2804, ordered the legislation to be reported favorably, as amended, on February 11, 2014. The bill was passed by the full House with bipartisan support twice during the 113th Congress, first as Title I of H.R. 2804, the “Achieving Less Excess in Regulation and Requiring Transparency Act of 2014” (ALERRT Act), on February 27, 2014 (236–179), and, second, as Title I of Subdivision B of Division III of H.R. 4, the “Jobs for America Act,” on September 18, 2014 (253–163).

Hearings

The Committee on the Judiciary held no hearings on H.R. 1759.

Committee Consideration

On April 15, 2015, the Committee met in open session and ordered the bill H.R. 1759 favorably reported without amendment, by a rollcall vote of 14 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. 1759:

1. Amendment #1, offered by Mr. Conyers. The Amendment strikes the requirement that a rule must be noticed in monthly online updates for at least 6 months before it can become effective. The Amendment was defeated by a rollcall vote of 9 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	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)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	9	13	

2. Motion to report H.R. 1759 favorably to the House. The bill will increase transparency and accountability in the Federal regulatory process. The motion was agreed to by a rollcall vote of 14 to 9.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)	X		
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)			
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)			
Mr. Marino (PA)	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Gowdy (SC)			
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Ms. Walters (CA)	X		
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		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)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Mr. Peters (CA)		X	
Total	14	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. 1759, 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, May 4, 2015.

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. 1759, the “ALERT Act of 2015.”

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

Sincerely,

KEITH HALL,
 DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
 Ranking Member

H.R. 1759—ALERT Act of 2015.

As ordered reported by the House Committee on the Judiciary
 on April 15, 2015.

H.R. 1759 would require Federal agencies to provide certain information to the public regarding proposed and final regulations. The bill would require Federal agencies to submit information for a proposed new supplement to the Unified Agenda of Federal Regulatory and Deregulatory Actions (a semiannual compilation of the Federal regulations under development) that would be published monthly. The Office of Information and Regulatory Affairs (OIRA) would be required to post that information on the Internet on a monthly and annual basis. With certain exceptions, regulations would not be effective until 6 months after they have appeared in the proposed monthly report.

CBO estimates that preparing the monthly supplemental reports for 3,000 to 4,000 final regulations each year would cost less than a million dollars a year, subject to the availability of appropriated funds, over the 2016–2020 period. Because agencies routinely monitor the status of regulations that are being processed, CBO does not expect this additional reporting requirement would add a significant administrative burden. Based on information from the Congressional Research Service about the current regulatory process, CBO also expects that the requirements in H.R. 1759 would not significantly delay the implementation of final regulations.

Enacting H.R. 1759 could affect direct spending by some agencies (such as the Tennessee Valley Authority) because their operating costs are covered by receipts from the sale of goods, fees, and other collections. Therefore pay-as-you-go procedures apply. Because most of those agencies can make adjustments to the amounts collected, CBO estimates that any net changes in direct spending by those agencies would not be significant. Enacting the bill would not affect revenues.

H.R. 1759 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1759 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. 1759 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

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. 1759 updates and strengthens requirements currently found in the Regulatory Flexibility Act and Executive Order 12866 to facilitate better public information about pending new regulations by requiring: the provision of more detailed information about the nature and expected timing and costs of planned, new regulations; the monthly, online posting of that information; and, that at least 6 months of such on-line publications occur before a new regulation may become effective, subject to specified good-cause exceptions.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1759 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

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title.

Section 1 sets forth the short title of the bill as the “All Economic Regulations are Transparent Act of 2015,” or the “ALERT Act of 2015.”

Sec. 2: Office of Information and Regulatory Affairs Publication of Information Relating to Rules.

Subsec. (a). Amendment. Amends Title 5 of the United States Code by inserting “Chapter 6A—OIRA Publication of Information Relating to Rules,” which includes the following sections:

Sec. 651. Agency monthly submission to OIRA. Requires agency heads to submit a monthly update to the Administrator of the Of-

Office of Information and Regulatory Affairs (OIRA) that includes each rule the agency expects to propose or finalize in the upcoming year. The monthly updates, for each rule, must include: a summary, objectives, legal basis, whether comments will be requested on the proposed rule, the stage of the rulemaking process, and whether the rule is subject to a regulatory review under 5 U.S.C. 610. If a notice of proposed rulemaking has been issued for a rule, the agency must also include a schedule for completion, an estimate of the costs the regulation is expected to impose, and an estimate of the overall economic effects of the rule, including the effect on jobs, or an affirmative statement that no economic information was considered.

Section 652. OIRA Publications. Requires the Administrator to make the monthly updates publicly available on the Internet. Requires the Administrator to publish an annual cumulative assessment of agency rulemaking in the Federal Register. The following information will be included: information received in the monthly submissions, cost and benefit analyses of rules, agency action that reduced the scope of the regulatory state, the total cost of rules, and the total number of rules for which a cost estimate was unavailable. Requires the OIRA Administrator to make publicly available on the Internet on an annual basis certain information about the review and analysis of each proposed or finalized rule. The following information will be included: cost and benefit analyses, docket numbers, regulatory identifier number, the number and a list of rules reviewed by OIRA, and the number and list of rules covered under the Congressional Review Act. The first publication will require the cost and benefit analyses for all proposed and final rules in the past 10 years.

Sec. 653. Requirement for rules to appear in agency-specific monthly publication. Provides that a rule may not take effect until the monthly submission to OIRA has been publicly available on the Internet for not less than 6 months. The 6-month requirement does not apply to rules that do not require notice and public comment and rules the President issues an Executive Order declaring necessary for emergency, national security, or other specified purposes.

Sec. 654. Definitions. Defines agency, agency action, rule and rule making as having the meaning given those terms in 5 U.S.C. 551.

Subsec. (b). Technical and conforming amendment. This subsection amends the table of chapters for part I of title 5 of the U.S.C.

Subsec. (c). Effective dates. This subsection establishes effective dates for the monthly updates and OIRA publications, and provides that the requirement that monthly-update information about new rules be published online for 6 months before a new rule may become effective shall take effect 8 months after enactment.

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 (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

Chapter		Sec.
1. Organization		101
* * * * *		
6. <i>The Analysis of Regulatory Functions</i>		601
6A. <i>Office of Information and Regulatory Affairs Publication of Information Relating to Rules</i>		651
* * * * *		

CHAPTER 6A—OFFICE OF INFORMATION AND REGULATORY AFFAIRS PUBLICATION OF INFORMATION RELATING TO RULES

- Sec. 651. Agency monthly submission to office of information and regulatory affairs.
- Sec. 652. Office of information and regulatory affairs publications.
- Sec. 653. Requirement for rules to appear in agency-specific monthly publication.
- Sec. 654. Definitions.

SEC. 651. AGENCY MONTHLY SUBMISSION TO OFFICE OF INFORMATION AND REGULATORY AFFAIRS.

On a monthly basis, the head of each agency shall submit to the Administrator of the Office of Information and Regulatory Affairs (referred to in this chapter as the “Administrator”), in such a manner as the Administrator may reasonably require, the following information:

- (1) For each rule that the agency expects to propose or finalize during the following year:
 - (A) A summary of the nature of the rule, including the regulation identifier number and the docket number for the rule.
 - (B) The objectives of and legal basis for the issuance of the rule, including—
 - (i) any statutory or judicial deadline; and
 - (ii) whether the legal basis restricts or precludes the agency from conducting an analysis of the costs or benefits of the rule during the rule making, and if not, whether the agency plans to conduct an analysis of the costs or benefits of the rule during the rule making.
 - (C) Whether the agency plans to claim an exemption from the requirements of section 553 pursuant to section 553(b)(B).
 - (D) The stage of the rule making as of the date of submission.
 - (E) Whether the rule is subject to review under section 610.
- (2) For any rule for which the agency expects to finalize during the following year and has issued a general notice of proposed rule making—
 - (A) an approximate schedule for completing action on the rule;
 - (B) an estimate of whether the rule will cost—

- (i) less than \$50,000,000;
- (ii) \$50,000,000 or more but less than \$100,000,000;
- (iii) \$100,000,000 or more but less than \$500,000,000;
- (iv) \$500,000,000 or more but less than \$1,000,000,000;
- (v) \$1,000,000,000 or more but less than \$5,000,000,000;
- (vi) \$5,000,000,000 or more but less than \$10,000,000,000; or
- (vii) \$10,000,000,000 or more; and

(C) any estimate of the economic effects of the rule, including any estimate of the net effect that the rule will have on the number of jobs in the United States, that was considered in drafting the rule. If such estimate is not available, a statement affirming that no information on the economic effects, including the effect on the number of jobs, of the rule has been considered.

SEC. 652. OFFICE OF INFORMATION AND REGULATORY AFFAIRS PUBLICATIONS.

(a) **AGENCY-SPECIFIC INFORMATION PUBLISHED MONTHLY.**—Not later than 30 days after the submission of information pursuant to section 651, the Administrator shall make such information publicly available on the Internet.

(b) **CUMULATIVE ASSESSMENT OF AGENCY RULE MAKING PUBLISHED ANNUALLY.**—

(1) **PUBLICATION IN THE FEDERAL REGISTER.**—Not later than October 1 of each year, the Administrator shall publish in the Federal Register, for the previous year the following:

(A) The information that the Administrator received from the head of each agency under section 651.

(B) The number of rules and a list of each such rule—

(i) that was proposed by each agency, including, for each such rule, an indication of whether the issuing agency conducted an analysis of the costs or benefits of the rule; and

(ii) that was finalized by each agency, including for each such rule an indication of whether—

(I) the issuing agency conducted an analysis of the costs or benefits of the rule;

(II) the agency claimed an exemption from the procedures under section 553 pursuant to section 553(b)(B); and

(III) the rule was issued pursuant to a statutory mandate or the rule making is committed to agency discretion by law.

(C) The number of agency actions and a list of each such action taken by each agency that—

(i) repealed a rule;

(ii) reduced the scope of a rule;

(iii) reduced the cost of a rule; or

(iv) accelerated the expiration date of a rule.

(D) The total cost (without reducing the cost by any offsetting benefits) of all rules proposed or finalized, and the

number of rules for which an estimate of the cost of the rule was not available.

(2) *PUBLICATION ON THE INTERNET.*— *Not later than October 1 of each year, the Administrator shall make publicly available on the Internet the following:*

(A) *The analysis of the costs or benefits, if conducted, for each proposed rule or final rule issued by an agency for the previous year.*

(B) *The docket number and regulation identifier number for each proposed or final rule issued by an agency for the previous year.*

(C) *The number of rules and a list of each such rule reviewed by the Director of the Office of Management and Budget for the previous year, and the authority under which each such review was conducted.*

(D) *The number of rules and a list of each such rule for which the head of an agency completed a review under section 610 for the previous year.*

(E) *The number of rules and a list of each such rule submitted to the Comptroller General under section 801.*

(F) *The number of rules and a list of each such rule for which a resolution of disapproval was introduced in either the House of Representatives or the Senate under section 802.*

SEC. 653. REQUIREMENT FOR RULES TO APPEAR IN AGENCY-SPECIFIC MONTHLY PUBLICATION.

(a) *IN GENERAL.*—*Subject to subsection (b), a rule may not take effect until the information required to be made publicly available on the Internet regarding such rule pursuant to section 652(a) has been so available for not less than 6 months.*

(b) *EXCEPTIONS.*—*The requirement of subsection (a) shall not apply in the case of a rule—*

(1) *for which the agency issuing the rule claims an exception under section 553(b)(B); or*

(2) *which the President determines by Executive order should take effect because the rule is—*

(A) *necessary because of an imminent threat to health or safety or other emergency;*

(B) *necessary for the enforcement of criminal laws;*

(C) *necessary for national security; or*

(D) *issued pursuant to any statute implementing an international trade agreement.*

SEC. 654. DEFINITIONS.

In this chapter, the terms “agency”, “agency action”, “rule”, and “rule making” have the meanings given those terms in section 551.

* * * * *

Dissenting Views

INTRODUCTION

H.R. 1759, the “All Economic Regulations are Transparent Act of 2015,” or the “ALERT Act of 2015,” amends the Administrative

Procedure Act (APA)¹ to impose an arbitrary 6-month delay in implementing nearly every new rule. Specifically, the bill will prohibit agency rules from becoming effective until the information required by the bill has been available online for 6 months, with only limited exceptions. As a result, the bill jeopardizes public health and safety as well as the efficiency of governmental operations. Although not within our Committee’s jurisdiction, we also note that certain of the bill’s reporting requirements myopically focus on the costs of regulations, while ignoring their overwhelming benefits.

Not surprisingly, a broad spectrum of organizations strenuously oppose H.R. 1759, including the Coalition for Sensible Safeguards (an alliance of more than 150 labor, scientific, research, good government, faith, health, community, environmental, and public interest organizations),² Public Citizen,³ the Center for Progressive Reform,⁴ and the American Association for Justice.⁵

In sum, H.R. 1759 is yet another anti-regulatory measure intended to encumber and further slowdown the agency rulemaking process. For these reasons, and those detailed below, we oppose this ill-conceived and dangerous legislation and respectfully dissent.

DESCRIPTION AND BACKGROUND

Established pursuant to the Paperwork Reduction Act (PRA) of 1980⁶ and housed in the Office of Management and Budget (OMB), the Office of Information and Regulatory Affairs (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.”⁷ Because OIRA is a component of OMB and, therefore, is part of the Executive Office of the President, it ensures that rules promulgated by agencies reflect the President’s policy priorities.⁸

¹ 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2015).

² Letter from Katherine McFate, Co-Chair, & Robert Weissman, Co-Chair, Coalition for Sensible Safeguards to Bob Goodlatte (R-VA), Chair, & John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (Apr. 14, 2015) (on file with H. Comm. on the Judiciary Democratic staff).

³ Letter from Robert Weissman, President, & Amit Narang, Regulatory Policy Advocate, Public Citizen to Bob Goodlatte (R-VA), Chair, & John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (Apr. 14, 2015) (on file with H. Comm. on the Judiciary Democratic staff).

⁴ James Goodwin, Analysis of H.R. 1759, the All Economic Regulations are Transparent Act of 2015,” Center for Progressive Reform (on file with H. Comm. on the Judiciary Democratic staff).

⁵ Letter from Lisa Blue, President, American Association of Justice, to John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (Apr. 15, 2015) (on file with H. Comm. on the Judiciary Democratic staff).

⁶ 44 U.S.C. § 3503 (2015).

⁷ 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]. Executive Order 12291, issued by President Ronald Reagan in 1981, first gave OIRA the responsibility to review the substance of agencies’ regulatory actions before publication in the *Federal Register*. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

⁸ See Curtis W. Copeland, Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs, Congressional Research Service Report for Congress, RL 32397 (Jan. 26, 2010), available at: <http://www.fas.org/sgp/crs/misc/RL32397.pdf>. Accordingly, variations in how OIRA operates—as a gatekeeper or a counselor regarding Federal agency rulemaking—are largely a function of the wishes of the President that the office serves. *Id.*

One of OIRA's principal responsibilities is to facilitate Federal executive branch agencies' compliance with the Regulatory Flexibility Act,⁹ which requires the publication of a semiannual report identifying those rules that may have a significant economic impact on a substantial number of small entities.¹⁰ Published during the months of October and April in the *Federal Register* and available online via OMB's website, this report, known as the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda), includes, *inter alia*, the following:

- (1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities; [and]
- (2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking[.]¹¹

In addition, OIRA, pursuant to the Regulatory-Right-to-Know Act,¹² submits to Congress an annual report on the benefits and costs of regulations. This report contains: "(1) an estimate of the total annual costs and benefits (including quantifiable and non-quantifiable effects) of Federal rules and paperwork, to the extent feasible—(A) in the aggregate; (B) by agency and agency program; and (C) by major rule; (2) an analysis of impacts of Federal regulation on State, local, and tribal government, small business, wages, and economic growth; and (3) recommendations for reform."¹³ The report is submitted with the Administration's annual Federal budget request.¹⁴

Section by Section Description

H.R. 1759 amends the APA to require OIRA to make additional reports on agency rulemakings and to impose a moratorium prohibiting such regulations from becoming effective until the information required by the bill has been available online for 6 months, with only limited exception.

New section 651, as established by section 2 of the bill, requires each agency to submit to OIRA on a monthly basis: (1) a summary of the nature of each rule the agency expects to propose or finalize during the following year, including the regulation identifier number and docket number; (2) the objectives and legal basis for each rule, including any statutory or judicial deadlines and whether the legal basis restricts the agency from concluding an analysis of the

⁹ Pub. L. No. 96-354 (1980) (as amended) (codified in 5 U.S.C. §§ 601 *et seq.* (2015)).

¹⁰ The Regulatory Information Service Center (RISC), a component of the U.S. General Services Administration, compiles these semiannual reports from information supplied by OIRA. Office of Management and Budget—Office of Information and Regulatory Affairs, About the Unified Agenda, available at http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.jsp (last visited Apr. 16, 2015).

¹¹ Pub. L. No. 96-354, § 3(a), 94 Stat. 1165 (1980) (as amended) (codified at 6 U.S.C. § 602 (2015)).

¹² Pub. L. No. 106-554, § 1(a)(3), tit. VI, § 624 (2000).

¹³ Treasury and General Government Appropriations Act of 2001, Pub. L. No. 106-554, § 624, 114 Stat. 2763, 2763A-161 (2000) (codified at 31 U.S.C. § 1105 note (2015)).

¹⁴ 31 U.S.C. § 1105(a) (2015). This report is required to be issued "[o]n or after the first Monday in January but not later than the first Monday in February of each year." *Id.*

costs or benefits of the rule and, if not, whether the agency plans to conduct an analysis of the costs or benefits of the rule; (3) whether the agency plans to claim an exemption from the requirements of section 553(b)(B) of the APA, which excepts the notice and comment requirements for a rule “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”; (4) an approximate schedule for completing action on the rule and an estimate of what the rule will cost; and (5) an estimate of the economic effects of the rule (including any estimate of the net effect that the rule will have on the number of jobs in the United States) or a statement affirming that an estimate is not available.

New section 652, which is not within the Judiciary Committee’s jurisdiction, requires OIRA to make the information mandated pursuant to section 651 publicly available via the Internet within 30 days of submission. Section 652 also requires OIRA to publish an annual report that *inter alia* must contain the information previously supplied pursuant to section 651. Of particular concern is the requirement that OIRA report the total cost (without reducing the cost by offsetting benefits) of all rules proposed or finalized. The report must also include the number and a list of all rules for which a resolution of disapproval was introduced in either the House or Senate under the Congressional Review Act,¹⁵ which authorizes Congress, under certain conditions, to disapprove a rule.

Subsection (a) of new section 653 specifies that a rule may not take effect until the information required to be posted on the Internet pursuant to new section 652(a) has been available for not less than 6 months, unless subsection (b) applies. Subsection (b) provides that subsection (a) does not apply if: (1) the agency claims an exemption under section 553(b)(B) of the APA, which excepts the notice and comment requirements for a rule “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;”¹⁶ or (2) the President determines by executive order that such rule shall take effect because it is: (a) necessary because of an imminent threat to health or safety or other emergency; (b) necessary for the enforcement of criminal laws; (c) necessary for national security; or (d) issued pursuant to any statute implementing an international trade agreement.

CONCERNS

I. H.R. 1759’S ONE-SIZE-FITS-ALL MORATORIUM JEOPARDIZES PUBLIC HEALTH AND SAFETY

New section 653, as established by H.R. 1759, is the most problematic aspect of the bill. It imposes a one-size-fits-all moratorium prohibiting agency rules from becoming effective until the information required by the bill has been available online for 6 months, with only limited exception. For example, the Department of the Interior earlier this year proposed regulations for blowout preventers used in offshore drilling in response to those that failed

¹⁵ Pub. L. No. 104–121, 110 Stat. 847 (1996) (codified at 5 U.S.C. §§ 801 et seq. (2015)).

¹⁶ 5 U.S.C. § 553(b)(B) (2015).

in the BP/Deepwater Horizon oil disaster, which occurred more than 5 years ago.¹⁷ Nevertheless, the bill would further delay the implementation of this critical, but long-overdue rule for 6 additional months.

The Coalition for Sensible Safeguards, which is comprised of more than 150 labor, scientific, research, good government, faith, health, community, environmental, and public interest organizations, warns:

As a result of this requirement, the benefits of critically needed regulations—whether measured in lives saved, environmental damage averted, or money saved—would be put on hold unnecessarily for 6 months or longer. This delay amounts to a 6-month regulatory moratorium, which is added to the often lengthy period of several years required for developing and finalizing these regulations. Such delays could extend well beyond that initial 6-month period should the OIRA Administrator fail to post the required information in a timely manner.¹⁸

The bill's moratorium provisions can only be avoided only if the rule either: (1) qualifies under the APA's exception for notice and comment, which applies "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;"¹⁹ or (2) if the President issues an executive order determining that the rule is necessary because of an imminent threat to health or safety or other emergency, necessary for the enforcement of criminal laws, necessary for national security, or issued pursuant to any statute implementing an international trade agreement.

With respect to the APA's notice and comment exceptions, the courts have strictly interpreted them very narrowly. As the Court of Appeals for the District of Columbia Circuit opined, "We have repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'"²⁰

The bill's other exception is equally problematic. It is restricted to situations where the President determines that the rule is necessary to address an *imminent* threat to health or safety or other emergency, necessary for the enforcement of criminal laws, necessary for national security, or issued pursuant to any statute implementing an international trade agreement. And, it is unreasonable to require a President, who may be in the midst of a national crisis, to take time out to author an executive order dispensing with the bill's moratorium each time a rule is promulgated. With

¹⁷Elana Schor, Interior To Unveil Blowout Prevention Rule Today, Politico (Apr. 13, 2015).

¹⁸Letter from Katherine McFate, Co-Chair, & Robert Weissman, Co-Chair, Coalition for Sensible Safeguards to Bob Goodlatte (R-VA), Chair, & John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary, at 1 (Apr. 14, 2015) (on file with H. Comm. on the Judiciary Democratic staff).

¹⁹5 U.S.C. § 553(b)(B) (2015).

²⁰Mack Trucks, Inc. v. E.P.A., 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 754 (D.C.Cir.2001)); *see also* Jifry v. Federal Aviation Admin., 370 F.3d at 1179 ("The exception excuses notice and comment in emergency situations, or where delay could result in serious harm."); Am. Fed. of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C.Cir.1981) ("As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations. . . .").

only limited exception, an executive order must be published in the *Federal Register* to be effective.²¹ And, the executive order must comply with various detailed requirements pursuant to an executive order issued by President John F. Kennedy, which is still in effective.²² For example, a proposed executive order, among many other requirements, must “first be submitted to the Director of the Office of Management and Budget, together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order . . . and its relationship, if any, to pertinent laws and other Executive orders or proclamations.”²³ If the OMB Director approves the proposed executive order, the Director must then submit it to the Attorney General for his or her “consideration as to both form and legality. If the Director or the Attorney General does not approve the executive order, it must be returned to the President accompanied by a statement of the reasons for such disapproval.”²⁴

Simply put, the bill’s exceptions are woefully inadequate particularly when one considers the fact that approximately 4,000 to 6,000 regulations are typically issued each year, all of which—as a result of this bill—would be held up for 6 months, unless they could be pigeonholed into one of these exceptions. The overwhelming majority of these regulations deal with thoroughly mundane or ministerial matters, such as the size of certain screws used in aircraft engines, Federal Aviation Administration flight path determinations, U.S. Coast Guard bridge opening schedules, and standards for curbside mailboxes (which were proposed earlier this year).²⁵ It makes no sense to impose a one-size-fits-all half-year moratorium on these straightforward, yet necessary regulations.

In an effort to address this major problem with H.R. 1759, House Judiciary Committee Ranking Member John Conyers, Jr. (D-MI) offered an amendment striking the bill’s moratorium provision. Unfortunately, his amendment failed to pass by a party-line vote of 9 to 13.²⁶

II. H.R. 1759 WILL MAKE RULEMAKING LESS TRANSPARENT BY EXCLUDING THE BENEFITS OF RULES

Another troubling aspect of H.R. 1759 is that it specifically prohibits OIRA from taking into account benefits when providing total cost estimates for proposed and final rules. Section 652 requires OIRA to include in its annual report various items of information about Federal rulemaking. Of particular concern is the bill’s requirement that OIRA report the total cost (without reducing the

²¹ 44 U.S.C. § 1505 (2015). Executive orders that do not have to comply with the publication requirement of those “not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof.” 44 U.S.C. § 1505(a)(1) (2015). In addition, publication is not required “[i]n the event of an attack or threatened attack upon the continental United States and a determination by the President that as a result of an attack or threatened attack” and such publication is “impracticable” or would not “serve to give appropriate notice to the public,” under such conditions.” 44 U.S.C. § 1505(c) (2015).

²² Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962) (codified 1 C.F.R. Part 19 (2015)).

²³ *Id.*

²⁴ *Id.*

²⁵ Standards Governing the Design of Curbside Mailboxes, 80 Fed. Reg. 19,914 (Apr. 14, 2015).

²⁶ Official Tr. of Markup of H.R. 1759, the “All Economic Regulations are Transparent Act of 2015,” by the H. Comm. on the Judiciary, at 152 (Apr. 15, 2015), available at http://judiciary.house.gov/_cache/files/33353aa9-de0f-4765-94ca-09c3f95efe97/04.15.14-markup-transcript.pdf.

cost by offsetting benefits) of all rules proposed or finalized. The bill's myopic focus on the cost of rules—without any regard for their benefits—reflects the one-sided view that the supporters of this legislation have about the value of regulations. Without question, the benefits of regulations routinely outweigh their costs.

Pursuant to the Regulatory-Right-to-Know Act,²⁷ OMB is required to submit to Congress a report containing “an estimate of the total annual costs and benefits (including quantifiable and non-quantifiable effects) of Federal rules and paperwork, to the extent feasible—(A) in the aggregate; (B) by agency and agency program; and (C) by major rule[.]”²⁸ The most recent of these reports states that the estimated annual benefits of major Federal regulations issued between 2003 to 2013 ranged between \$217 billion and \$863 billion and the estimated annual costs ranged between \$57 billion and \$84 billion.²⁹

H.R. 1759, on the other hand, completely ignores the fact that the benefits of regulations greatly exceed their costs many times over. Although the bill purports to strengthen transparency, it will result in a distorted and misleading analysis of rules that only focuses on their costs.

To address this shortcoming of the bill, Representative Henry C. “Hank” Johnson, Jr. (D-GA), Ranking Member of the Regulatory Reform, Commercial and Antitrust Law Subcommittee, offered an amendment that would have revised section 652 of H.R. 1759 to include the requirement that OIRA report on the benefits of regulations in addition to the bill's requirement that the cost of regulations be reported. Owing to the fact that his amendment sought to amend a provision not within the Committee's jurisdiction, Representative Johnson withdrew his amendment.

III. H.R. 1759 DUPLICATES CURRENT REPORTING REQUIREMENTS

H.R. 1759's reporting requirements are to some degree redundant of current law. Agencies already are required to provide status updates twice a year on their plans for proposing and finalizing rules pursuant to the Regulatory Flexibility Act³⁰ and Executive Order 12866.³¹ Also, OIRA, as previously noted, already issues an annual report on the total annual costs and benefits of Federal rules and paperwork under the Regulatory Right-to-Know Act.³² The bill also requires OIRA to report annually on the very same information that it is required to post monthly under the bill.

As a further illustration of the redundant aspect of this bill, H.R. 1759 requires OIRA to report to Congress on the “number of rules and a list of each such rule for which a resolution of disapproval was introduced in either the House of Representatives or the Sen-

²⁷ Pub. L. No. 106-554, § 1(a)(3), tit. VI, § 624 (2000).

²⁸ Treasury and General Government Appropriations Act of 2001, Pub. L. No. 106-554, § 624, 114 Stat. 2763, 2763A-161 (2000) (codified at 31 U.S.C. § 1105 note (2015)). This report is to be submitted with the Administration's annual Federal budget request, which is required to be issued “[o]n or after the first Monday in January but not later than the first Monday in February of each year.” 31 U.S.C. § 1105(a) (2015).

²⁹ Office of Management and Budget—Office of Information and Regulatory Affairs, 2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, at 1-2 (2014), available at https://www.whitehouse.gov/sites/default/files/omb/infoereg/2014_cb/draft_2014_cost_benefit_report-updated.pdf.

³⁰ Pub. L. No. 96-354 (1980), as amended (codified in 5 U.S.C. §§ 601 *et seq.* (2015)).

³¹ Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

³² Pub. L. No. 106-554, § 1(a)(3), tit. VI, § 624 (2000).

ate under section 802.”³³ Thus, essentially, Congress would be requiring the Executive Branch to report on the activities of Congress.

CONCLUSION

Unfortunately, H.R. 1759, the “All Economic Regulations are Transparent Act of 2015,” is a prime example of what happens when we fail to conduct any meaningful consideration of a bill before it is marked up. Neither in this Congress, nor in the prior Congress when this bill was originally introduced, did the Committee have an opportunity to deliberate on its merits. In fact, H.R. 1759 was introduced the same week it was marked up and its predecessor legislation went straight to the floor in the 113th Congress without ever being considered by the Judiciary Committee. As a result, there is neither a record to demonstrate the need for this legislation nor any testimony that could help illuminate what its practical consequences might be.

H.R. 1759 raises significant concerns. By imposing an arbitrary 6-month delay for implementing nearly any new rule, the bill will jeopardize public health and safety. Indeed, a vast array of time-sensitive rules ranging from the mundane (such as numerous U.S. Coast Guard bridge closing regulations) to those that ensure the safety of the toys our children play with and the food we eat would be delayed as a result of this legislation.

In addition, H.R. 1759 undermines transparency in the regulatory process by specifically prohibiting the Office of Information and Regulatory Affairs from taking into account the benefits of rules when providing total cost estimates for proposed and final rules. Thus, a regulation that costs only \$1, but results in \$1 billion in benefits would only be reported as costing \$1.

Finally, the other requirements imposed by this legislation are to some degree redundant of current law. Agencies already are required to provide status updates twice a year on their plans for proposing and finalizing rules pursuant to the Regulatory Flexibility Act³⁴ and Executive Order 12866.³⁵ In addition, the Office of Information and Regulatory Affairs already issues an annual report on the total annual costs and benefits of Federal rules and under the Regulatory Right-to-Know Act.³⁶

³³ H.R. 1759, 114th Cong. § 2 (2015).

³⁴ Pub. L. No. 96-354 (1980) (as amended) (codified in 5 U.S.C. §§ 601 *et seq.* (2015)).

³⁵ Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

³⁶ Pub. L. No. 106-554, § 1(a)(3), tit. VI, § 624 (2000).

Without question, H.R. 1759 is yet another anti-regulatory measure intended to further slowdown the agency rulemaking process. For these reasons, we respectfully dissent and urge our colleagues to oppose this misguided and dangerous legislation.

MR. CONYERS, JR.
MR. NADLER.
MS. LOFGREN.
MS. JACKSON LEE.
MR. COHEN.
MR. JOHNSON, JR.
MS. CHU.
MR. DEUTCH.
MR. GUTIERREZ.
MS. BASS.
MR. RICHMOND.
MR. CICILLINE.

